



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**

**CRIMINAL CASE NO. 72 OF 2010**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**PATRICK MUNDIA MUIRU ..... ACCUSED**

**RULING**

**BACKGROUND**

1. By an application dated 3<sup>rd</sup> May 2017 the Applicant herein **PATRICK MUNDIA MUIRU** under section 200 (3) of CPC section 2 and 4 of the fair Administration Act No. 4 of 2015 and Article 50 (1) 2(g) and (h) of the constitution of Kenya 2010 sought the following orders.

**1) THAT the ruling of 7<sup>th</sup> February 2017 be reviewed set aside or be varied.**

**2) THAT the following witnesses be recalled for further cross examination**

- a) TERESIA NJAMBI – PW1
- b) JOHN WAINAINA KABURU – PW2
- c) CHRISTINE WANJIKU MUIRU P W3
- d) PC CHRISTOPHER NANDA – PW 4

**3) THAT in the alternative to prayer No. 2 above the accused be offered an opportunity to call on JOHN KAMAU who is his brother as defence witness.**

2. The application was supported by an annexed affidavit sworn by the accused in which it was deponed that at the trial he was represented by an Advocate known as Njau of Njau & Co. advocates who conducted the accused defence before Justice Ombija as he then was wherein the accused gave unsworn statement in his defence and that when Justice Ombija ceased to exercise jurisdiction the court appointed Mr. Wamwayi to undertake the defence on his behalf.

3. It was contended that the accused was not given an opportunity to recall witnesses neither was that right explained to him and since the prosecution witnesses are fairly few and easily available it was only fair that the named witnesses be recalled. It was stated further that under Article 159 (2) d the courts are

enjoined to administer Justice without undue report to technicalities of procedure noting that one Njau who represented the accused before Justice Ombija was appointed by the family of the deceased and was not chosen by the deceased in terms of Article 50 (g) of the constitution.

4. It must be stated for record purposes that on 7<sup>th</sup> day of February 2017 this court dismissed the application by the accused dated 8<sup>th</sup> December 2016 in which the accused sought for the trial to start denovo or in the alternative the named witnesses be recalled to testify on the ground that the accused had not made out a case for grant of orders sought.

### **SUBMISSIONS**

5. It has been submitted on behalf of the applicant that the court did not deal with his prayer no 3 to be allowed to call one John Kemau as his witness and that the Advocate who represented him at the trial did not represent his best interest since he was appointed by the family of the victim.

6. On behalf of the prosecution it was submitted that the orders sought are the same as those sought in the application that was dismissed and therefore the matter is resjudicata in support of which the case of **Aggrey Chiteri Vs Republic Constitutional Petition Number, 260 Of 2015 At Nairobi** was submitted where it was stated that the filing of a petition when a similar one has already been adjudicated upon him finality would amount to an abuse of the process of the court.

7. It was further submitted that the applicant did not meet the condition upon which the court may review its ruling and that it was not enough for the applicant to hold a different view with the court unless there was mistake or error apparent on the face of the record for which **High Court Of Kenya At Nairobi. Cr Mis App No 34 of 2013 R Vs DDP and 3 Others exparte Peter Opondo Kaluma** was submitted in support where it was held that an applicant can only succeed if there is evidence of a mistake or error that is so clear and does not require much explanation. Otherwise controversial statements and findings in a court's judgments are for resolution by an appellate counsel are not meant for review.

### **ANALYSIS AND DETERMINATION**

8. From the submissions herein there are only two issues for determination: Whether the applicant has made out a case for Review of the ruling of the court herein and what orders should the court make in this matter.

9. I have given my most anxious consideration to this application, in the application dated 8/12/2016 the applicant sought for an order that the case be heard denovo or in the alternative four named witness be recalled for cross examination and the applicant allowed to call one John Kamau as a witness in his defence.

10. In the present application, the applicant has abandoned his prayer for hearing denovo but maintained his prayer for recall of the four named witnesses for further cross examination or in the alternative he be accorded an opportunity to call one JOHN KAMAU as a defence witness.

11. In the rulling under review it is clear from the records that the court only dealt with the prayer for the trial to start denovo but did not pronounce itself on the Limb for recall of the witnesses for further cross examination with the only pronouncement thereon being that most of the prosecution witness were related to the accused person and starting the trial afresh will not be in the best interest of administration of justice. It is therefore clear that there is an apparent error on the face of the record of which entitles the applicant for review.

12. The right of recall of witnesses is given under section 146(4) of the Evidence Act which states 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.***

The court therefore may allow the applicant to recall witnesses based on the circumstances of each case. In the application under review as well as the present application the applicant has not stated reasons as to why it is now necessary to recall the four named witnesses for a further cross examination save for the fact that they are a live and available. I therefore find that the applicant has failed to establish grounds upon which the court may exercise the right of recall under the provisions of section 150 of CPC.

**13.** The right of recall by the applicant should have been exercised immediately before the commencement of the defence case which would have given the accused an opportunity to prepare his defence unlike in the present situation where the prosecution case had been closed and the accused put on his defence which begs the question as to what would happen should the court allow the accused to recall witnesses on the ruling by the previous Judge putting the accused on his defence. I therefore find no merit on the application to recall the named witnesses for further cross examination.

**14.** This therefore leaves the court with the alternative prayer to be allowed to call as a defence witness one John Kamau. The purpose of a trial should always be a search for truth and it must be conducted in manner that will protect the right of every accused person. Article 50(2) of the constitution provides for right to fair hearing which includes the right of accused to adduce and challenge evidence. Since the application is made after the close of defence case, I see no prejudice that may be suffered by the prosecution should the accused be allowed to re open his case **which I hereby do** to call one **John Kamau** as a defence witness as to block that intended evidence at this stage without hearing it would led to a miscarriage of Justice.

**15.** I therefore allow the application herein in terms of the alternative prayer for the accused to call on **John Kamau** to testify as a defence witness in the interest of Justice.

DATED, DELIVERED and SIGNED at Nairobi this **31<sup>st</sup>** day of **May**, 2017

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Nduati for the State*

*Mr. Wamwayi for the accused*

*Accused present*

*Tabitha court clerk*