



**Mutua v Republic (Miscellaneous Criminal Application E077 of 2021)  
[2023] KEHC 20067 (KLR) (Crim) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS CRIMINAL APPLICATION E077 OF 2021  
K KIMONDO, J  
JULY 11, 2023**

**BETWEEN**

**NAHASHON MUTUA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant is aggrieved by the order of the learned trial magistrate, Hon DM Ndungi, PM dated March 3, 2021 in Milimani Criminal Case 1741 of 2015.
2. The applicant is the accused in that matter. The learned trial magistrate took over the trial when five witnesses had testified. When the trial court explained the rights to the applicant under section 200 of the Criminal Procedure Code, he opted to recall three witnesses, PW1, PW3 and PW4. The prayer was disallowed and the trial ordered to proceed from the point it had reached.
3. Being aggrieved, he lodged an undated chamber summons court-stamped March 15, 2021 seeking, in the main, for review of the impugned order. But there are additional prayers to stay the proceedings in the lower court; and, for disclosure of all the evidence that the prosecution intends to rely on as per the earlier orders of the lower court dated February 29, 2016 and July 17, 2018.
4. The applicant filed submissions on June 16, 2023 in this revision.
5. The revision is strenuously opposed by the prosecution through Grounds of Opposition and written submissions all dated June 14, 2023.
6. On June 22, 2023, the applicant relied wholly on his written submissions. I also heard further arguments from the learned counsel for the respondent.



7. I take the following view of the matter. The applicant was charged with causing grievous harm contrary to section 234 of the [Penal Code](#). He pleaded not guilty. As I have stated, the case is still pending.
8. I have now had the benefit of the original record of the proceedings in the lower court. Five witnesses had testified before Hon C Oluoch, SPM and Hon Ooko, PM at the time Hon. Ndungi, PM was taking over the proceedings. The latter dealt at length with the question whether the witnesses should be recalled. He called for an affidavit from the investigating officer as well as written submissions by the parties. In a four-page typed ruling, he found that section 200 of the [Criminal Procedure Code](#) was not cast in stone; and, that he retained discretion on whether to recall the three witnesses.
9. Article 165 (6) of the [Constitution](#) confers the High Court with supervisory jurisdiction over all subordinate courts. Furthermore, and, by dint of sections 362 to 364 of the [Criminal Procedure Code](#), the High Court is imbued with wide powers to review the orders of the learned trial magistrate. However, not every decision of the subordinate court is amenable to revision; and, some of the decisions are best left to interlocutory appeals or even final appeals.
10. Section 200 of the [Criminal Procedure Code](#) requires the succeeding magistrate to explain to the accused, on the record, of the right to recall any witnesses. Section 200 (3) is couched in mandatory terms: the succeeding magistrate shall inform the accused person of that right. I find that this right was well explained to the applicant here and on the record.
11. The three witnesses he proposed to recall were all cross-examined at length by the applicant or his counsel. Some of the witnesses were protected witnesses in a related murder trial and could no longer be traced. At the time the new magistrate was taking over the proceedings, the prosecution had one remaining witness, Number 91XXX PC Simiyu. Considering that the trial dated back to the year 2015, I concur with the learned trial magistrate that the application for recall of the three witnesses was unmerited.
12. Under Article 50 (j) of the [Constitution](#), an accused person is entitled “to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence”. The key words are the evidence the prosecution intends to rely on. I note that the trial court had directed that such evidence be provided to the applicant.
13. The prayer to compel the prosecution to comply with court orders dated February 29, 2016 and July 17, 2018 is not well founded. The supporting affidavit sworn on March 10, 2021 does not specify the evidence that the prosecution has not supplied to date. All that is sought in prayer 4 of the chamber summons is that the High Court orders the prosecution to comply with the mentioned court orders.
14. I have studied the record. On February 29, 2016, defence counsel informed the court that he had not been supplied with “one document, the register of people in the cells and OB.”. On July 17, 2018, defence counsel was seeking a formal order to get those documents from the police. I note that these are all matters within the power of the trial court. I also note that the investigating officer is as yet to take to the stand. Furthermore, it may as well form a ground of the final appeal. I say that very carefully and obiter.
15. Lastly, the present revision is largely a disguised interlocutory appeal. It has engendered further delays of the case in the lower court. The Supreme Court in [Joseph Lendrix Waswa v Republic](#), Supreme Court Petition No 23 of 2019 [2020] eKLR, was emphatic that except in the clearest of cases, interlocutory appeals should not be entertained by the superior courts. The rationale is self-explanatory: Beyond causing delays, the accused person may eventually be acquitted and the grievances will be all water under the bridge. See also [Thomas Patrick Gilbert Cholmondeley v Republic](#), Court of Appeal, Nairobi, Criminal Appeal 116 of 2007 [2008] eKLR.



16. For all those reasons, I find that the undated chamber summons bearing a court stamp of March 15, 2021 is devoid of merit. It is hereby dismissed. The Deputy Registrar shall return the original records to the lower court to enable the trial to resume at the earliest.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 11<sup>th</sup> day of July 2023.

**KANYI KIMONDO**

**JUDGE**

**Ruling read virtually on *Microsoft Teams* in the presence of: -**

The applicant (in person).

Ms. Ntabo for the respondent instructed by the office of the Director of Public prosecutions.

Mr. E. Ombuna, Court Assistant.

