



**Republic v Isabwa & 6 others (Criminal Case 29 of 2015)
[2024] KEHC 10350 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10350 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 29 OF 2015
K KIMONDO, J
AUGUST 22, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

**ERIC MUNGERA ISABWA ALIAS CHAIRMAN 1ST ACCUSED
RAPHAEL KIMANI GACHII ALIAS KIM BUTCHER 2ND ACCUSED
MUSTAFA KIMANI ANYONI ALIAS MUSTO 3RD ACCUSED
STEPHEN ASTIVA LIPOPO ALIAS CHOKORE 4TH ACCUSED
JANE WANJIRU KAMAU ALIAS SHIRO 5TH ACCUSED
MARGARET NJERI WACHIURI 6TH ACCUSED
SIMON WAMBUGU GICHAMBA 7TH ACCUSED**

RULING

1. On 15th July 2024, and at the close of the re-examination of Quinto Odeke (PW34), the learned Prosecution Counsel, Ms. Maina, made an oral application to recall the witness. The prayer was predicated upon section 146 (4) of *Evidence Act*.
2. The recall was for purposes of producing original call data reports relating to a number of cell phones. The learned prosecutor argued that the reports were earlier produced in a separate robbery trial in Chief Magistrates Criminal Case 479 of 2015.
3. The application is contested by the 3rd and 4th accused persons only. According to learned counsel for the 3rd accused, Mr. Ongaro, there are some discrepancies in the reports that have precipitated the present application. He argued further that no basis has been laid for late production of the evidence.



He added that the witness confirmed that the reports are in HTML and Excel formats. Accordingly, it makes no sense to claim that there are “originals” in the related file before the Chief Magistrates Court.

4. The objection by learned counsel for the 4th accused, Mr. Wokabi, on the other hand, is on the need for prior disclosure of that evidence. I heard him to say that since he is not representing the accused in the lower court, the DPP should ensure service of the reports before the next hearing date.
5. I will commence with the objections by the 4th accused. The mere fact that all the accused are charged before the two courts does not mean they have common counsel. Article 50 (2) (j) of *the Constitution* decrees that the accused persons be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence when their trial commences.
6. I will now turn to the objections by the 3rd accused. They point strongly towards admissibility, quality or veracity of the proposed evidence or reports intended to be produced by the witness. The objections can well be taken if and when the witness applies formally to produce the reports.
7. Section 146 of the *Evidence Act* deals with the order and direction of examinations. Sub-section 4 provides as follows-

The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.
8. The application for recall was made immediately after the testimony by the witness. The “original” reports are said to be in a related criminal file before the Chief Magistrate. I cannot comment about whether the reports are original or admissible at this stage. But in view of the clear language of section 146 (4) above, I am inclined to allow the application.
9. The upshot is that Quinto Odeke (PW34) may be recalled to the stand for further examination in chief, cross examination and re-examination.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF AUGUST 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of: -

The accused persons.

Ms. Dela for the Republic instructed by the office of the Director of Public prosecutions.

Mr. Wokabi holding brief for Mr. Wachira for the 1st accused.

Mr. Wokabi holding brief for Mr. Olando for the 2nd accused.

Mr. Wokabi holding brief for Mr. Ongaro for the 3rd accused.

Mr. Wokabi for the 4th & 6th accused persons.

Mr. Wokabi holding brief for Ms. Nyamongo for the 5th and 7th accused persons.

Mr. E. Ombuna, Court Assistant.

