



**Wambui & another v Republic (Criminal Revision E026 of 2022)
[2023] KEHC 3679 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E026 OF 2022
GL NZIOKA, J
APRIL 20, 2023**

BETWEEN

WILSON NGUGI WAMBUI 1ST APPLICANT

SIMON WAMBUGU NDUNGU 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application herein is seeking for review of the order of the trial Magistrate in CMCC No 586 of 2017, whereby the court declined to allow the applicants' prayer for the case to start de novo. It is the applicants' averments in the supporting affidavit, that, the case should have started afresh after a new learned trial magistrate took over.
2. However, the application was opposed by the Respondent vide grounds of opposition dated January 17, 2023 and filed on the same date. The grounds states that: -
 - a. The appellants were charged before the court, pleaded not guilty and given a chance to have their case heard and determined.
 - b. The prosecution witnesses were availed and the applicants had a chance to cross examine the witness.
 - c. The applicant adequately prosecuted their case and the trial court gave them a chance to do that without being restrained.
 - d. The application before court is brought in bad faith, an abuse of the process of the court and has not disclosed any merit at all.



- e. That prosecution must come to an end, that right of starting the case de novo is not absolute. The trial court has the discretion to decide on the application at hand and dismissed the same.
 - f. The appellant's appeal lacks merit and should accordingly be dismissed.
3. The application was disposed of vide filing of submissions. The applicants in their submissions filed on February 27, 2023, stated that it is desirable that the trial court hear the case to its conclusion and render judgment. The case of *Ndegwa v R (1985) KLR 535* was cited.
4. The applicants further submitted that section 200 of the *Criminal Procedure Code* envisages a situation where the trial court has ceased to have jurisdiction and allows for the succeeding court to proceed with the trial. That in such a scenario, the accused person may opt to have witnesses re-called to give their evidence so as to ensure the succeeding learned trial magistrate is able to personally and independently assess the demeanour and credibility of the witnesses and weigh their evidence accordingly.
5. Further, before the learned trial magistrate opts to proceed with the trial from where it had reached under his predecessor, it must be shown that the witnesses are not available or it would be impracticable and prejudicial to the prosecution or the accused person and cited the case of; *Criminal Appeal No 523 of 2010 Joseph Kamau Gichuki v R.*
6. That the learned trial magistrate allowed the prosecution's application to proceed with the case from where it had reached and reviewed his order for the case to start de novo, without establishing the reason the witnesses could not be recalled and failed to give them an opportunity to comment greatly prejudicing them and as such there was a mistrial.
7. However, the Respondent vide submissions dated; February 16, 2023, submitted that the prosecution availed the witnesses and the applicant had a chance to cross-examine them and exhausted the question posed to them. That, the application has been brought too late in the day and is an abuse of the court process.
8. Further, the right to start a case de novo is not absolute as the court must be shown a reason for the same. That the applicants have not informed the court of the reason for the case to start de novo neither the reasons for the witnesses to be recalled.
9. Furthermore, the prosecution witnesses cannot be traced and therefore if the case is to start de novo, the prosecution will be extremely prejudiced as it will not be able to mount a new trial. Reliance was placed on the cases of *Director of Public Prosecutions vs Kipyegon Josphat & 2 others (2019) eKLR* and *Hussein Khalid & 16 others vs Attorney General & 2 others (2020) eKLR* where the courts denied applications for starting the cases de novo where no reasons had been adduced. The Respondent urged the court to dismiss the application.
10. I have considered the matter in the light of the material placed before the court. I note from the lower court record that, before the court rendered the impugned decision, the investigating officer was summoned to explain whether the witnesses PW1 and PW2 could be traced. He told the court that, the witnesses had left the country and could not be traced.
11. Further, the applicants have not explained the prejudice they will suffer if the witnesses are not recalled as they had cross examined them. Furthermore, I note that the earlier reason to recall witnesses made by the prosecution was based on the arrest of the 3rd suspect who was later released.



12. The right to recall witnesses is not absolute. The matters in court must also be heard and determined expeditiously for justice delayed is justice denied. Indeed, the trial court rendered itself properly on the matter and I therefore find no merit in the application herein and dismiss the application.
13. The lower court file be released to the trial court for the case to proceed accordingly.
14. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 20TH DAY OF APRIL, 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Appellants present in person, in court virtually

Mr Atika for the Respondent

Ms Ogutu: Court Assistant

