



Director of Public Prosecutions v Swazuri & 24 others (Criminal Revision E003 of 2023) [2023] KEHC 22153 (KLR) (Crim) (14 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E003 OF 2023
EN MAINA, J
SEPTEMBER 14, 2023**

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

PROF MUHAMMAD ABDALLA SWAZURI 1ST RESPONDENT
EMMA MUTHONI NJOGU 2ND RESPONDENT
TOM AZIZ CHIVANGI 3RD RESPONDENT
DR SALOME LUDENYI MUNUBI 4TH RESPONDENT
JOASH OINDO MUGAMBI 5TH RESPONDENT
LILIAN SAVAI KIVERENGE 6TH RESPONDENT
FRANCIS KARIMI MUGO 7TH RESPONDENT
CATHERINE WANJIKU CHEGE 8TH RESPONDENT
JANE WANJIKU GACHIGI 9TH RESPONDENT
KEVIN OINDO MUGAMBI 10TH RESPONDENT
SUNSIDE GUEST LIMITED 11TH RESPONDENT
SAMUEL RUGONGO MUTURI 12TH RESPONDENT
EVAHMARY WACHERA GATHONDU 13TH RESPONDENT
MICHAEL ONYANGO OLOO 14TH RESPONDENT
GODFREY RUBIA MURITU 15TH RESPONDENT
SOSTENAH OGERO TARACHA 16TH RESPONDENT



SHAKIL AHMED KHAN	17 TH RESPONDENT
NAZIR AHMED MATABKHAN	18 TH RESPONDENT
TORNADO CARRIERS LIMITED	19 TH RESPONDENT
FRANCIS KIBARU KARANJA	20 TH RESPONDENT
MARTHA WAIRIMU WAITHAKA	21 ST RESPONDENT
JOHN KAMAU MWANGI	22 ND RESPONDENT
PHILIP KILEYIA SEIYANDUKI	23 RD RESPONDENT
BERTHA WANGITHI MUTHIKE	24 TH RESPONDENT
HON VICTOR WAKHUMILE	25 TH RESPONDENT

RULING

1. The Director of Public Prosecutions, the Applicant herein, seeks the revision of the orders of the court in a Ruling delivered on 4th April 2023 in Milimani ACC No. 6 of 2019.
2. The Application is contained in the Notice of Motion brought under a Certificate of Urgency dated 25th April 2023 and is supported by an affidavit sworn by Evah Kanyuira, Senior Prosecution Counsel in the Office of the Director Public Prosecutions. The Applicant invokes the provisions of Article 50,165 (6) and (7) of *the Constitution*, Sections 87(a), 205, 214,215, 362 and 364 of the *Criminal Procedure Code*, Sections 4,5(b) and 25 of the Office of the Director Public Prosecutions Act and the Guidelines on Decision to Charge and seeks the following orders:
 - “i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to call for and examine the record of the proceedings in the Anti - Corruption Chief Magistrate Court Nairobi at Milimani in Milimani Anti - Corruption Case Number 6 of 2019 *Republic v Prof. Mohammad Swazuri & 24 others* for the purpose of satisfying itself as to the correctness, legality or propriety of the order issued on 4th April 2023 by Hon V. Wakumile.
 - iv. That the Court be pleased to review, vary, reverse, set aside and/or alter the orders rendered by Hon Victor Wakumile dated 4th April 2023 and replace it with an order allowing all the orders prayed for by the Prosecution vide the application seeking the amendment of charge sheet and disclosure of additional documents in Anti - Corruption Chief Magistrate's Court Nairobi at Milimani Anti - Corruption Case Number 6 of 2019 *Republic v Prof. Mohammad Swazuri & 24 others*.
 - v. That this Honourable Court finds that the Trial Magistrate has demonstrated lack of neutrality, objectivity and impartiality and is thus unable, unwilling and not ready to hear and determine this case on the basis of the merits of the issues, evidence and the law toward an outcome anticipated in the law.



