



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. E010 OF 2025

REPUBLIC

PROSECUTOR/RESPONDENT

VERSUS

LUKA MARINDI **1ST**

ACCUSED/APPLICANT

ISAIAH MARINDI **2ND**

ACCUSED/APPLICANT

RULING

1. The Accused persons' Counsel made an oral application on 16th February 2026 seeking that the matter start *de novo*. According to Counsel, both Accused say they were sick on the date the matter proceeded and were unaware it was proceeding, as all they heard was "*kaeni chini case yenu itaendelea*".
2. Counsel claimed that the Accused persons tried to inform their previous Advocate, who ignored them, and that their request to consult the said Advocate was not honoured thereby excluding them from the entire court proceedings.

3. Ms. Chala, for the Prosecution, opposed the application, submitting that the Accused persons were represented during the previous proceedings. Further, they did not tender any evidence to prove that they were sick during the hearing.
4. She contended that the current Advocate ought to have secured an explanation from the previous Advocate; otherwise, he was condemned unheard. She submitted that the court had earlier denied the Accused persons bond as there were vulnerable witnesses who were traumatized when they appeared in court, and in any case, if the court was to allow the application for the matter to start *de novo*, the Accused persons should then be taken back into custody.
5. In rejoinder, the Applicants' Counsel denied the proposition by the State, claiming that his clients were out on bond for two (2) weeks and that they posed no threat to the victims. She asserted that the Accused persons had a right to be given another chance if they were not satisfied with how the proceedings were conducted, and prayed that the matter be heard *de novo* in the interest of justice.

ANALYSIS AND DETERMINATION

6. I have carefully considered the oral application, the parties' rival submissions, the record of proceedings, as well as the relevant law.

7. The main issue for determination is whether the Accused persons have laid sufficient grounds to warrant the court to order the proceedings to start *de novo*.
8. It is not in dispute that the Accused persons were represented by their counsels, Mr. Mondia and Mr. Muaka acting alongside each other at the start of the trial process. Their complaint, however, is that they were sick at the time of the court proceedings and that their previous Advocates allegedly ignored their concerns and proceeded with the hearing without their effective participation. On the other hand, the Prosecution has opposed the application, stating that the Applicants have failed to provide evidence that they were unwell, and further that the current Counsel has not received any explanation from the previous Advocate as to what happened before making the current application.
9. She submitted that the witnesses were vulnerable given the nature of the offence and were traumatised during their testimonies, and that starting the matter afresh would prejudice their case and their vulnerable witnesses.
10. The law governing applications to commence trials afresh is anchored in Section 200 of the Criminal Procedure Code (Cap 75), which applies *mutatis mutandis* to trials in the High Court pursuant to Section 201(2) thereof. Section 200(1) states that:-
“200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein

and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard, and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

11. Although the present application does not arise from a change of a trial Magistrate or Judge, the principles under Section 200 of the Criminal Procedure Code remain relevant in this case especially where claims of procedural irregularities or denial of a fair trial are raised, as it relates to the right to a fair hearing anchored in Article 50 of the Constitution of Kenya, 2010.
12. Article 50(2) guarantees the right of an Accused person to be present when being tried, to challenge evidence, and to adduce evidence in his defence. These rights are fundamental, and any proceedings conducted in a manner that substantially undermines them may prompt the court's intervention to safeguard the integrity of the trial process.
13. The Court of Appeal in ***Joseph Kamau Gichuki v Republic [2013] KECA 448 (KLR)*** gave guidance on how to proceed with such applications. The court held that Section 200 should be invoked sparingly and only where the ends of justice would be defeated if the trial continues from where it stopped.
14. Additionally, in ***Abdi Adan Mohamed v Republic [2017] KECA 517 (KLR)***, the Court of Appeal emphasized that the discretion under Section 200 belongs to the court, not the accused, and must not be exercised whimsically or to defeat justice. The court clarified that an accused's demand to recall witnesses accrues only after the court elects to proceed without starting afresh.
15. According to the appellate court, the relevant considerations include: the convenience of commencing de novo; the stage to which the trial has progressed; the availability and potential loss

of memory of witnesses; the time elapsed since commencement; and the prejudice likely to be suffered by either the prosecution or the accused.

16. Applying these principles to the present case, I note that the matter has made advanced steps with the Prosecution having called three witnesses who have already testified and cross-examined by the Accused's previous Counsel, Mr. Muaka and Mr. Mondia.
17. The record does not indicate any objection raised by the Applicants or their previous Counsel during those proceedings regarding their alleged illness or having been denied a chance to be heard or cross-examine any of the witnesses. Further, the Applicants have not produced any medical documentation or other corroborating evidence to support their claim of sickness, which is a critical omission given that they seek the court's leave for the case to start *de novo*.
18. To allow the application now would occasion significant prejudice to the prosecution and especially the vulnerable witnesses, who may suffer further trauma from recounting their evidence. It would also delay the final determination of the case. The interests of justice demand that trials proceed expeditiously, as enshrined in Article 159(2)(b) of the Constitution, and without undue interference, in the absence of compelling reasons.
19. Regarding the bond issue, while the Applicants submit they have complied with bond terms since they were released, this does not

override the earlier determination denying bond due to witness vulnerability.

20. Taking all the circumstances of this case into account, this court is not persuaded that the Accused persons have demonstrated that they were denied the opportunity to participate in the proceedings or that a miscarriage of justice has occurred. The reasons advanced for the request that the matter start *de novo* remain unsubstantiated.
21. In light of the foregoing, I find that the Applicants have not met the threshold for recommencing the trial afresh. The application is devoid of merit and is hereby dismissed. The matter shall proceed from where it reached.
22. It is so ordered.

Dated, signed, and delivered at Kakamega, this 16th day of March 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Wanyonyi for the Accused/Applicants

Ms. Chala for the Prosecution/Respondent

Court Assistant: Polycap

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