



REPUBLIC OF KENYA



Chief Registrar of the Judiciary (Makindu Law Courts) v Kasimu & another (Criminal Revision E098 of 2025) [2025] KEHC 12044 (KLR) (12 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL REVISION E098 OF 2025
TM MATHEKA, J
AUGUST 12, 2025**

BETWEEN

CHIEF REGISTRAR OF THE JUDICIARY (MAKINDU LAW COURTS) APPLICANT

AND

ALEX KASIMU 1ST RESPONDENT

MUSEE KASIMU 2ND RESPONDENT

RULING

1. Through directions dated 13/3/2025 the learned Hon. Y.A Shikanda SPM referred this matter to the High Court for Revision and further directions.
2. On 26/5/2025 the Deputy Registrar referred the file to me for directions.
I requested for lower court file which has now been availed.
3. For the avoidance of doubt on why this matter is before me – I reproduce the “direction” from the lower court file here.

Musee Kasimu and Alex Kasimu (hereinafter referred to as the 1st and 2nd accused persons respectively) were charged with the offence of giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code. The particulars of the offence were that on 5/11/2022 at Kibwezi Police Station, the accused persons informed police officers that a motor cycle and Kshs. 127,000 had been stolen during the arrest of the 1st accused person, information they knew to be false. Upon taking plea on 27/11/2022, the 1st accused person informed the court that when he was arrest at Kibwezi Market on 4/7/2022, he had Kshs. 127,000 and motor cycle. That only the motor cycle had been returned to him. The 1st accused person asked for the court’s intervention in order to get back his money and a jacket.



The 2nd accused person stated that he was arrested together with the 1st accused person. That the 1st accused person reported to the police station that he had lost Kshs. 127,000 but the officers on duty declined to book his report. The 2nd accused person alleged that they were informed to wait for the OCS and when the said OCS appeared, he promised to follow up on the issue. A mobile phone was also mentioned. The 2nd accused person further stated that the OCS was informed that the motor cycle had been recovered from some boys and that the suspects had been arrested. That the suspects then recorded statements to frame up the accused persons.

The prosecution responded by stating that the 1st accused person had reported that his motor cycle and Kshs. 127,000 had been stolen but when the matter was investigated, it was established that the 1st accused person had lied. The [prosecution refrained from delving further on the ground that they would be getting into the evidence for the trial. The court directed that it would hear the prosecution evidence and if the court finds that the accused persons have a case to answer, they would be given a chance to state their side of the story. That the complaint by the accused persons involved the charge they were facing.

The record indicates that later on 14/12/2022, the accused persons engage counsel, Mr. Kivindyo who appeared for the accused persons raised the same complaint as had been made by the 1st accused person save that counsel claimed that the 1st accused had Kshs. 147,300 in his jacket. Counsel claimed that the money and motor cycle had been confiscated by the police. That there were witnesses to the incident. Counsel urged the court to issue summons to the OCS Kibwezi Police Station or a production order for the items to be released to the 1st accused person or for the police officer to show cause why action should not be taken against him. Counsel alleged that the items were not exhibits. The prosecution did not seem to object to issuance of summons to the OCS. The court issued summons to the OCS. The court issued summons to the OCS and one Corporal Moshi to attend and address the issues that had been raised by the defence. On 22/12/2022 the OCS and Corporal Moshi appeared in obedience to the summons. The record indicates that the court took the testimonies of the 1st accused person and two other witnesses. They were identified as DW1, DW2 and DW3. The evidence of the OCS was also taken. He was identified as PW1. The matter was adjourned thereafter. Before any further evidence was taken, the defence filed a formal application seeking the release of the motor cycle in issue.

