



**Republic v Ogutu (Criminal Case E013 of 2023) [2025] KEHC 6141 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6141 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E013 OF 2023**

**JM OMIDO, J**

**MAY 8, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**CALVINS OTIENO OGUTU ..... ACCUSED**

**RULING**

1. The Accused person herein Calvins Otieno Ogutu, has under Section 200(3) of the *Criminal Procedure Code* sought for an order and directions that the present trial, which commenced in June, 2023 when he was first presented before this court, commences de novo, following the transfer of Lady Justice M. Shariff, who previously had the conduct of the trial.
2. The reasons that the Accused person has proffered for his application is that in view of the seriousness of the offence that he is faced with, it is necessary and in the interest of justice that the matter commences afresh so that I be presented with an opportunity to see the witnesses and observe their demeanor when they testify before me.
3. It is instructive from the record that 11 out of 15 witnesses have testified. Ms. Muema, the learned Prosecution Counsel has informed the court that the remaining witnesses are experts and the investigating officer.
4. Section 200 (3) of the *Criminal Procedure Code* provides as follows:  
200(3). Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”
5. What have superior courts said about the application of this provision? Let us look at case law.



6. In *Ndegwa v Republic* [1985] KLR at 534, the Court of Appeal observed as follows:

“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.”
7. In *Office of the Director of Public Prosecutions v Peter Onyango Odongo & 2 others* [2015] eKLR, Makau J, stated as follows:

“Section 200(3) of the *Criminal Procedure Code* is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate’s predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanour of the witnesses to enable the Court make a just decision. It should be noted Section 200(3) of C.P.C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for the 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 that 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 to the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity. Section 200(3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50(1) of *the Constitution* of Kenya 2010.”
8. What is clear from the above decisions is that although it is mandatory for the court to explain to the accused his right to ask for the recall of witnesses, it is not mandatory for the Court to accept such request. The ultimate decision rests with the court and will depend on the circumstances of each case and the reasons advanced by the Accused person for the application.
9. The application by the Accused person has been resisted by the State on the grounds that the PW1 and PW2 are the Accused person’s and the deceased’s children, who are minors and who suffered psychological trauma and who will be retraumatized if recalled to testify for a second time.
10. Ms Muema for the State further states that if the court orders for a de novo trial, the prosecution will be unable to secure the attendance of some of the witnesses who were teachers and colleagues of the deceased and who have since been transferred to different places. She therefore prays that the trial proceeds from where it reached.
11. I have considered the positions taken by the two sides and the record. As we have seen above, although it is mandatory for the court to explain to the accused his right to ask for the recall of witnesses, which explanation has been made to the Accused person, the ultimate decision rests as to whether to commence the trial de novo or proceed with the matter from where it reached rests with the court.
12. Noteworthy, the main ground for the application, as I understand the Accused person to say, is the necessity, in his view, for the court to observe the demeanor of the witnesses.
13. Without a doubt, recalling of witnesses occasions delay in conclusion of a trial. This is a matter that is at a fairly advanced stage and the Accused person participated fully in the trial. I note from the court



record, that the witnesses the accused wishes to recall gave evidence and were cross-examined fully by his Advocate. The Accused person was therefore accorded the opportunity to challenge their evidence, in line with Article 50(2)(k) of *the Constitution*.

14. The Accused person states that there is need for me to note and/or observe the demeanor of the witnesses who testified. He has not raised any concerns about the manner in which they gave their testimonies that would call justify his application, for example, where a witness was hesitant to respond to questions, or one who is hostile or refractory. To state generally that there is need to observe the demeanour of the witnesses without stating the particular reasons that would call for the recall of such witnesses on that ground is not in my view satisfactory.
15. The prosecution has raised concerns about some child witnesses being re-traumatized and the possibility of not tracing other witnesses to testify afresh. There is no doubt that in a criminal trial, witnesses have their place and a very important role to play. Under Section 8 of the *Children Act*, courts are obligated to give priority to the best interest of the child in deciding any matter involving a child. A matter involving a child witness is one such matter. The best interest of the child witnesses in this case is that this court must act in a manner that will not subject them to prejudice by re-traumatization, while ensuring that the Accused person does not stand to suffer any prejudice.
16. No rejoinder was made to the concerns above that were raised by the State, which then the court must in the circumstances find to be real.
17. Having said as much, I reach the persuasion that the Accused person has not provided in his application sufficient reason why the trial should start de novo. I then reach the result that he has failed to show what prejudice he will suffer if this case is not heard de novo.
18. Accordingly, the accused's application is without merit and the same is dismissed in its entirety.

Orders accordingly.

**DELIVERED (VIRTUALLY) DATED AND SIGNED THIS 8<sup>TH</sup> DAY OF MAY, 2025.**

**JOE M. OMIDO**

**JUDGE**

