



**Republic v Mutembei & another (Criminal Revision  
E002 of 2024) [2024] KEHC 5969 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL REVISION E002 OF 2024  
DR KAVEDZA, J  
MAY 28, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DOUGLAS MUTHEE MUTEMBEI ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN KINOTI LIMBERE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the subordinate court, the respondents are facing two counts of dealing in endangered wildlife species contrary to section 92 (2) as read with section 105(1)(b) of the [wildlife conservation and management act](#). All the prosecution witnesses have since testified. Before the close of the prosecution’s case, Ms. Rono, learned prosecution counsel made an application to amend the charge sheet. The trial court considered the application and it was dismissed on 14<sup>th</sup> December 2023.
2. On January 24, 2024, the applicant filed a revision application of the ruling delivered by the trial court on December 14, 2023. The application is supported by an affidavit of the same date, stating that the amendment pertains to the weight of the endangered wildlife trophy. This information came to the prosecution’s attention only after the last prosecution witness had testified, prompting the application. The application was opposed, but the trial magistrate dismissed it without considering sound legal principles. The applicant argued that no prejudice would be suffered by the respondents if the amendment, which concerns only the weight of the elephant tusks, was allowed. He urged the court to allow the application as prayed.
3. In response, the respondents filed a replying affidavit sworn by the 2<sup>nd</sup> respondent. The averments made are that the learned magistrate dispensed justice in dismissing the application. That the prosecution is trying to fill in the gaps in their case. He urged the court to dismiss the application.



4. I have considered the application, the response, the written submissions on record and the applicable law. Looking at the entire application, the crucial issue is whether there was a miscarriage of justice when the trial court denied the State the opportunity to amend the charge sheet.

5. Section 214 (1) of the [CPC](#) provides as follows: -

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

- (i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- (ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”

6. The prosecution’s application was prompted by the evidence of PW5, the officer who carried out the weighing of the recovered exhibits, the endangered wildlife trophies. PW4, the scene’s of crime officer was present during the process. The trial magistrate dismissed the application on the basis that, allowing the application, would lead to a miscarriage of justice and infringe on the accused persons’ right to an expeditious trial.

7. The record however shows that the respondents were arrested on June 23, 2023 and took the plea on June 26, 2023. Thereafter, the trial proceeded smoothly and in a span of five months, six prosecution witnesses had testified. Indeed, this commendable on the part of the parties and more so the court which was in control of the proceedings. I have further noted from the record that there was no friction between the parties during the entire process until when the prosecution sought to amend the charge sheet after the testimony of PW5, who told the court that the weight of the exhibit was 21.4kg, thus contradicting the weight stated in the charge sheet. It is instructive to note that at the time, the application for amendment was made, the prosecution was left with only one witness, who has since testified. It is perhaps for this reason the trial court agreed with the defence that an amendment to the charge would be prejudicial to the accused persons who had a right to an expeditious trial.

8. The question that this court has to grapple with is indeed whether, the accused persons would suffer prejudice if the application is allowed. I think not. From the record, the accused persons were arrested on 23<sup>rd</sup> June 2023 which was on a Friday and were arraigned on 26<sup>th</sup> June 2023 for plea. It was not until the 27<sup>th</sup> that the exhibits were presented to PW5 for weighing. It therefore appears to me that the weight attached to the exhibit at the time of plea was an estimated weight for purposes of presenting the accused persons before court as stipulated under Article 50 of [the Constitution](#) of Kenya.



9. The actual weighing of the exhibits was done on 27<sup>th</sup> June 2023, and a certificate thereof prepared on the same day by PW5. It was after the evidence of PW5 that the prosecution realised the variance in the weight indicated in the charge sheet vis-à-vis the evidence of PW5, and, promptly made an application to amend the charge. Therefore, there was no inordinate delay in making the application.
10. It is noteworthy that the weight of the exhibits as per the evidence of PW5 is 21.4 Kgs as opposed to the weight indicated in the charge sheet, approximately 25kgs. Had he provided a higher weight, one would have read malafides in the prosecution's application.
11. From the foregoing analysis, it is clear that the application for amendment was not intended to delay the hearing or prejudice the rights of the accused persons but, to assist the court to reach a just and fair conclusion.
12. I hasten to add that the credibility of the prosecution evidence in respect of the proposed amendment can be challenged by recalling witnesses for further cross-examination. Additionally, defence counsel will have an opportunity to submit on any gaps that may have been filled pursuant to the amendment. Finally, Judicial Officers are hawk eyed and vigilant and would not fail to recognise an attempt to subvert the course of justice by delaying the case hence violating the rights of the accused persons.
13. In any event, in view of Article 159(2)(d) of *the Constitution*, even if the charge sheet was to be left unamended, that would not in itself invalidate the charge. In *Obedi Kilonzo Kevovo vs Republic*, (Court of Appeal Criminal Appeal at Nairobi No. 77 of 2015), the court held that the fact that the charge sheet indicated that the offence occurred a month before the date established by the evidence did not prejudice the appellant and was curable under sections 275(2) and 382 of the Criminal Procedure Code. Similarly, I find that the accused persons will not suffer any prejudice if the charge is amended.
14. Having so stated, it is my view, that the application dated 24<sup>th</sup> January 2024 is merited. The orders issued by the trial court on 14<sup>th</sup> December 2023 dismissing the application to amend the charge sheet are hereby set aside.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF MAY 2024.**

**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Ms. Tumaini Wafula for the Applicant

Ms. Mukundi for the Respondents

Joy Court Assistant