- vi. That the Honourable Court be pleased to make any other order that it deems fit in the interests of justice of this Application.”
3. The Application is based on the following grounds as stated on its face thereof and in the supporting affidavit of Evah Kanyuira:
- “i. That the Learned Trial Magistrate Hon Victor Wakumile issued an unconstitutional, irregular and illegal order on 4th April 2023 when issuing orders directing the DPP to wit; “The DPP is urged to consider withdrawing the entire file under Section 87(a) CPC and conduct a review of the same in consideration of public interest and the need to prevent abuse of the legal process” and unless these is corrected substantial injustice will be occasioned to the case.
 - ii. That the trial Court directed that the matter will be mentioned on 10th May 2023 for compliance purpose which effectively changed a scheduled hearing date to a mention date when indeed the Prosecution was eager to present witnesses in the case and has also declined and/or stalled all other plea-bargain proceedings.
 - iii. That, on 11th April 2023 the Trial Court denied parties access to Justice by unjustifiably refusing and/or deferring the request made vide a letter dated 6th April 2023 by the Prosecution which sought to conduct and conclude plea bargain proceedings following execution of a Plea Bargain Agreement.
 - iv. That the Prosecution has dutifully presented witnesses (even when the Learned Trial Court acquiesces the Respondents to ask irrelevant questions and repetitious reiterations of evidence already on record delaying the case) and is eager to prosecute its case before an impartial court properly directed by the law and evidence.
 - vi. That the trial Court has demonstrated lack of neutrality, objectivity and impartiality and is thus unable, unwilling and not ready to hear and determine this case on the basis of the merits of the issues, evidence and the law toward an outcome anticipated in the law when the Court pronounced itself in veiled attacks on the Prosecution Case as follows;
 - a. “This trial is somewhat murky because apart from the cogent reasons which appear in paragraph 4(a) -4(d) of the Supporting Affidavit of Caroline Kimathi and which any court would allow as the basis for amending the charge sheet, there are several accused persons who entered into plea bargain agreement with the DPP and they paid the initial deposit directed only for the DPP /EACC to amend the agreement demand” unilaterally to their disadvantage and decline to refund the deposit on
 - b. “I have heard a blank cheque but the submission seemed to suggest that the DPP has a sea of cheque when it comes to amendment under Section 214 of the CPC which can never be the case”



- c. "When the Complainant had all the opportunity to place the evidence before the authority during the investigations and he inexplicably failed to do so then he cannot in all fairness be allowed to place the new evidence almost 5 years after commencement of the trial"
- d. "We are past the era of fence-sitting. I have no doubt in my mind that the able prosecution Counsel who are seized of the matter can advise accordingly since they are the ones who bear the brunt of a disjointed prosecution (sic)"
- e. "All the Accused person who deposited the money toward the failed plea bargain be refunded immediately. Unless the same is otherwise legally held"
- f. "The DPP is urged to consider withdrawing the entire file under Section 87 (a) CPC and conduct a review of the same in consideration of public interest and the need to prevent abuse of the legal process"
- vii. That the Learned Chief Magistrate erred in law by failing to consider the import of provisions of Section 214 of the *Criminal Procedure Code*.
- viii. That trial Court erroneously, illegally and irregularly issued an order that disregarded common legal position that the duty to disclose all material that the Prosecution intends to rely on is obligatory, continuous and expansive and as such the impugned Court order is inimical to this duty and should thus be set aside, varied and/or revised.
- ix. That the Learned magistrate erred in law by misconstruing the Applicant's duty of disclosure under Article 50(2) (g) and as laid out in the active case management for criminal cases.
- x. That while DPP has within the strict confines of the law concluded a Plea Bargain Agreement with some accused persons the Trial Court contrary to the law has declined or refused to record plea bargain proceedings as anticipated in Section 137A-0 of the CPC.
- xi. That the Learned Trial Magistrate considered extraneous matters that were not anticipated in the Applicant Application, neither did the Court invite comments from the Applicant or the Accused Persons when ordering that "All the Accused person who deposited the money toward the failed plea bargain be refunded immediately. Unless the same is otherwise legally held" which effectively makes the Court an interested party to the plea bargain and contrary to Section 137 of the CPC.
- xii. That in ordering the funds held pursuant to plea bargain be refunded immediately, the Court has invariably and constructively rejected a plea bargain process and pursuant to Section 137] (2) the Prosecution elects to have the matter tried before another Court.
- xiii. That it is extremely unfair and procedural to subject parties to prolonged litigation when a plea agreement has been concluded between parties.



- xiv. That it is extremely unfair and procedural to decline an Application brought in good faith and in the interest of administration of justice and instead prefer prolonged criminal proceedings based on hypothetical issues settled by Superior Court order or Plea Bargain yet they can be easily corrected by way of amendment of the charge sheet and focus on the real issues as the law anticipates.
 - xv. That the Application is meritorious and should be allowed as prayed.”
4. The Application is vehemently opposed by the 1st, 2nd, 3rd, 4th, 5th, 6th, 9th,10th, 11th, 14th and 16th Respondents through their respective Grounds of Opposition dated 18th July 2023 and 16th June 2023. The parties relied further on the written submissions filed in the matter.