On 28/2/2023, when the court was informed that the defence had filed a formal application for release of the motor cycle, the prosecution applied for what was termed as a mini-trial to be dismissed. In the opinion of the prosecution, the evidence in the mini-trial was actually touching on the main trial and the proceedings were a kin to commencing a trial with the defence case, which was contrary to the rules of criminal procedure. The defence objected to the application by the prosecution to dispense with the mini-trial. In its ruling, the court (Hon. Ireri-SPM) agreed with the defence and held that the mini-trial was not dealing with the charge against the accused persons. The court directed that the mini-trial would proceed. On 25/10/2023 the OCS (PW1) continued with his testimony and produced in evidence the motor cycle and other items including the inventory. Before PW1 was cross-examined, the defence then applied for release of the produced items to the 1st accused person. The court ordered for release of the motor cycle to the 1st accused person then stood down PW1. Hon Ireri was subsequently transferred and the matter was placed before on 28/11/2024. The parties asked the court to give directions in the matter.

I have considered the record. The accused persons are charged with giving false information that the 1st accused person's motor cycle and money were stolen during his arrest. The



complaint under inquiry is that the 1st accused person's motor cycle and money were taken by the police during his arrest. While raising the complaint, the 1st accused person urged the court to order for the release of the items or take action against the police if the items are not released. The court summoned the OCS and one Corporal Moshi to attend and address the complaint. When the officer appeared, the court decided to commence a mini-trial. This was even before the police officers responded to the allegations. There were no directions by the court on how the complaint was to be handled, before the trial within a trial commenced.

The testimonies of the defence witnesses have a direct bearing on the charge facing the accused persons. In my view, the testimonies amount to their evidence in defence. Even the partial testimony of PW1 has a direct bearing on the charge. PW1 went further and produced exhibits in evidence. With all due respect to my predecessor, I agree with Ms. Ngari, Prosecution counsel that conducting the mini-trial was irregular and that it amounted to commencing a case with defence hearing instead of the prosecution case. My opinion is that the complaint under inquiry was defence put forth by the accused persons to the charge against them and by purporting to conduct an inquiry into the complainant, the court exposed itself to procedural irregularities. It is not clear what the inquiry was intended to achieve. Given the circumstances, there is a danger that after the witnesses are heard in the inquiry, there will be nothing substantial to be heard at the main trial. The main evidence in respect of the charge will have been taken, albeit irregularly.

I am not comfortable with proceeding with what I consider to be an irregularity. If I proceed with the inquiry whose purpose is not clear to me, I am likely to be prejudiced and embarrassed at the end of the inquiry. The parties will also be prejudiced. I will not know what to do with the evidence taken during the inquiry or how to treat it vis a vis the evidence at the main trial. The proceedings were taken by a court of concurrent jurisdiction. Even when the prosecution applied for the mini-trial to be dispensed with, the court made a ruling that the mini-trial should continue. I am of a contrary view. I have agonized on what direction I should take given that the proceedings and orders were made by a court of concurrent jurisdiction.

I do not think I have jurisdiction to dispense with the mini-trial which appears to be at an advanced stage and order for the evidence taken so far to be expunged from the record. The most appropriate route, in my view, is to refer the matter to the High Court for possible revision and further directions on how the matter should proceed. Consequently, I respectfully decline to proceed with the mini-trial and hereby direct that the matter be referred to the High Court for revision and further directions. If the High Court directs that the mini-trial proceeds, I will be obliged. A skeleton file shall be opened to track the progress of the matter and the original file shall be sent to the High Court as Makueni for Revision. The proceedings be typed on a priority basis.

4. I have perused the lower court file proceedings. On 22/12/2022.

Mr. Gichuki for the two accused persons: Matter is for mini trial on the issue of the motor cycle detained by the OCS Kibwezi as well as loss of money taken by the police in course of arrest by the accused person. I have the accused person, the complainant, and two other witnesses and I am ready to proceed.

CP: I have the OCS and Corporal Moshi in court to answer to the allegations raised by the defence, we have also received an affidavit and we are adequately ready to respond to the allegations.

