**Kamunya v Republic (Criminal Revision E002 of 2025)**
**[2025] KEHC 11509 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11509 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CRIMINAL REVISION E002 OF 2025**

**AK NDUNG'U, J**

**JULY 31, 2025**

**BETWEEN**

**ENOCK NDIRANGU KAMUNYA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By way of a Notice of Motion dated 20/1/25, the Applicant moved this court for orders;
    1. Spent
    2. Spent
    3. That this Honourable court be pleased to grant leave to the Applicant to file an appeal out of time against the ruling and order of the Hon A. Kithinji (R.M) delivered on the 4th October 2024 in Rumuruti Magistrate's Court Criminal case No. MCCHSO E021 of 2024.
    4. Spent
2. The application is premised on the grounds on the face thereof and supported by the affidavit of the applicant sworn on the 20th January 2025 the gist of which is that the trial court made a ruling on the 4 /10/24 cancelling the applicant's bond without proper grounds or compelling reasons.
3. That the applicant is desirous of appealing against the decision of the trial court to seek a reversal of the orders aforesaid and that the intended appeal raises serious issues of law and fact and has extremely high chances of success.
4. The delay is attributed to the fact that the applicant had unfortunately instituted an application for review being Nanyuki H.C MISC APP NO. E077 OF 2024 whereby the court found that the applicant ought to have approached the court by way of appeal and not review.

5. The prosecution opposed the application and filed a preliminary objection as well as grounds of objections opposition.

6. The preliminary objection was as follows:-

    1. That this court is functus officio having already delivered its ruling dismissing the Applicants application in High Court Criminal Revision Application No. E028 of 2024 on 17th October, 2025.

    2. That the Application is an abuse of the court process and should accordingly be dismissed.

7. The grounds of opposition are listed as;

    1. That the application is vexatious and frivolous.

    2. That the applicant is seeking in prayers number 2 and 4 to have this court issue final orders in an interim application sine the substance of the intended appeal is the reinstatement of the applicant's bond terms.

    3. That the Application is an abuse of the process of this honourable court and the same ought to be dismissed.

8. I have considered the application, the multiple grounds upon which it is anchored and the supporting affidavit. I have had due regard to the grounds of opposition and the preliminary objection raised by the respondent. I have taken into account the learned submissions made by respective counsel on record.

9. Of determination is whether the application is properly before the court, the court having dismissed an earlier application for review of the decision sought to be appealed from and, secondly, based on the answer to issue no. 1, whether the Applicant has achieved the threshold for the grant of leave to appeal out of time.

10. On the question whether the filing of and the determination of an application for review shuts out an appeal, my reading of the *Criminal Procedure Code* does not offer a specific guidance on the matter save for the provision under Section 364(5) of the *Criminal Procedure Code* that specifically bars the filing of a review application where an appeal lies. The section provides;

> "When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

11. In my view, the administration of justice would be greatly prejudiced if a party in a litigation is permitted to seek a remedy through the review procedure and if the outcome be unfavourable, such a party still be allowed to litigate the same issues in the same court on an appeal. My considered position is that the choice whether to take the appeal or review route must be a conscious one complete with the knowledge that it is irregular to approach the court through both avenues.

12. Allowing a party to pursue both revision and appeal on the same issue would undermine the principle of finality in legal proceedings. It would create uncertainty and allow for endless challenges to the same decision.

13. Indeed, *the Constitution* speaks to this under Article 50(2)(q) recognizing that the remedy is one or the other and not both. The Article provides;

    (2). Every accused person has the right to a fair trial, which included the right-

(q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law. (emphasis mine).

14. Though made in the civil jurisdiction, I find useful guidance in the sentiments of Odunga J (as he then was) in HA v LB [2022] eKLR where he stated;

> ”Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the *Civil Procedure Act* under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court’s seal of approval to persons who wish to play lottery with judicial process. Accordingly, I associate myself with the decision in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi (supra) that both options cannot be pursued concurrently or one after the other. In this case the Appellant having sought to review the order made on 27th May, 2021 cannot now purport to appeal against the same. He can only appeal against the decision made on 4th November, 2021”.

15. The issue is also elucidated in Serephen Nyasani Menge v Rispah Onsase [2018] eKLR thus:

> “In the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error.

16. In my view, opening a window for the 2 approaches to court through review and then appeal is a sure invite to forum shopping on the part of the parties and as correctly summed up by Odunga J above, open the judicial process to lottery leading to obvious abuse of the court process.

17. In the premises the application before court is one for failure since the leave sought is meant to allow the filing of an appeal which this court has for reasons stated found not to lie once the applicant chose to go by way of review.

18. With the result that the application is dismissed. The application is dismissed.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 31ST OF JULY 2025.**

**A.K. NDUNG'U**

**JUDGE**