The Applicants case

5. The gist of the Applicant’s case as stated in the pleadings and the written submissions dated 5th July 2023 is that the trial court’s Ruling delivered on 4th April 2023 is unconstitutional as it is an affront to the Office of the Director of Public Prosecutions’ Prosecutorial powers.
6. The Applicant contends that the trial court erred in declining the application by the prosecution in that: - it was unconstitutional to direct the Director of Public Prosecutions on how to conduct the trial by unnecessarily stalling the plea agreement proceedings; by misapplying Section 214 of the [Criminal Procedure Code](#); erred in his application on the law of disclosure and by considering extraneous matters.
7. The Applicant framed 6 issues for determination:
 - a. What is the jurisdiction of this court in the instant application?
 - b. Was the application to amend the charges founded on law?
 - c. Was the application to disclose evidence in the possession of the prosecution merited?
 - d. Can the 22nd accused person be treated as a prosecution witness?
 - e. Did the trial court properly conduct itself in the proceedings?
 - f. What is the appropriate relief?
8. On the first issue, Learned Counsel for the Applicant submitted that this court has jurisdiction under Article 165 of [the Constitution](#) to supervise subordinate courts and to review any order or action; that the jurisdiction is broader than the revisionary jurisdiction under Sections 362 to 367 of the [Criminal Procedure Code](#); That this authority cannot be limited by any statutory provision and that the Application goes into the constitutionality of the ruling by the trial court, much more than the correctness or illegality thereof. Counsel placed reliance on the case of [Director of Public Prosecutions v Perry Mansukh Kasangara & Others](#) [2020] eKLR.
9. On the amendment of the charges, Counsel submitted that the prosecution met the conditions for amendment of the charges set out in Section 214 of the [Criminal Procedure Code](#) and the reasons given in the impugned ruling by the trial court were erroneous; that it was erroneous for the court to base its finding on the fact that the trial had taken 5 years and 5 out of 33 prosecution witnesses had already testified; that the court failed to consider that the delay was not occasioned by the prosecution; that it was wrong for the court to find that the proposed amendment was a substantive yet the amendments



- were restricted to correcting the Statement of the Offence, correcting the particulars in Count 4,6,9 and 10 and adding three Counts against the 3rd, 6th and 7th accused persons and also sought to withdraw charges against the 23rd accused person.
10. On the third issue, Counsel contended that the trial court misapprehended the cases it relied upon in arriving at its decision; that the court did not carefully analyze the ratio decidendi in the cases of *Republic v Martha Mukami & another* [2020] eKLR, *Republic v Michael Ezra Mulyoowa* [2015] eKLR, *Republic v Sospeter Odekee Ojamoong & 8 others* [2019] eKLR and *Republic v Charlse Musyimi Maithya & 3 Others* [2022] eKLR. That the correct application of the authorities would have resulted in the trial court allowing the prosecution's application.
 11. On the third issue, the Applicant contends that the court did not properly appreciate the law on disclosure of evidence under Article 50 (2) of *the Constitution*. That the voluminous nature of the evidence would not be a factor to be considered in allowing the prosecution to supply additional evidence as the defence would have had adequate opportunity to prepare their defence. Further that the court imputed improper motive on the prosecution without any evidence and that the trial court erred by concluding that the Application was brought with ulterior motive, which was discourteous to the prosecution.
 12. On the fourth issue Counsel asserted that Article 157(8) of *the Constitution* and Section 143 of the *Evidence Act* allows the prosecution to withdraw the case against the 22nd accused person; that the prosecution retains the discretion to prosecute criminal cases without undue influence; and that the prosecution had satisfied the law in making such application. Counsel stated that the Application was brought in good faith and no prejudice would be occasioned to the other accused persons. In support of her submissions Counsel cited the case of *Republic v Simon Okoth* [2017] eKLR.
 13. On the fifth issue, Counsel argued that the trial court did not conduct itself properly in the proceedings; that the court used pejorative terminology in the ruling. That although the court was not neutral in its ruling, the Prosecution abandoned its prayer for the recusal of the Learned Magistrate; that the court ought not to direct the prosecution in the matter of the refund of the amount paid pursuant to the plea bargain as that was not a prayer that had been sought in the application and in any event, the Learned Magistrate ought to have confined himself to Sections 137 A-O of the *Criminal Procedure Code*. Counsel submitted that the Applicant had made a case for the grant of the orders sought in this Application.