The court proceeded to give directions to the effect that the 1st accused was the complainant and he would be heard first He was heard, cross examined by the Prosecutor, re examined by his counsel. The 2nd accused was heard as DW2. There was also DW3.



The defence closed its case. Then the court heard PW1. Matter was fixed for further hearing and Pre trial on 11/1/2023. It was adjourned to 28/2/2023;

5. On 28/2/2023;

Mr.Gichuhi for the 1st accused applicant: Matter is for filing of a formal application for the release of the motor cycle. I have filed an served the application together with my written submissions to the prosecution. I pray for 14 days to confirm compliance and a ruling date. That upon delivery of the ruling, the parties be allowed to proceed with mini trial.

Ileri – SPM

CP: I confirm I have been served with the application and the submissions. I request for 21 days to respond due to pressure of work. On the mini trial the OCS is in court ready to proceed as well as corporal Moshi. However, if the mini trial is adjourned, I would apply the mini trial be dismissed in the infirity(sic), and since we are delving in the main trial of it is like we started with the defence case which is contrary to the rules of criminal procedure, Once the ruling has been done then we can proceed with the main trial. The mini trial is a disguise defence trial.

B.Ileri – SPM

Gichuhi: Your honour I oppose the application by the prosecution on dispensing on the mini trial. The issues raised in the mini trial are preliminaries which issues were raised as they infringe on the rights constitutional rights of the accused persons. The issues raised are not a defence trial.

The accused persons cannot proceed to the main trial. When he is being subjected to harsh conditions to meet his basic rights due to unprocedural illegalities occasioned to the 1st accused person, when he was arrested. The mini trial is very necessary and the same cannot be wished away it will be very prejudicial to the 1st accused person for the same reasons. I urge the court to proceed with the mini trial. Your honour we are interested in the main case. There is no intervention of the hearing procedures in this case. Only two witnesses are participating in the mini trial and it is not a defence case. I urge the court to proceed as it had directed earlier. I will be ready to proceed with the mini trial.

Order: The mini trial was necessitated by a complaint by the 1st accused person, which necessitated the issue to be first heard before the main trial. The mini trial is not meant and is not dealing with the charges on the prosecution's case. Therefore, I find no irregularity in the procedure in which the mini trial is being conducted therefore the mini trial will proceed as earlier directed.

Prosecution is granted 14 days to respond to the application.

The OCS can be heard today.

Court: I have a meeting in the afternoon this mini trial cannot be reached today. It is adjourned. Hearing on 29/3/23.

Mention on 16/3/24 for the application.

6. The foregoing is part of the record that Hon Shikanda found when he took over the matter on the 28th November 2024.

7. The issue for determination is whether he is justified in his reluctance to proceed with the matter as it is.



8. The revisionary powers of this court are set out under Art 165(6) (6) and(7) of *the Constitution* which says ;
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice
9. This is exemplified at Section 362, 364, 365, 366 of the Criminal Procedure Code.
10. S. 362 states
- The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.
11. S. 364 provides inter alia
- (1) 1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
12. The court is to examine the proceedings and to satisfy itself as to the “correctness, legality, or propriety of any finding, sentence or order recorded or passed, and as to the regularity of (the) proceedings”
13. When the pleas were taken, the accused persons pleaded not guilty and in what is not unusual raised a complaint against the police officers who arrested them. The trial magistrate Hon. Ireri SPM set in an unusual procedure immediately treated the complaint as a formal complaint against the officer, turning the 1st accused into a complainant and set up a mini-trial to determine whether or not items allegedly recovered from the accused persons could be released to them. The record shows that what transpired amounted to the defence being heard before the case for the prosecution commenced.
14. The question is – what was the legal basis for this so called “mini-trial”. It is noteworthy that the trial court did not cite any legal provision in support of the same
15. A quick perusal of the Criminal Procedure Code demonstrates that there is no such provision in the law - Section 208 of the Criminal Procedure Code provides – “ Procedure on plea of not guilty”
- (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).
 - (2) The accused person or his advocate may put questions to each witness produced against him.



