



**Wambulwa v Republic (Criminal Revision 3 of 2017)  
[2025] KEHC 6781 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6781 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL REVISION 3 OF 2017  
WM KAGENDO., J  
MAY 15, 2025**

**BETWEEN**

**WILBERFORCE WAMBULWA & 6 OTHERS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. This Honourable Court is called to determine the Notice of Motion application dated 30<sup>th</sup> October, 2024 brought under the dint of to Section 3 of the [Criminal Procedure Code](#) and other enabling Provisions of The Law by the Applicant.
2. The Applicant sought the following orders:-
  - a. That the Court file which cannot be traced be reconstituted using copies of available documents supplied to the court registry by the parties to enable further prosecution of the case.
  - b. That the reconstructed Court file be maintained as the record of the Court for all intent and purposes of further action in the case.
  - c. That upon reconstruction of the Court file, the same be placed before a Judge in the Criminal Division for further directions.
3. The Application is supported by the 7<sup>th</sup> Accused Person affidavit wherein he avers that:-
  - a. The seven (7) Accused persons were charged before the Chief Magistrate's Court on 11<sup>th</sup> July, 2011 in Anti-Corruption Case No. 10 of 2011.



- b. The case proceeded before the Magistrate's Court until 17 th January,2017 when the trial Court ordered the prosecution to close its case for lack of witness.
- c. Being dissatisfied with the direction of the trial Magistrate, the prosecution filed this reference before the High Court.
- d. The reference was registered as Number 3 of 2017 and was placed before Justice Dorah Chepkwony.
- e. On 6 th February, 2017 Justice Chepkwony stayed the proceedings in Mombasa Anti-Corruption Case No. 10 of 2011 pending the hearing and determination of the Revision.
- f. The Revision was duly heard and Ruling was scheduled for 24 th March, 2017.
- g. No Ruling was delivered on 24/3/2017 and since then there has been no action in this matter as the Court file cannot be traced.
- h. Several efforts had been made by the registry to trace the file but the same has not been found.
- i. The Magistrate's Court file was enjoined in the Revision file and the proceedings have stalled.
- j. The Accused have been patiently waiting for over seven (7) years and some of them were still working in government institutions.
- k. It was now over thirteen (13) years from the time the Accused were arraigned in Court and would like to know their fate.

#### **Analysis and Determination**

4. Unlike in Civil cases, where every document filed in Court, a copy thereof is retained and or served on the parties, from which copies a Court file can be reconstructed, that is not the case with Criminal cases. Other than perhaps being supplied with copies of the charge sheet and witness statements nothing else is availed to the accused person and or his Counsel.
5. Articles 50(1)(2)(q) of the Constitution of Kenya, 2010 provides for the protection of the Law and that parties should be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
6. This case in question was instituted by the Complainant in 2011 and to date it has not been determined to its conclusion for the mere reason that the file was misplaced.
7. I should therefore fashion a remedy that guarantees their rights and also engenders integrity in the process of criminal justice to all including the victims of their crimes.
8. Retrial is an option in such cases. In High Court Misc. Criminal Application No. 246 of 2010- Danson Maina Muchoki – Versus - Republic. Ochieng and Achode JJ in dispensing the argument that an acquittal should follow where court records are alleged to be missing, stated that, the appropriate orders to make where court records are alleged to be missing, depending on the circumstances of the case, is a retrial.



9. Nonetheless, retrial is ordered where a trial is possible; the evidence and witnesses should be available. It may also be ordered in the interest of justice. See the Court of Appeal in *Ikimat – Versus - Republic* [2005] IKLR 1982 where it stated that: -

“ A retrial should not be ordered unless the court is of the opinion that on a consideration of the admission or potentially admissible evidence a conviction might result, each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

10. In this case, the exhibits are not available. The incident took place over 14 years ago and possibility of procuring all the witnesses may be impossible or only with great difficulties and expense. This option is therefore not feasible in this case.

11. The reconstruction of a skeleton file is therefore the most feasible option in this case. I so order. But how will this be done in a manner that ensures the record as reconstituted in credible and reliable?  
Conclusion and Disposition

12. In my considered view, the DPP, in liaison with the Investigating Officer and the Defence, will provide any material in their possession which is relevant to this exercise. Then there shall be a session to consider the available material and whether they are credible or not. Eventually, the record agreed by parties and authenticated by court shall become or a decision to the contrary made.

13. On the basis of the above, the court finds the Notice of Motion application dated 30 th October, 2024 is found to have merit and the same is hereby allowed. The record to be reconstituted within the next 30 days.

14. Mention on 17/6/2025 before the dr. it is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 15 DAY OF MAY , 2025**

**HON. LADY JUSTICE W. M. KAGENDO**

**(JUDGE)**

**HIGH COURT OF KENYA AT MOMBASA (CRIMINAL DIVISION)**

In the presence of:

M/s. Bebora, Court Assistant;

Mr. Ngiri... State Counsel;

Chitembwe... Applicants

Signed By: Hon. Lady Justice Wendy Micheni

**THE JUDICIARY OF KENYA.**