The case for the Respondents

14. The 1st Respondent raised six grounds of opposition to wit: that this application is misconceived and an abuse of the court process; that the Applicant's remedy lies on appeal as opposed to revision; that this court lacks the jurisdiction to re-evaluate the evidence before the lower court in a revision application; that the applicant has failed to point out any illegality, incorrectness or impropriety in the impugned ruling; the Orders as framed in prayer no. 5 cannot be granted in a revision application brought under Section 364 of the *Criminal Procedure Code*; the orders sought are prejudicial to the 1st and 2nd Respondents and that the Application is an attempt at seeking the recusal of the learned trial magistrate from the trial proceedings without filing a formal application for recusal.
15. On their part, the 3rd, 4th, 5th, 6th, 9th, 10th, 11th, 14th and 16th Respondents contend that the prayers sought in the applicant cannot be granted in a revision application but only on appeal. That the scope of revision and the High Court's supervisory jurisdiction is limited. For this Counsel cited the cases of *Republic v Evans Mairura Omwenga* [2022] eKLR and *George Aladwa Omwera v Republic* [2016] eKLR.



16. Counsel submitted that the Application in effect seeks to challenge the dismissal of the applicant's application to amend the charge sheet and adduce additional evidence which application was brought four years after a lengthy hearing and that the trial court applied the correct principles of law.
17. Counsel contended that on the supply of additional evidence, the court correctly considered and applied the principles set out in the case of *Sospeter Ojaamong (supra)*; that the prosecution did not place any material before the court to explain why the documents had not been supplied four years into the trial; That introduction of new evidence would prejudice the accused persons right to a fair hearing under Article 50 in that it would necessitate the recall of witnesses, taking into account that the trial had taken more than four years. They urged the court to dismiss the Application.

Issues for determination

18. A reading of the Pleadings and the rival submissions of learned Counsel for the parties I find that only one issue arises for determination and that is:-

Whether the impugned ruling and orders made on 4th April 2023 are incorrect, improper or illegal to warrant their revision by this court.

Analysis and determination

19. The supervisory jurisdiction of this court under Article 165(6) of *the Constitution* is given effect in Sections 362 and 364 of the Criminal Procedure Code which states:-

“ 362. Power of High Court to call for records

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.”

....

364(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.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.



- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (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.”

20. It is trite that the court’s jurisdiction on revision is limited to correcting a manifest error in the proceedings of the trial court so as to ensure the fair administration of justice. The court does not delve into the merits of the decision as it would do when exercising its appellate jurisdiction and it cannot be justified in substituting its own views on matters of fact or evidence before the trial court. In the case of *Joseph Nduvi v Republic* [2019] eKLR the court stated: -

“ 11. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

21. In the case of *George Aladwa Omwera v Republic* [2016] eKLR (*supra*), the Court observed that:-

“ 22. In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals. In *Veerappa Pillai V Remaan Ltd* the Supreme court of India had this to say:-

“The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for



itself the correctness of the decision impugned and decide what the proper view on the order be made.....”

22. This was also the position taken by the court in the case of *Reuben Mwangi Nguri v Republic* 2021 eKLR where the court held:-

“The prayer of revision vested in this court under Section 362 of the *Criminal Procedure Code* is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court. Accordingly, revision is by no means to be taken as an appeal by the aggrieved party to the High Court in criminal cases where such orders are being sought under Section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.”

23. While the jurisdiction is discretionary, it must be exercised judicially taking into account the circumstances of each case.

24. To succeed under Sections 362 and 364 of the *Criminal Procedure Code*, the Applicant must demonstrate to the court that either the finding or order or proceedings of the trial court is incorrect, illegal or improper. As stated the court must never be required to go into the merits of the case and indeed where an appeal lies but the Applicant decides to proceed by way of revision the court ought not entertain such application. (See Section 364 (5) of the *Criminal Procedure Code*).

25. The courts have with time expanded the circumstances under which revision may be exercised and in the case of *Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others* [2020] eKLR the court went to great lengths to distinguish supervisory jurisdiction from revision and stated:-

“

“150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction? I can readily identify the following as situations which would merit the court’s intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:

- a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;
- b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;
- c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.
- d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring “the fair administration of justice”;

This list showing rationale for intervention is of course not exhaustive.