- (3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.
16. Clearly upon the accused pleading not guilty - the procedure for hearing of the matter is for the court to hear the complainant and his witness of any . The provisions of this section are couched in mandatory terms . – it says shall, hence the court had no legal stand to begin hearing the case for the accused persons.
17. Where an accused person has a complaint, the known procedure is for the court to make appropriate orders to address that complaint. For instance, the accused’s person claimed their items were being held by the police. The court simply needed to find out whether they were exhibits in the matter. Upon the hearing of the relevant witnesses and production of the same as evidence, then the court would have determined whether or not to release them to the complainant, the accused, forfeit or retain the same depending on the outcome of the case. Otherwise, the matter would be referred to the OCS/DCI for investigations depending on the circumstances to determine whether an offence had been committed and refer the matter to ODPP for decision to charge. If the issue was say, an injury or sickness, the accused would be referred to hospital for treatment. The court would not start a mini trial against the person alleged to have caused the injury. There would have to be a charge against someone before any form of trial could take place.
18. In this case, by beginning to ‘try’ the complaint by the accused persons the learned trial court took over the role of the Report Officer Personnel at the OB desk (receiving the complaint) the investigating officer (recording statements) and the prosecution (deciding there was a charge for mini trial). There was a charge sheet before the court where the two accused persons ware facing trial. That was the matter that was before the court for trial.
19. Yet, Section 211 of the Criminal Procedure Code provides for the process for the hearing of the case for the accused person - it is called defence hearing in other words. It states;
- (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).
- (2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.



20. The prosecution gets a right of reply as provided for under section 212 of the Criminal Procedure Code.

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

21. From the foregoing, and with respect, it is evident that the procedure that the learned trial court adopted is unknown to the law – where the accused persons’ case is heard before the prosecution’s case is heard. The trial within trial that happens in this system is where the production of a confession is objected to and the procedure is well laid out in precedent see Court of Appeal in *Musili Tulo v Republic* [2014] KECA 412 (KLR):

It is evident therefore that there was objection made to the admissibility of the extra judicial statements and it was not accurate for the trial court to state that there was none. Once the objection was raised, it was the duty of the trial court to make an order for a ‘trial within the trial’ and to deliver a ruling to determine such admissibility, even before the statements were marked for identification. The purpose is to determine the voluntariness of the statement intended to be tendered for the prosecution, because a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. It is a matter of law and is for judge alone to decide upon hearing evidence - see *Shah v. Republic* 1984 [KLR] 674. Indeed, it is an aspect of fair trial. We do not know what decision the trial court would have arrived at had it held a trial within the trial. What we can say for certain is that the court fell into error by failing to determine the issue of admissibility of the two extra-judicial statements.

22. So - was the procedure adopted by the trial court regular?
23. I have to agree with Hon. Shikanda that the so called mini-trial is irregular and the legality of those proceedings questionable when viewed in light of the Criminal Procedure Code.
24. I have looked through the entire Criminal Procedure Code seeking for this procedure of inquiry/mini trial into an accused person’s complaint within a criminal case and I have not found a provision that supports the same.
25. In the circumstance I find and hold that that the said proceedings are as irregular as they are not in accordance with the provisions of the Criminal Procedure Code on the conduct of the trial in a subordinate court, upon the plea of not guilty by an accused person.
26. Any rulings , findings or orders under those proceedings be and are hereby quashed .
27. The whole mini-trial is set aside and the proceedings be and are hereby expunged from the record.
28. The trial to start de novo and proceed in accordance with the Criminal Procedure Code.
29. The Deputy Registrar to ensure that the lower court file is returned to Makindu Law Courts within 7 days hereof. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA CTS THIS 12TH AUGUST 2025

MUMBUA T. MATHEKA

JUDGE

