



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mathu v Republic (Criminal Revision E006 of 2025)  
[2025] KEHC 14384 (KLR) (23 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 14384 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL REVISION E006 OF 2025  
NIO ADAGI, J  
SEPTEMBER 23, 2025**

**BETWEEN**

**JOHN GITAHU MATHU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein sought revision orders in Chief Magistrate's Court at Mavoko in Criminal Case No. E778 of 2023, through a Notice of Motion dated 21/01/ 2025 through Waithira Kamiti & Co. Advocates. The Applicant seeks to recall prosecution witnesses for cross examination.
2. The accused person herein has been charged with the offence of Causing Death by Dangerous Driving contrary to Section 46 of the *Traffic Act* Cap 403 Laws of Kenya.
3. Reasons advanced for request to recall prosecution witnesses is that the Applicant is a stammerer and being tongue-tied, struggles in expressing himself and compounded by his being a lay man in matters legal, he did not properly cross-examine and he did not even conduct a cross-examination, due to the obvious inability to clearly bring out points in his favour. That he did not even cross-examine some of the witnesses at all, let alone cross-examine well. With the above disability challenges, the Applicant enlisted the services of a counsel so as to breach the gap and have himself zealously be represented by an advocate of his own choice, for the course and interest of justice, given the severity of the offence he is faced with.
4. Further, the Applicant states that, having been able to afford legal representation, his counsel formally came on record on 14<sup>th</sup> November, 2024, after the prosecution's witnesses had already testified, the prosecution had closed its case and the court had already found that the Applicant had a case to answer, albeit the Applicant did not even file submissions on a no case to answer and therefore put to his Defence.



5. Further also, the Applicant amplifies that during the whole trial, he was never furnished with the Charge Sheet at all and thus was unaware of the particulars of the offence he was being charged with and this infringed on his fundamental rights of Fair Hearing as espoused under Article, 50(2) (b) of the Constitution of Kenya 2010.

That having been brought on board, Counsel for the Applicant came on record, made an oral Application before the trial court to have the prosecution's case be reopened for the sole purpose of cross-examining the prosecution's witnesses that had already testified as a matter of right and be furnished with a copy of the Charge Sheet and court documents to enable him prepare adequately for his defence and ensure that justice is done. The trial court found no good reason to allow the Applicant's application stating that the trial had been conducted in the presence of the Applicant and that he did well, thus did not grant the Applicant his right and an opportunity to cross-examine the prosecution witnesses in his quest to ensure that justice is done, through his duly appointed counsel.

6. The Applicant argue that the trial magistrate erred in law in declining to exercise her discretion in favour of the accused and or giving the accused an opportunity to lay foundation of their case and challenge the evidence availed by the prosecution and the accused run the risk of not properly and thoroughly examining the prosecution witnesses through his appointed counsel thereby causing a serious miscarriage of justice.
7. That the accused person is facing a case that attracts a heavy punishment of imprisonment of a term not exceeding Ten (10) years, an option of a hefty fine and or suspension of his driving license for a period of Three (3) years which is a matter of death and life to him, as he relies on the license for his daily bread and that it is only for the interest of justice that he be allowed to recall the prosecution witnesses for cross-examination, otherwise he stands to be highly prejudiced resulting into miscarriage of justice.
8. Failure to afford the accused an opportunity to properly and thoroughly re-examine and challenge the evidence of the prosecution witnesses constitutes a violation of the accused constitutional right to fair trial provided under Article 50(2)(k).
9. That granting the accused person the request to further cross-examine the prosecution witnesses will cause no prejudice to the prosecution but will simply serve the ends of justice and the prosecution will have an opportunity to scrutinize the defence evidence, respond and even cross examine the defence witnesses.
10. The accused prays that this court exercises its supervisory jurisdiction and do satisfy itself on the legality, propriety or regularity of the proceedings and decision and pray that this court orders that:-
  - a. That the orders of the trial court in issue be quashed and vacated.
  - b. That the prosecution witnesses be recalled for purposes of further cross examination by the defence counsel.
  - c. Any other appropriate orders that this court may deem fit.
11. The application is opposed by the Respondent through the Replying Affidavit dated 4th March 2025 sworn by Ms. Agatha Abang, Prosecution Counsel. The Respondent contends that the Applicant fully participated in the trial and cross examined the witnesses during the trial thus his right to legal representation was not violated as one has a right to self-representation.



12. That during the proceedings of the trial the Applicant was present during the examination in chief and cross-examination of the prosecution witnesses and thus he was fully aware of the charges he was facing in the trial court.
13. The Respondent states that no good reasons have been afforded by the Applicant to have the prosecution case be re-opened as the ruling on case to answer has been delivered by the honourable trial court.  
Further that, having the prosecution case re-opened would be prejudicial to both parties as a ruling of Case to Answer has already been delivered by the trial court.
14. The Respondent submits that the trial magistrate did not err in declining to have the prosecution case re-opened and therefore the trial court did not violate any rights of the Applicant as provided under Article 49 and Article 50 of *the Constitution* of Kenya.
15. The Respondent in relying on the cases of William Mwangale Ongoma v Republic (2020) KEHC 1446 (KLR) and Koech v Republic (2024) KECH 5055 (KLR) which quoted Martin Mavuti Kituyi v Republic HCCR Revision No. 27 of 2023, prays that Applicant's application be dismissed.