151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:
- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court’s independence in the conduct and management of its proceedings.
 - ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question
 - iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
 - iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
 - v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice.”
26. Further, the court in Reuben Mwangi (supra), while citing the English Court of Appeal decision REX Versus Compensation Appeal Tribunal 1952 IKB 338 – 347 reinforced the jurisdiction as follows:-
- “The court of Kings Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control tends not only to seeking that the inferior tribunals keep within their jurisdiction, but also to seeking that they observe the law.
- The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it offends against the law, when the kings Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it.”
27. In the present application, the Applicant contends that the trial court erred in declining the application for amendment of the charges so as to introduce new counts and to drop charges against one accused. It is also contended that he erred by misapplying the authorities cited in that regard. Learned Counsel for the Applicant referred this court to those authorities as Republic v Martha Mukami & another [2020] eKLR, Republic v Michael Ezra Mulyoowa [2015] eKLR, Republic v Sospeter Odekee Ojamoong & 8 others [2019] eKLR and Republic v Charles Musyimi Maithya & 3 Others [2022] eKLR.
28. It is also contended that the trial court erred in declining the prosecution’s request to introduce additional evidence in the case. They also impugn the conduct of the trial magistrate in the matter and contended that he interfered with the plea agreement process and issued orders for refund of monies paid by some of the accused persons upon collapse of the plea agreement when no such order was sought; that the learned magistrate considered extraneous matters and even directed the Office of the Director of Public Prosecutions to withdraw the case when the decision to do so is the preserve of the Office of the Director of Public Prosecutions and that the Learned Magistrate’s allegation that the application was couched in ulterior motives was discourteous to Counsel and that therefore the magistrate ought not to continue hearing the case.



29. In the matter of amendment of charges, the power to amend is donated to the trial court by Section 214(1) of the Criminal Procedure Code. The Court's power is at all times to be exercised judicially but not capriciously. The court is enjoined to consider the circumstances of the case and the interest of justice. The jurisdiction is unfettered the only condition being that should the charge be amended the court shall call upon the accused person to plead to the amended charge - (Section 214 (1) (i) of the Criminal Procedure Code) and also to have the witnesses recalled to testify afresh or to be cross examined. (Section 214 (1) (ii) of the Criminal Procedure Code). My reading of the impugned ruling reveals that the trial magistrate duly considered the reasons for the application but declined to grant the amendment for the reasons that the trial has substantially progressed – for about five years and that several witnesses have already testified hence the amendment would violate the accused persons' guaranteed right to fair trial (speedy trial). The learned magistrate gave the same reason for declining the application for additional evidence.
30. In my considered view, taking into account the right to fair trial of the accused person in such an application is not an error. To the contrary it is a must in light of Articles 25(c) and 50 of the Constitution. It is also not an extraneous matter and the trial magistrate cannot therefore be faulted for basing his decision or finding on that ground. As to whether the finding was merited, as already stated, that is not an issue for revision but for appeal. Be that as it may, it is a principle of any trial whether civil or criminal, that a party ought not to be allowed to patch up its case as it progresses, a principle which the learned magistrate also took into account in rejecting the application. It is also instructive that the Criminal Procedure Code has many provisions regarding the effect of a defective charge to a trial. (See Sections 137 and 382) which learned Prosecution Counsel would be minded to consider. The long and short of it, however, is that I find no illegality, incorrectness or impropriety in the finding/order of the trial magistrate.
31. As for the allegation that the trial magistrate misconducted himself I find firstly that, by stating that the prosecution “should consider withdrawing the entire case” the trial magistrate did not make an order for the Director of Public Prosecutions to withdraw the case. This in my view was but a mere suggestion which does not bind the court. My finding is fortified by the fact that the remarks were made *Orbiter dictum* and should have been treated as such.
32. In regard to the plea agreements, there is nothing on the record to demonstrate that interference by the learned trial magistrate. Indeed, Section 137C (3) of the Criminal Procedure Code prohibits the court from participating in the plea agreement. From the record, the only thing the trial magistrate did was to direct the Prosecution to refund the accused person who had monies paid pursuant to the agreement which the Director of Public Prosecutions later reneged on. Whereas this was definitely not a ground to refuse the application, I would expect that the Director of Public Prosecutions would not require any urging to do so.
33. As for the prayer that the case ought to be removed from the learned trial magistrate, my finding is that that is an issue for recusal which procedurally should be made before the learned magistrate in the first instance.
34. In the upshot the application is found to be unmerited and it is dismissed.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF SEPTEMBER 2023.

E. N. MAINA
JUDGE

