



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL APPEAL NO. E036 OF 2025

SYMON WANJOHI MURIUKI alias CUSTOMER.....1ST APPELLANT/APPLICANT
PETERSON BUNDI KARERA alias KATA.....2ND APPELLANT/APPLICANT
JACKLINE WANJIKU WACHIRA.....3RD APPELLANT/APPLICANT
- VS -
REPUBLIC.....RESPONDENT

RULING

- [1] The applicant filed the Notice of Motion dated 6th June 2025 seeking the following orders:
1. Spent.
 2. Spent.
 3. That the Honourable Court be pleased to stay proceedings in Wang’uru Court in Criminal Case No. E806/2024 pending the hearing and determination of this appeal.
- [2] The application is based on the grounds on the face of the application and the supporting affidavit of Symon Wanjohi. The applicant’s case is that he has filed an appeal. He seeks for the lower court file proceedings stopped so that his appeal be heard first. He was aggrieved when the court declined to grant him another date to cross-examine the complainant.
- [3] Further, he avers that he was unwell and was able to produce his medical documents but the court refused to listen to him. He had not been given all the statements and documents to enable him prepare.
- [4] Lastly, that this court to allow his application so that his appeal cannot be rendered nugatory.

[5] **The respondent on 22nd July, 2025 deposed to a Replying Affidavit and reiterated the averments in the applicant's supporting affidavit.**

Applicant submissions

[6] The applicant did not wish to file submissions.

Respondent submissions

[7] The respondent submit that Section 362 of the Criminal Procedure Code vests this Court to call for and examine the records of any criminal proceedings before any subordinate Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed.

[8] Further, they submit that this Court do exercise its jurisdiction as donated by Article 165 [6] and [7] of the constitution and make orders or give directions it considers appropriate to ensure the fair administration of justice.

Issue

[9] Whether the applicant has made out a sufficient case to warrant the recall of the complainant for cross-examination.

Analysis

[10] Article 50(2)(k) of the Constitution of Kenya, 2010, which guarantees the right of an accused person "to adduce and challenge evidence."

[11] The applicant seeks to recall the complainant for cross-examination. Further, he averred that he had not been given all the statements and documents to enable him prepare.

[12] In the present case, the record shows that the complainant testified before the subordinate court. The applicant asserts that he was indisposed and presented medical records, but the trial court declined his request for adjournment and proceeded with the hearing.

[13] On an application fro recall of witnesses the court must balance the interests of a fair trial, the right to an expeditious trial of criminal cases and the potential prejudice to the both the accused and prosecution.

[14] **In Michael Kinuthia Muturi v R, Criminal Appeal No. 51 of 2008**, where the court held:

“The recall of a witness is not automatic. The court must be satisfied that such recall is essential to the just decision of the case and that it will not cause prejudice to the opposite party.”

[15] The prosecution has not demonstrated that recalling the complainant would cause undue hardship or that the witness is unavailable. Moreover, under Section 150 CPC, the trial court retains the discretion to recall a witness at any stage if the evidence appears essential to the just determination of the case.

[16] Section 150 of the Criminal Procedure Code, which provides:

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or recall and re-examine any person already examined, if his evidence appears to it essential to the just decision of the case...”

[17] **In Republic v David Mwangi Thuo [2021] eKLR**, the court observed that:

“The purpose of Section 150 CPC is to ensure that no party suffers injustice because of an oversight, mistake, or unforeseen circumstance in the course of trial.”

[18] Thus, given the circumstances, particularly, the medical explanation offered by the applicant and the constitutional imperative to ensure a fair hearing—this Court finds that recalling the complainant for limited cross-examination would not occasion injustice to the prosecution but would safeguard the applicant’s fair trial rights.

[19] **It is trite law that there is no right to interlocutory appeal in criminal cases, and the present appeal is, therefore, incompetent. The right to appeal under section 347 of the Criminal Procedure Code is against conviction and sentence or acquittal, as follows:**

“347. Appeal to High Court

(1) Save as is in this Part provided—

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(b) Repealed by Act No. 5 of 2003, s. 93.

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

[Act No. 17 of 1967, s. 30, Act No. 5 of 2003, s. 93.]”_

[20] However, the applicant’s application has brought to the attention of the Court the request for reconsideration of the issue of his request for recall of witness, which could have been done by way of an application for revision of orders under sections 362 of the Criminal Procedure Code. Indeed, the DPP has responded to the application on the basis of the supervisory and revisionary jurisdiction of the High Court. The Court will, therefore, treat the Appeal and the Notice of Motion made thereunder as an application for revision in terms of sections 362 and 364 of the Criminal Procedure Code. The court will then exercise its supervisory jurisdiction and revise the order of the Court as appropriate.

ORDERS

[21] Accordingly, for the reasons set out above, the Court makes the following orders:

1. The Appeal shall be marked settled upon terms in exercise of the supervisory jurisdiction of the Court under Article 165 (6) and (7) of the Constitution and section 364 of the Criminal Procedure Code that the trial court shall allow the recall of the Complainant for further cross-examination and the accused shall be supplied with all the copies of statements and exhibits that the prosecution seek to rely on in the trial.
2. The trial court file shall be returned to Wang’uru for directions as to further hearing of the case in accordance with the directions of this Court.
3. Mention for directions as to hearing before the Wang’uru Principal Magistrate’s Court on 10/12/2025.

[22] File closed.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mamba for DPP.

Mr. Kipruto for Ms. Kimotho for the Accused/appellant.