



**Omusayi v Republic (Miscellaneous Criminal Application 046 of 2022)  
[2023] KEHC 23113 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23113 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION 046 OF 2022  
SC CHIRCHIR, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**PATRICK OJANGO OMUSAYI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Patrick Ojango Omusayi the Applicant, was charged with of assault causing actual bodily harm contrary to section 257 of the *penal code* at the Chief Magistrate’s Court in Butere. He went through trial without legal representation until the close of prosecution’s case. Upon being put on the defense he sought for the services of an Advocate.
2. Before his defence commenced, his advocate applied for the recalling of the first three prosecution witnesses for further cross-examination. The Trial court disallowed the Application, prompting this application for revision.
3. The application seeks for revision on grounds that :
  - a). The trial court failed to appreciate the fact that the applicant was not represented and was not in a position to effectively cross-examine the witnesses.
  - b). That both the counsel and the trial magistrate had indeed not had the benefit of seeing the said witnesses.
  - c). It is further stated that the trial court failed to take into account the provisions of section 146 of the *Evidence Act*.
  - d). That the trial court failed to appreciate the fact that the prosecution was not going to suffer any prejudice.



## **Applicant's Submission**

4. The Applicant has drawn the attention of the court to various past decisions and section 146(6) of the *Evidence Act*, section 150 of the *Criminal Procedure Code* (CPC), Article 50(2) and Article 25(c) of the *Constitution*, all of which are relevant to the recalling of witnesses
5. The prosecution did not respond to the Application.

## **Determination.**

6. I have considered the Application and the submissions of the Applicant. The Revision jurisdiction of this court is provided for under Article 165 (6) and (7) of the *constitution* and sections 362 and 364 of the *CPC*. Section 362 of the *CPC* provides as follows: “The High court may call and examine the record of any 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 courts”
7. The orders which the high court may make pursuant to the said jurisdiction are provided for under section 364 of the same *Act* , which include reversing or altering the order of the subordinate court but does not include making any change alteration or reversal in an order of an acquittal.
8. Section 146(4) of the *Evidence Act* states, “The court may in all cases permit a witness to be recalled either for examination in chief or for further cross-examination, and if does so, the parties have the right of further cross-examination and re-examination respectively”.
9. Further section 150 of *CPC* empowers the court to summon, call, recall and re- examine a witness at any stage of the proceedings as long as the evidence of the person being called or recalled is essential to the just decision of the case ( Emphasis added) . Thus, the power to recall is at any stage and is necessitated by the need to do justice.
10. In the case of *Joseph Ndungu Kagiri vs Republic* (2016) e KLR the circumstances were similar to the present case. The Accused person had sought to recall witnesses on grounds that previously, he had no legal Representation. Justice Mativo , while overturning the order of the trial court in this regard stated :

“ It was improper for the court to refuse the Application to recall witnesses , thereby occasioning grave injustice to the accused person by locking out evidence that could have been brought by the intended cross- examination . This refusal was in my view to the detriment of the accused person who hitherto had no legal representation. The Right to fair trial encompasses the right to challenge evidence. Cross- examination is the main mode of challenging evidence and if the accused person considers himself or herself inadequate to effectively challenge the evidence , it cannot be said that the accused’s right to fair trial has been protected . I have read the Trial court’s Ruling and I do not find any reason advanced for the refusal. The right to fair trial is non- derogable and courts must ensure that any plea aimed at the protection of this right be not treated casually.”
11. Am duly guided by the above decision. Effective cross- examination is part of the core of the right to fair trial. This right is unlimited and courts must be constantly vigilant so as to ensure that this right is protected. I hasten to acknowledge that speedy trial is equally a component of fair trial, but substantive justice must never be sacrificed in the altar of expediency.
12. The trial court made reference to compliance with s. 200 (3) *CPC*, and the fact that the it had fully complied with the aforesaid section of the code. This is however a case of muddling up issues. The



applicant's application was a recall of witnesses for cross-examination pursuant to the provisions of 150 of the code . There was no complain about non-compliance of s.200(3) of *CPC*. The two must not be confused (see *Young Mule vs. Republic* (2020) e KLR.

13. In conclusion the application is merited. I hereby allow the same and proceed to make the following orders :
- a). The ruling of the trial court delivered on 19/7/2022 in criminal case No.35/2021 is hereby set aside.
  - b). The prosecution witnesses, namely PW1, PW2, and PW3 to be recalled for cross-examination.

**DATED, SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**S.CHIRCHIR**

**Judge**

**In the presence of**

E.Zalo-CA

Ms . Osoro for the Respondent

No appearance by the Applicant.

