



**Wangui v Republic (Miscellaneous Criminal Application  
19 of 2024) [2024] KEHC 3819 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
MISCELLANEOUS CRIMINAL APPLICATION 19 OF 2024**

**DR KAVEDZA, J**

**APRIL 22, 2024**

**BETWEEN**

**KEVIN KIRAGU WANGUI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before the trial court, the applicant is facing the charge of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*, No. 3 of 2006. During the hearing of his case, he made an oral application to recall prosecution witness. The trial court 4<sup>th</sup> September 2023, the trial court dismissed the application in addition to cancelling his bond terms for failing to attend court.
2. Subsequently, the applicant filed a notice of motion application on 29<sup>th</sup> February 2024. In the application he prayed he be allowed to recall prosecution witnesses who have already testified. In addition, he prayed that the trial magistrate handling the matter to recuse herself. The application was supported by an affidavit sworn. The grounds raised were that he did cross-examine the witnesses as he did not understand the case well. That he requested to recall witnesses but the court denied the request. In addition, that he did not have witnesses during the trial. He also prayed for reinstatement of cash bail. since he was serving a traffic offences sentence when the bond was cancelled. He urged the court grant the prayers sought.
3. The power of this court in its revisionary jurisdiction is founded under Section 362 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.



4. Article 165(6) of the Constitution provides that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.

5. Consequently, this court has jurisdiction to entertain the application before me. In the instant application, the applicant sought the revision of various orders made by the trial court. He sought to recall prosecution witnesses, the trial magistrate handling the matter having changed. The governing law of such applications is Section 200 (3) of the Criminal Procedure Code which provides: -

“(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 the right”.

6. Regarding the jurisprudence surrounding section 200(3) of the Criminal Procedure Code, extensive legal analysis has clarified that this section does not unequivocally mandate the initiation of criminal cases *de novo* every time there is a change in the trial court. The application of section 200 of the CPC requires courts to consider various factors. These include the feasibility of commencing the trial *de novo*, the progress made in the ongoing trial, the availability of witnesses who have already given testimony, potential memory loss by witnesses, the elapsed time since the trial commenced, and the potential prejudice faced by either the prosecution or the accused. In my considered opinion, the pivotal criterion should be whether a fair trial would be materially prejudiced.

7. Recalling of witnesses' occasions delay in a trial which is against the spirit of Article 50 (2) (e). I note from the court record, that the witnesses the accused wishes to recall gave evidence and were cross-examined though briefly by the applicant. However, PW 4 was not cross-examined by the applicant. He claimed that he did not understand the nature of the charges against him and as such could not adequately cross-examine the witnesses. He also claimed that he was not supplied with witness statements. However, the record shows that he was supplied with the said statements on 18<sup>th</sup> July 2017.

8. It is my finding that although the applicant has not provided sufficient evidence why he wants the trial to start *de novo*, the ends of justice dictates that he be given sufficient opportunity to cross examine witnesses. This court is satisfied that that in order to accord justice to the applicant and having examined the trial court record, the trial court went into error in disallowing the application to recall the prosecution witnesses for cross-examination. I have seen the need to recall the prosecution witnesses for cross examination.

9. Recalling the prosecution witnesses for further cross examination does not amount to starting the case *de novo*. As the case is yet to be concluded a request for recall of witnesses by either the prosecution or defence should always be allowed to serve the interest of justice. There will be no prejudice caused to the prosecution if the witnesses are recalled for further cross examination as the prosecution counsel will have an opportunity to re-examine those witnesses if need be.

10. The applicant also prayed that the order cancelling his bond terms be reviewed. However, the same is found to be lacking in merit. On the application for the trial magistrate to recuse herself, applicant has not provided any evidence to support the application. As such the prayer is dismissed.



11. The end result is that that the application for revision is partially allowed. The prosecution witnesses to be recalled for cross-examination by the applicant. The application for fresh bail/bond terms shall be made to the trial court. The matter shall be mentioned on 21<sup>st</sup> May 2024 before the trial court.

Orders accordingly

**RULING DATED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF APRIL 2024**

.....

**D. KAVEDZA**

**JUDGE**

