



Mutwiri v Director of Public Prosecutions (Criminal Miscellaneous Application E003 of 2026) [2026] KEHC 5534 (KLR) (23 April 2026) (Ruling)

Neutral citation: [2026] KEHC 5534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL MISCELLANEOUS APPLICATION E003 OF 2026**

HM NYAGA, J

APRIL 23, 2026

BETWEEN

NICHOLAS MUTWIRI APPLICANT

AND

DPP RESPONDENT

RULING

1. Coming up for determination is the application dated 4/2/2026, which seeks the following orders:-
 - a. Spent
 - b. That pending hearing and determination of this application this Honourable court be pleased to order for stay of proceedings in the Chief Magistrates court at Tigania in MCSO. NO. E003 OF 2025 Republic -vs- Nicholas Mutwiri.
 - c. That the applicant be allowed to recall prosecution witness PW1, for purposes of further cross examination by the accused applicant's counsel.
 - d. That costs of the application be in the cause.
2. The application is propped by the grounds set out therein and is further supported by the applicant's affidavit sworn on even date.
3. In a nutshell, it is the applicant's case that he is facing trial in Tigania Law Courts Sexual Offence Case No. E003 of 2025. That on 15/1/2026, his advocate made an application seeking to recall PW1 for further cross-examination. That in its ruling delivered on 29/1/2025, the court disallowed the application despite the fact that the prosecution had not closed its case and PW1 was in court when the application was made.
4. The applicant avers that as a result of the said ruling, his right to a fair trial was violated.



5. That no prejudice will be caused to the prosecution as they will have an opportunity to re-examine the witness.
6. The applicant states that he was acting in person at the time he cross-examined the said witness and as a layman, he omitted asking fundamental questions.
7. The prosecution opposed the application. It is averred that the offence was committed against a 14 year old girl. That the applicant was arraigned in court on 17/2/2025 and hearing took place on 30/6/2025 and as such, the applicant had an opportunity to engage an advocate. That the applicant duly cross examined the witness. That when the advocate for the applicant came on record, the prosecution had closed its case.
8. The prosecution further states that the trial court noted that the said witness was traumatized and she had to undergo counselling and as a vulnerable witness, she was reluctant to come to court.
9. The prosecution stated further that the trial court was right to reject the application.
10. The prosecution counsel relied on the following authorities:
 - a. Samuel -vs- Republic Misc. Application No. E024 of 2023
 - b. Osodo vs Rael Obara
11. It was argued that in as much as the applicant has a right to legal representation, the victim has an equal right to protection.

Analysis and Determination

12. This court has been moved under Articles 25 and 50 (2) of *the Constitution*.
13. In essence, the applicant is seeking a revision of the ruling of the trial court delivered on 29/1/2026.
14. Under Article 165(6) and (7) of *the Constitution*, this court has powers to call for the record of any court or tribunal subordinate to it. The Article provides as follows:
 165.
 - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
15. Further Section 362 of the CPC provides as follows:-

“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.”
16. This court’s powers are thus designed to cure any irregularity in any proceedings and orders of a subordinate court of tribunal.



17. In the ruling the question the trial court duly addressed itself to the application and declined to grant the orders sought.
18. This court is fully aware that it can only interfere with the decision of the trial court if it is to find that the same was made in error or would cause prejudice to the applicant by denying him a fair trial. In any other case, this Court cannot purport to micro-manage the trial court.
19. From the trial court record, it is evident that the applicant was arraigned in court on 17/2/2025. He was released on bond on 10/3/2025. A pre-trial was held on 17/3/2025 and the applicant was furnished with the charge sheet and statements. The hearing was set for 30/6/2025 and on that date, the complainant gave her evidence. The applicant did not seek any adjournment and proceeded to cross-examine the complainant.
20. The complainant's mother also testified and the applicant duly cross-examined her as well.
21. Further proceedings took place on 11/12/2025. On 15/1/2026, the advocate for the applicant came on record and sought to recall the complainant.
22. The right to legal representation is expressly stated and jealously guarded by *the Constitution*. That stated, it is upon an accused person to take steps to instruct an advocate of his choice. Where applicable, the court may direct that an advocate be appointed at the state expense.
23. Despite being out on bond, it took the applicant nine (9) months to appoint an advocate and this was at the tail end of the trial.
24. Under section 150 of the Criminal Procedure Code, the trial court possessed powers to recall any witness. It 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 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, party may be prejudiced by the calling of that person as a witness.

25. As was correctly stated by the trial court, the court's discretion should be exercised judiciously with the aim of doing justice. This position was reiterated in Republic vs Wilson Chelelgo Cheponin (2019) KEHC 7872 (KLR) where it was held as follows;

“The primary consideration on an order or application for recall by the Court suo motu, or upon application by the Parties, is that the immutable and unlimitable Constitutional Right to fair trial guaranteed under Article 25 (c) of the Constitution is observed. Of significance to upholding the right to fair trial in this respect is the right to “challenge evidence” by cross-examination under Article 50 (2) (k) and the right “to have adequate time and facility to prepare a defence,” under Article 50 (2) (c).”



26. I have carefully examined the proceedings and the ruling of the trial court. It took account of all the critical considerations. It found that the complainant being a vulnerable witness, had been traumatized by the events that took place and recalling her would only re-open the trauma wounds.
27. The applicant, as I stated, had ample time to procure an advocate. He was not denied that opportunity. He slept on his rights. I don't see any reasons to quash the trial court's findings
28. For the foregoing reasons, I find no merit in the application and it is dismissed.
29. The trial court record is to be remitted back for the conclusion of the trial.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF APRIL 2026.

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H.M. NYAGA

JUDGE

