



**Republic v Wawire (Criminal Case 3 of 2020)
[2024] KEHC 15839 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 3 OF 2020
AC BETT, J
DECEMBER 16, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

CLAIRE NAUTUTU WAWIRE ACCUSED

RULING

1. This matter was part heard before Hon. P. J. O. Otieno, J who was transferred after the close of the prosecution case and after the then trial Judge had made a finding that the Accused has a case to answer.
2. When this court took directions under Section 200 of the Criminal Procedure Code (CPC), the defence Counsel made an application to recall all the seven (7) witnesses that had testified under Section 200 (3) of the CPC on the ground that it is the Accused person’s right to have the said witnesses called.
3. The Prosecution opposed the application and submitted that the right to recall witnesses is not an absolute right but must be qualified. They contended that the Accused, who was represented by able Counsel had not advanced reasons why the witnesses need to be recalled.
4. This matter has been pending since January 2020, which is one month shy of five years. Looking at the record, the Prosecution encountered difficulties in procuring the witnesses. The length of time that has lapsed since the offence was committed and since the said witnesses testified is likely to make it near impossible to trace the witnesses.
5. In the case of Abdi Adan Mohammed -v- Republic [2017] eKLR, the Court of Appeal considered the circumstances under which witnesses can be recalled under Section 200 of the Criminal Procedure Code and held as follows:-

“Where, in the language of Section 200(3) the accused demands that any witness be “re-summoned and re-heard,” the demand must be subject to availability of the witnesses sought



to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re-summoned is deceased, to insist on calling such a witness. Similarly, if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith.”

6. In the present scenario, the Accused’s Counsel who has been in conduct of the case all along and had ample opportunity to cross-examine the witnesses, sought to invoke the provisions of Section 200 (3) and invoke the Accused’s right to recall the witnesses. He did not advance any reason for his application.
7. I have considered the application carefully. I find that the application was not made in good faith. Considering the length of time that has lapsed since the hearing began, it is uncertain whether the witnesses can still be traced or even if traced, if their recall of the events that took place is still intact. In the Abdi Adan case (Supra) the Court of Appeal cited the case of Joseph Kamau Gichuki -v- R. Cr. Appeal No. 523 of 2010 cited in Nyabutu & Another -v- R. [2009] KLR, 409, where the Court stressed that:-

“By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded.”

8. Being guided by the above case, I find and hold that it is not in the public interest to order recall of the witnesses herein. The application is therefore disallowed.
9. Those are the orders of the Court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:-

Ms. Chala for the Prosecution

The Accused

Mr. Mango for the Accused

Court Assistant: Polycap

