



**Republic v Ngigi alias Francis Kaime Njoroge & 3 others (Criminal Revision
E014 of 2023) [2024] KEHC 486 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E014 OF 2023
PN GICHOHI, J
JANUARY 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**KENNETH KAMAU NGIGI ALIAS FRANCIS KAIME
NJOROGE 1ST RESPONDENT
ANGWENYI MOMANYI 2ND RESPONDENT
GEORGE OMONDI AYAKO 3RD RESPONDENT
AUGUSTINE MATERE MULONGO 4TH RESPONDENT**

RULING

1. The background of this ruling is that the 1st, 2nd, 3rd and 4th Respondents were arrested at different times and charged in different files for the offence of obtaining money by false pretences contrary to section 313 of the [Penal Code](#) and each denied the charge. These files were :-CMCCR No.2415 of 2013- *Republic v Augustine Mattered Mulongo*CMCCR No. 3073 of 2013- *Republic v Angwenyi Momanyi*CMCCR No. 2549 of 2014- *Republic v Kenneth Kamau Njoroge*CMCCR No. 2243 of 2013- *Republic v George Omondi Ayako*
2. The charges were ultimately withdrawn and a substituted charge presented before the court on 6/8/2015 in Nakuru CMCCR No. 2243 of 2013 where the all the Respondents were charged with the offence of obtaining money by false pretences contrary to section 313 of the [Penal Code](#).
3. The 1st Respondent faced three other counts, two of which were the offence of making a document without authority contrary to section 357 (a) of the [Penal Code](#) and the third being a charge of Uttering a document without authority contrary to section 357 (b) of the [Penal Code](#).



4. Apparently, each denied the offence as charged and the matter ultimately proceeded for hearing and at the close of the Prosecution case, each of the Respondents herein was placed on his defence. The defence then sought to be supplied with copies of typed proceedings.
5. It was upon their being supplied as prayed that the defence raised the issue of missing proceedings which caused a stalemate between the parties as to the way forward. That led to a ruling dated 27th February 2020 where Hon. F. Munyi PM, upon appreciation of the seriousness of missing proceedings directed that the matter be placed before the Presiding Judge being Prof. Ngugi J (as he then was) for further directions on way forward.
6. That prompted the filing of HCR MISC. E068 of 2021 where the 2nd, 3rd and 4th Respondents filed their respective affidavits lamenting the missing and torn proceedings as well as interchange of the Respondents in the proceedings which they termed grave miscarriage of justice.
7. The 2nd, 3rd and 4th Respondents also filed their submissions through their respective Advocates being M/S Makori Nyangu & Co. Advocates (for 2nd Respondent), M/S Wambeyi Makomere & Co. Advocates (for 3rd Respondent) and M/S Olonyi Advocates (for the 4th Respondent).
8. The State through Ms Mumbe orally addressed the Court that she was leaving the matter to court even though she did not agree that the records were mutilated.
9. Upon considering the trial court's ruling and the submissions by parties, the Honourable Judge made orders dated 29/7/2022 thus:-

“...I note that the Learned Magistrate did not make a definitive determination or finding that the proceedings are mutilated or pages thereof are missing, and if so, whether the missing pages affect the quality of the proceedings or trial.

The matter be remitted back to the Magistrates Court for these findings. In the event such a finding is made, then in the circumstances of this case, Court orders that there be a retrial (that the trial starts afresh).

Mention on 03/08/2022 before the CM for her to assign a new Court to hear and dispose of the matter. Deputy Registrar to transfer the file back to the Chief Magistrate with these directions.”

10. Upon perusal of these orders, Hon. Kibelion (PM) rendered his ruling dated 21st June 2021 and directed that the matter start afresh.
11. Aggrieved, the Applicant moved this Court by Revision Application dated 17th July, 2023 under Section 362, 364 and 365 of the [Criminal Procedure Code](#). Based on the grounds of the face of that Application, the Applicant prayed:-
 1. Spent
 2. That this Court makes a definitive finding that the missing pages of the proceedings does not affect the quality of the trial as the same relate to examination of surety and that the evidence of the case is intact.
 3. That this Court orders and directs that Nakuru CMCR No. 2243 of 2013 proceeds from where it had reached being defence hearing.



