



**Kiplabat & another v Republic (Criminal Revision Application
E001 of 2023) [2023] KEHC 26042 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL REVISION APPLICATION E001 OF 2023
RB NGETICH, J
NOVEMBER 30, 2023**

BETWEEN

VINCENT KIPLABAT 1ST ACCUSED

VINCENT KIPCHIRCHIR 2ND ACCUSED

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein sought revision orders in Eldama Ravine SPM Criminal Case No. E033 of 2023, through letter dated 31st July, 2023 filed on 2nd August, 2023 through Oyaro J. & Associates Advocates. The Applicant seeks to recall prosecution witnesses for cross examination.
2. The accused persons herein have been charged with the offence of being in possession of suspected stolen property contrary to section 323 of the Penal Code. The particulars of the offence are that on the 11th day of January, 2023 along Marigat –Nakuru Road within Mogotio Sub-County of Baringo County were jointly found ferrying 8 pieces of metal valued at Kshs. 48,000/= using an unregistered motor cycle Chasis No.MD2A221BX6NWB96476 Boxer red in colour having suspected to be stolen property.
3. Reasons advanced for request to recall prosecution witnesses is that the accused had no legal representation when the prosecution witnesses adduced evidence and therefore failed to raise pertinent issues of their defence including laying and marking their documentary exhibits besides examining the prosecution witnesses on the same.
4. The Applicant argue that the trial magistrate erred in law in declining to exercise her discretion in favor of the accused and or giving the accused an opportunity to lay foundation of their case and challenge the evidence availed by the prosecution and the accused run the risk of their documentary evidence not being admitted thereby causing a serious miscarriage of justice.



5. That the accused persons are facing a case that requires prove of the source of the property found in their possession and therefore locking out the accused documentary evidence which will seriously weaken their case and gives the prosecution an undue advantage and failure to afford the accused an opportunity to properly adduce and challenge the evidence of the prosecution constitutes a violation of the accused constitutional right to fair trial provided under Article 50(2)(k).
6. That granting the accused persons request to further cross examine the prosecution witnesses will cause no prejudice to the prosecution but will simply serve the ends of justice and the prosecution will have an opportunity to scrutinize the defence documents, respond and even cross examine the defence witnesses.
7. The accused pray that this Honourable court exercises its supervisory jurisdiction and do satisfy itself on the legality, propriety or regularity of the proceedings and decision and pray that this Honourable court orders that:-
 - a. That the orders of the trial court in issue be quashed and vacated.
 - b. That the prosecution witnesses be recalled for purposes of further cross examination by the defence counsel.
 - c. Any other appropriate orders that this court may deem fit.
8. When the matter came up for mention before this court on the 14th November, 2023, the State Counsel Ms. Ratemo informed the court that the prosecution will not be prejudiced if the witnesses are recalled for purposes of cross examination and submitted to court that the witnesses can be recalled for purposes of cross examination.
9. I wish to consider whether this court should allow recall of the two prosecution witnesses who testified.
10. The applicant has invoked the revisionary power of the court provided under Article 165(6) and (7) of *the Constitution* and Section 362 as read together with Section 364 of the Criminal Procedure Code. The provisions are as hereunder:-

“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.”

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

.....

b. in the case of any other order 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.

.....;

- 5). When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.”

11. The operative law that provides for recall of witnesses in section 150 of the [Criminal Procedure Code](#) which provides 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.”

12. The proviso to section 150 allows witnesses recalled to be cross-examined by the prosecution or the defence counsel and in the case of [Joseph Ndungu Kagiri v R](#) (2016) eKLR, Justice Mativo observed as follows:

“The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record; he had just been supplied with the proceedings and prosecution witnesses’ statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses’ statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application.”

13. In the above case, Justice Mativo observed as follows:

“Lord Denning in the celebrated case of *Pett vs Greyhound Racing Association* decried the state of unrepresented parties in court when he stated that:

“It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine



or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

14. From the foregoing, there may be situations which would persuade a trial Judge to allow recall of witnesses and such a situation would be valid only if it is based on sound reasons. In the instant case, the record show that the accused persons were unrepresented when the prosecution witnesses testified and their gravamen is that, if they had counsel, the case would not have turned out as it did. In the case of *De Souza v Uganda* [1967] EA 784. It was observed that trial in the Magistrates court ends with close of defence case.
15. Record shows that the trial Magistrate in declining to recall witness indicated that the application was made after prosecution had closed their case and reasons advanced were not sufficient.
16. In the case of *Republic v Salim Mohamed* [2016] eKLR it was observed that

“ Article 50 of *the Constitution* provides for fair hearing. Under Article 50 (2) an accused person has a right to fair hearing which includes: -

 - (a) to be presumed innocent until the contrary is proved;
 - (c) to have adequate time and facilities to prepare a defence;
 - (g) right to choose and be represented by an advocate;
 - (k) to adduce and challenge evidence;
17. The accused persons are facing a charge of having suspected stolen property contrary to section 323 of the *Penal Code* and if found guilty might be sentenced to suffer 14 years imprisonment. Section 150 of *Criminal Procedure Code* talks of recall at any state of hearing. Hearing had not been concluded and there was therefore no reason to deny applicants opportunity to recall and cross examine the witness.
18. Section 146(4) of *Evidence Act* that is expressed in the following terms;

“(4) 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.”
19. Record show that the accused was not represented at the time the prosecution witnesses testified. From the letter, due to lack of presentation, they were not able to show the court documents which will assist him in his defence; in proving ownership of the suspected stolen goods.
20. I take note of the fact that the prosecution witnesses testified, closed their case and ruling on whether prema facie case was established was delivered by the court. However, section 50 of Criminal Procedure Code provides for recall at any stage of trial and in my view before determination of the case, a party who can demonstrate that he/she will be prejudiced if recall is not ordered should be accorded opportunity to recall and cross examine a witness. The prosecution will not be prejudiced as they will have opportunity to cross examine the witness. In view of the nature of evidence the applicant wishes to cross examine and introduce, it will be in the interest of justice to allow recall of the witnesses. The lapse on part of the applicant is attributed to lack of legal representation. The applicant having engaged an Advocate at late stage of trial and in view of the fact that prosecution have confirmed that they



will not suffer any prejudice, I am inclined to set aside the trial court order declining to allow recall of prosecution witness.

21. Final Orders : -

1. Trial court dated 24.04.23 is hereby set aside.
2. prosecution witnesses pw1 and pw2 to be recalled.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 30TH DAY OF NOVEMBER, 2023.

.....

RACHEL NGETICH

JUDGE

