



Ali & 7 others v Republic; Ochieng (Interested Party) (Criminal Revision E006 of 2025) [2025] KEHC 3430 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL REVISION E006 OF 2025**

**OA SEWE, J
MARCH 5, 2025**

BETWEEN

**MOHAMED ALI 1ST APPLICANT
JANE AKINYI 2ND APPLICANT
MATHEWS ODONGO WALONDI 3RD APPLICANT
PAMELA OOKO 4TH APPLICANT
ISA IBRAHIM 5TH APPLICANT
GEORGE OUMA 6TH APPLICANT
FREDRICK OKETCH 7TH APPLICANT
ADEN IBRAHIM 8TH APPLICANT**

AND

REPUBLIC RESPONDENT

AND

LUCAS OMONDI OCHIENG INTERESTED PARTY

(From the Ruling and Orders made in Magistrate’s Court Criminal Case No. E237 of 2024 at Mbita by Hon Martha Agutu, PM on 12th December 2024)

RULING

1. The applicants approached the Court vide their application dated 13th December 2024 seeking orders that the ruling and order made by the lower court in Mbita MCCR No. E237 of 2024 on the 12th December 2024 be revised. Their contention was that the lower court granted orders for the release of stolen goods to the interested party, Lucas Omondi Ochieng (wrongly cited as the respondent herein)



- in contravention of the law and the applicable procedures. The items in question were: 3 boats, 3 engines and 320 nets. The applicants' assertion was that the said items were released by the lower court in disregard to the provisions of Section 9(1)(d) of the *Victim Protection Act*, Chapter 79A of the Laws of Kenya and Sections 177 and 178 of the *Criminal Procedure Code*, Chapter 75 of the Laws of Kenya.
2. The applicants also took issue with the fact that the lower court granted the interested party free bond without reference to a pre-bail inquiry report as recommended in the Judiciary Bail and Bond Policy. They accordingly prayed that the lower court record be called for and evaluated as to correctness, legality and propriety.
 3. Indeed, Sub-Articles (6) and (7) of Article 165 of the *Constitution* provide that:
 - (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 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.
 4. Accordingly, directions were given herein on the 21st January 2025 pursuant to the provisions of Section 362 of the *Criminal Procedure Code* for the lower court file to be availed for perusal with a view of ascertaining the correctness, legality and propriety of the impugned orders. That provision states:

“The High court may call for and examine the records 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.”
 5. In the same vein, Section and 364(1)(b) of the *Criminal Procedure Code* stipulates that:

“In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order.”
 6. The record of the lower court confirms that the interested party was indeed charged and arraigned before the lower court in respect of the offence of stealing fishing nets contrary to Section 278B of the *Penal Code*, Chapter 63 of Laws of Kenya. It was alleged that on 16th January 2024 at Remba Island in Mfangano South Location in Suba West Sub County, he stole fishing nets valued at KShs. 180,000/= the property of Hisa Ibrahim Noor.
 7. The lower court record further confirms that the interested party denied the charge and was released on a free bond to attend court on 16th December 2024 for pre-trial directions. The lower court also ordered for the release of the 3 boats, 3 engines and 320 nets presented before it as exhibits.
 8. Thereafter, on the 16th December 2024, the Officer in Charge of Sena Police Station attended court in connection with the confiscated boat, engines and nets and after being examined on oath, it emerged that a complainant had come forward and claimed ownership of one of the engines. The prayer of the



OCS, therefore, was for the lower court to review its order for release of the exhibits to read 3 boats, 2 engines and 149 nets. The lower court obliged and made an order in the following terms:

“The 140 unclaimed nets the 3 boats to be released to the accused person with a rider that he gives access to Investigators to the items whenever the need arises...The Investigating officer and the OCS – Sena to give a full inventory of the nets confiscated from the accused person at the time of his arrest...The OCS to forward the outcome of the inquiries carried out on the engine that is the subject of the inquiry...”

9. In the premises, the single issue for determination is the question whether a perusal of the record of the lower court, and in particular the orders given by the lower court evinces any error in terms of correctness, legality, and propriety. In this connection, I am entirely in agreement with the position taken by Hon. Muriithi, J. in *DPP v Jackson Cherono* [2019] eKLR as to the scope of a revision application, namely:

A revision in a criminal trial is a “judicial review” for ascertainment of the legality of the process and order of the criminal trial Court.”

10. Hon. Odunga, J. took the same view in *Joseph Nduvi Mbuvi v Republic* [2019] eKLR thus:

“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.”

11. It is notable that the applicants erroneously hinged their application on Section 9(1)(d) of the *Victim Protection Act*. Erroneously because that provision states:

“(1) A victim has a right to—

...

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;”

12. It was never the applicants’ complaint that the lower court was not competent to handle the criminal trial or to make the impugned orders. Since the applicants’ contention is that the exhibits were released without being given an opportunity to be heard in response, the more apt provision is Section 9(2)(a) of the *Victim Protection Act*. It states:

“(2) Where the personal interests of a victim have been affected, the Court shall —



- (a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court;"

13. It is noted however that the goods in question were claimed to be the accused person's at the time of their release and therefore were not intended for use as exhibits in the criminal trial. There was no known victim who laid claim to their ownership at the time who could have been heard in opposition to the application for the release of the items. In any case, the Prosecuting Counsel was given an opportunity to respond to the application for release of the exhibits and he had the following to say:

"I have looked at the particulars and petition. They do not form the items we will rely on. They can be released."

14. The investigating officer, PC Jonathan Kibet, was also heard before the release order was made. He stated:

"...The arrest of the accused is not tied to the constitutional petition raised at the High Court. The 3 boats, 3 engines and 320 nets can be released to him. They do not form part of the items in the charges."

15. Hence, the learned magistrate had the power and jurisdiction to make an order for release of the items in view of the clear provisions of Section 177(a) of the [Criminal Procedure Code](#). It stipulates that:

"Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order—

- (a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or

16. To the extent that the matter was yet to undergo full trial, Section 178 of the [Criminal Procedure Code](#) that the applicants hinged their application on was not applicable to the circumstances of the matter. In the premises, the decision to order the release of the exhibits was not only lawful, but was also made on the basis of a fair evaluation of the representations made before the lower court by both the Prosecution and the Defence. If the magistrate erred in such evaluation and/or interpretation of the law, then the option availed to question the merits of the decision ought to have been by way of an appeal.

17. As to whether the release of the interested party was legal, proper and procedural, the [Constitution](#) itself provides in Article 49(h) that an arrested person has the right:

"(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

18. Moreover, Section 123 of the [Criminal Procedure Code](#) also provides that:

"(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail: Provided that the officer or court may, instead



of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

- (2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

19. Again, it is plain that the release of the interested party on free bond was perfectly lawful and within the discretion of the learned magistrate. Any attack on the merits of the decision could only have been entertained by way of appeal and not through an application for revision. Indeed, Section 364(5) of the *Criminal Procedure Code* is explicit that:

“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. Accordingly, I share the viewpoint taken by Hon. Wakiaga, J. in *George Aladwa Omwera v Republic* [2016] eKLR, in which he cited the decision of the Supreme Court of India in *Veerappa Pillai v Remaan Ltd* for the holding that:

“The supervisory power 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 should be made...”

21. In my careful consideration therefore, in so far as the Court is now being asked to consider and revise the decision of the learned trial magistrate on the merits, revision is not apt. Thus, it is my finding that the application dated 13th December 2024 is entirely misconceived and is, therefore, for dismissal. The same is accordingly dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF MARCH 2025

OLGA SEWE

JUDGE