### **Analysis and determination**

16. I wish to consider whether this court should allow recall of the four prosecution witnesses who testified.
17. The Applicant has invoked the revisionary power of the court provided under Article 165(6) and (7) of *the Constitution* and Section 362 as read together with Section 364 of the Criminal Procedure Code. The provisions are as hereunder: -

“362. The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying 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.”

364.

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may:
  - b. in the case of any other order than an order of acquittal, alter or reverse the order,
- (2). No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;  
Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.



- 5). When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

18. The operative law that provides for recall of witnesses in Section 150 of the Criminal Procedure Code which provides as follows:

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

19. The proviso to Section 150 allows witnesses recalled to be cross-examined by the prosecution or the defence counsel and in the case of *Ndungu Kairi v R* (2016) eKLR, Justice Mativo observed as follows:

"The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record; he had just been supplied with the proceedings and prosecution witnesses' statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses' statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application."

20. In the above case, Justice Mativo observed as follows:

"Lord Denning in the celebrated case of *Pett vs Greyhound Racing Association* decried the state of unrepresented parties in court when he stated that:

"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task"

21. From the foregoing, there may be situations which would persuade a trial Judge to allow recall of witnesses and such a situation would be valid only if it is based on sound reasons. In the instant case; the record shows that the Applicant was unrepresented when the prosecution witnesses testified and his grievance is that, if he had counsel, the case would not have turned out as it did. In the case of *De Souza v Uganda* [1967] EA 784. It was observed that trial in the Magistrates court ends with close of defence case.

22. The record shows that the trial Magistrate in declining to recall witnesses indicated that the trial was conducted in the presence of the Applicant and he fully participated during the same without



hindrance and without telling the court or raising the issue of not having all the documents and reasons advanced were not sufficient.

23. In the case of Republic v Salim Mohamed [2016] eKLR it was observed that:-

“ Article 50 of *the Constitution* provides for fair hearing. Under Article 50 (2) an accused person has a right to fair hearing which includes:

- (a) to be presumed innocent until the contrary is proved;
- (c) to have adequate time and facilities to prepare a defence;
- (g) right to choose and be represented by an advocate;
- (k) to adduce and challenge evidence;

24. The Applicant is facing a charge of Causing Death by Dangerous Driving that attracts a heavy punishment of imprisonment of a term not exceeding Ten (10) years, an option of a hefty fine and or suspension of his driving license for a period of Three (3) years which is a matter of death and life to him, as he relies on the license for his daily bread and that it is only for the interest of justice that he be allowed to recall the prosecution witnesses for cross-examination, otherwise he stands to be highly prejudiced resulting into miscarriage of justice.

25. Section 130 of Criminal Procedure Code talks of recall at any stage of hearing: Hearing had not been concluded as the Defence case was yet to be heard and there was therefore no reason to deny the Applicant opportunity to recall and cross examine the witnesses.

26. Section 146(4) of *Evidence Act* that is expressed in the following terms;

“(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross- examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

27. The record further shows that the Applicant was not represented at the time the prosecution witnesses testified. From the instant application, due to lack of presentation, he was not able to properly and thoroughly cross-examine the Prosecution witnesses.

28. I take note of the fact that the prosecution witnesses testified, closed their case and a ruling on whether a prima facie case was established was delivered by the trial court. However, Section 130 of Criminal Procedure Code provides for recall at any stage of trial and in my view before determination of the case, a party who can demonstrate that he/she will be prejudiced if recall is not ordered should be accorded opportunity to recall and cross examine a witness. The prosecution will not be prejudiced as they will have opportunity to cross-examine the witness.

29. In view of the nature of evidence the Applicant wishes to cross examine and introduce, it will be in the interest of justice to allow recall of the Prosecution witnesses. The lapse on part of the Applicant is attributed to lack of legal representation. The Applicant having engaged an Advocate at late stage of trial and in view of the fact that prosecution will not suffer any prejudice, I am inclined to set aside the trial court’s order declining to allow recall of prosecution witness.

30. Before I pen off, I must say that a keen perusal at the record does not reveal if the issue of the Applicant being a stammerer and had a impaired speech disability and thus was not able to comprehend the happening of the trial in court or that he was not able to cross-examine the prosecution witnesses was



not raised in the oral application for recall of the witnesses and the trial Magistrate cannot be faulted for the same.

**Final Orders: -**

31. Consequently, I make the following orders:-
- a. Trial Court's Orders issued on 14th November 2024 declining recall of Prosecution witnesses is hereby set aside.
  - b. Prosecution's Case to be re-opened and its four witnesses to be recalled.
  - c. This file is closed.
  - d. Orders accordingly.

RULING WRITTEN, SIGNED & DATED AT MACHAKOS THIS 23<sup>RD</sup> SEPTEMBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 23<sup>RD</sup> SEPTEMBER 2025

In the presence of :

Ms. Komen hb for Mr. Waithera..... for Applicant

Ms. Agatha..... for Respondent

Millygrace..... Court Assistant

