



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shee v Republic (Miscellaneous Criminal Application  
E168 of 2022) [2023] KEHC 306 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 306 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CRIMINAL APPLICATION E168 OF 2022**

**A. ONG'INJO, J  
JANUARY 26, 2023**

**BETWEEN**

**FEISWAL MOHAMED SHEE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. *Vide* an application dated July 11, 2022 and filed on July 12, 2022 together with the supporting affidavit sworn by Feiswal Mohamed Shee brought under article 50 (1), 165 (3) (a), (b) and 165 (6) of the Constitution of Kenya 2010, section 362 and 364 of the Criminal Procedure Code, the applicant prayed for the following orders: -
  1. That this application be certified as urgent and service thereof be dispensed with in the first instance and the same be heard *ex-parte*.
  2. That this honourable court be pleased to issue an order of stay of all the proceedings in Mombasa Chief Magistrate's Court Traffic Case No 1117 of 2020 pending the hearing, determination and final disposal of the instant application.
  3. That upon granting prayer (2) above, this honourable court be pleased to recall the record of the proceedings in Mombasa Chief Magistrate's Court Traffic Case No 117 of 2020 and thereafter exercise its supervisory and revision powers and do revise the decision delivered by Hon R Orora resident magistrate on March 31, 2022 declining to allow the applicant's demand to have the matter start *de novo* as legally permissible and/or enabled.
  4. That the costs of this application be in the cause.
2. The application is premised on the following grounds: -



- i. That the applicant herein was charged at the Chief Magistrate's Court at Mombasa with the offence of causing death by reckless driving contrary to section 46 of the [Traffic Act](#), cap 403 Laws of Kenya.
  - ii. That the applicant pleaded not guilty to the charge and was released on bond of Kshs 200,000 with 1 surety of similar amount which was later reviewed to an alternative cash bail of Kshs 50,000.
  - iii. That the applicant was dissatisfied by the representation of his then counsel one Mr Kiarie Kariuki who failed to adequately offer zealous advocacy and diligent representation in defending the applicant prompting the applicant to give instructions to Mr Omwancha who came on record in the matter.
  - iv. That the then counsel for the applicant failed to meet with the applicant and take instructions necessary for cross examination of the respondent's witnesses and was generally unprepared for the hearings to which he always appeared late.
  - v. That in order to effectively represent and defend the applicant, an application for the hearing to start *de novo* was necessary and crucial since the applicant is reasonably apprehensive that unless that is effected, his right to fair hearing will further be prejudiced.
  - vi. That the applicant has now moved this court seeking for revision of the aforementioned ruling by Honourable R Orora, Resident Magistrate, Mombasa in a bid to revise that ruling and allow for fair hearing of the suit.
  - vii. That it is by way of this instant application that this honourable court can exercise its supervisory powers to revise the ruling to safeguard the interest and rights of the applicant.
3. Upon perusal of the typed proceedings at page 37, Hon R Orora (RM) took over the matter on December 22, 2021. Section 200 was explained to the accused and Mr Opolu holding brief for Mr Omwancha for the accused made an application that the matter starts afresh. This was on the basis that there was an earlier advocate, Mr Kiarie, on record who did not represent the accused satisfactorily. The court opposed the application on grounds that the matter was at the defence stage and that the accused should have asked the court that he needed time to look for another advocate.
  4. Further, when the matter came up for mention on January 10, 2022, Mr Omwancha for the accused insisted that the matter starts *de novo*. This was on the basis that when the matter started, the state counsel wrote to the complainant indicating that the person who owns the motor vehicle should disown the accused. Counsel for the accused stated that the prosecution has been trying to cover the owner of the motor vehicle and that the accused felt that there was no justice. The state counsel opposed the application pointing out that the accused should go for judicial review and that he had been represented. That the accused's action was an afterthought, the accused had been placed on his defence, he cannot subject the owner of the motor vehicle and the deceased to produce evidence, and that the witnesses were adequately cross examined.
  5. The issue for determination herein is whether the applicant has satisfied the court for grant of orders for revision under section 362 and 364 of the [Criminal Procedure Code](#).
  6. The evidence in the trial court commenced on November 16, 2020 before Honourable C A Ogweno (RM) who recorded the the evidence of the last witness PW9 on May 15, 2021 before placing the applicant on his defence on a case to answer on July 15, 2021. This matter was then taken over by Hon Orora (RM) where Mr Opolu advocate held brief for Mr Omwancha advocate and upon section 200 of



- the *Criminal Procedure Code* being explained to the applicant, Mr Opolu prayed that the matter starts afresh since the applicant was not satisfied with Mr Kiarie advocate who was initially representing him.
7. When Mr Omwancha advocate attended court on January 10, 2022 for directions, he prayed that the matter starts *de novo* for the reason that the prosecution had been trying to cover for the owner of the motor vehicle and the applicant felt that there was no justice. The prosecution opposed that application and the trial magistrate in her ruling delivered on March 31, 2022 disallowed the application to start *de novo*.
  8. The applicant has invoked the revisionary power of the court that is provided for under section 362 of the *Criminal Procedure Code* as follows: -
    - “362. 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.”
  9. Section 150 of the *Criminal Procedure Code* provides for recall of witnesses as follows: -
    - “A court may, at any stage of a trial or other proceeding under this code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:  
  
Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”
  10. Having considered the application and the ruling of the trial court, I do find that the ruling was an exercise of the trial magistrate’s discretion under section 200 (3) of the *Criminal Procedure Code* and there is nothing incorrect, illegal or questionable about its propriety.
  11. In the case of *Ndegwa v Republic* [1985] KLR at 534 the Court of Appeal stated: -
    - “section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial.”
  12. In the case of *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others* [2015] eKLR it was held: -
    - “section 200(3) of CPC gives an accused person an opportunity to demand to have any witnesses recalled. This section makes it mandatory for succeeding magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory



to explain the accused his rights, the failure to inform the accused of his rights under that section renders the subsequent proceedings a nullity.”

13. The reasons given by the applicant for demanding to proceed *de novo* is that he was not satisfied by Mr Kiarie advocate. He also said that the prosecution wrote to the complainant indicating that the owner of the subject motor vehicle should disown the applicant. The applicant has not shown how his dissatisfaction with the previous advocate on record and the letter written by the state counsel to the complainant was related to the evidence that was given by the witnesses who had already testified. The grounds given for seeking to start *de novo* are not satisfactory and the application for revision is disallowed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Mr. Omwancha Advocate for the Applicant – No Appearance

Applicant present in person – No Appearance