12. The 4th Respondent opposed the Application through an Affidavit sworn by Geroge Omondi Ayako on 27th September 2023 and giving chronology of events since the matter was referred to the judge for directions, he termed the Application an afterthought and an abuse of Court process.
13. He deponed that the Application bends towards an appeal against the Judge's orders and which this Court cannot deal with. Further, he states that no appeal has been preferred against the orders granted by the said Judge and therefore this Court is *functus officio*. Lastly, he urged the Court to dismiss the Application .
14. When parties appeared for directions before this Court, Ms Mburu for the Applicant stated she had nothing useful to add while Counsel for the 2nd Respondent and holding brief for Counsel for the 4th Respondent urged this Court to consider the three files and decide on the Application.
15. On his part, Counsel for the 3rd Respondent emphasised their Affidavit and maintained that that the Applicant had failed to show that the orders complained of were made injudiciously.

Determination

16. Having considered the material before this Court, there is no dispute as to the chronology of events herein. The issue for determination is whether the Applicant warrants the orders sought.
17. It is a fact that High Court has powers under Section 362 of the [Criminal Procedure Code](#) to :

“...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.”
18. Further Section 364 of the [Criminal Procedure Code](#) provides that:-
 - (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.
 - (c) ...
 - (2)
 - (3) ...
 - (4) ...
 - (5) 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. [Emphasis added]



19. This Court is being asked to review the ruling dated 21st June 2021. There was no order extracted but this Court has perused the ruling where the learned Magistrate stated:-

“I have perused the directions of the Honourable Judge of 29/7/2022 vide High Court Misc. Application No. E068 /2021. Pursuant to the directions, the matter was re-allocated to court 8 by the then Chief Magistrate Hon. Nyaloti on 3/8/2022. The matter was mentioned the then court 8, then presided over by Hon. Ndegwa SPM who directed the matter to start afresh and fixed it for hearing on 30/1/2023. Based on those directions, the matter should start afresh before the court on 1/8/2023.”

20. That ruling shows that the learned Magistrate (Hon. Kibelion PM) is not the one who had referred the matter to the High Court in the first instance. Further, the directions that the matter starts afresh were given by Hon. Ndegwa SPM on 15/8/2022 which was less than a month after the directions by the Honourable Judge and that was in the presence of the parties herein except for the 1st Respondent who appears not to have been attending court.

21. The record shows that the matter was listed for hearing on 30/1/2023 as scheduled but adjourned to 13/3/2023 for reasons that the trial Magistrate was away on official duties. Come the date set, the matter was again adjourned because the magistrate was indisposed. It was rescheduled for hearing on 7/6/2023 and come that day, Hon. Kibelion PM sought to first peruse the court file in order to give directions which he did and now the subject of this revision.

22. It is clear that the Prosecution had no issue with the orders given by Hon. Ndegwa SPM hence the prosecution’s participation in taking hearing dates. This Application is being made almost one year after the first orders for matter to be heard afresh. This makes the Application herein appear as an afterthought. The Orders of 21/6/2023 were secondary having been made pursuant to the earlier orders by another court. There was no appeal against the orders issued on 15/8/2022. There is nothing to show any illegality or irregularity in the said orders, issued within the discretion of the Magistrate who was to hear the criminal case.

23. There is no doubt that some pages of the recorded proceedings are torn and one cannot make what was handwritten. That is an original record . The argument by the Applicant that the pages complained of are in relation to bond approval and not evidence is not sound. No page of recorded proceedings is inferior to any other page in a court file. Integrity of the whole court file is paramount and when interfered with in the manner as stated this case, and particularly in a criminal case, then the right of an accused person to a fair hearing under Article 50 of the Constitution of Kenya is compromised.

24. The Applicant herein does not dispute the confusion in the typed proceedings where there is interchange of the Respondents in relation to their participation or otherwise in the charges they were facing.

25. In the upshot, this Court makes the following orders:-

1. The Application dated 17th July, 2023 is hereby dismissed for lack of merit.
2. The original case file Nakuru CMCCR No. 2243 of 2013 be returned to the Chief Magistrate to place it before Hon. Kibelion PM to hear the matter afresh as earlier directed by the honourable Magistrate.
3. In the event that Hon. Kibelion PM is no longer in the station, the Chief Magistrate to allocate the file to any other Magistrate of competent jurisdiction to comply with the above orders.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF JANUARY , 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Kihara for Applicant

N/A for 1st Respondent

Mr. Makori for 2nd Respondent

Mr. Wambeyi for 3rd Respondent

4th Respondent in person (N/A for Counsel)

Laureen Njiru, Court Assistant

