



**Aruba v Republic (Criminal Revision E1453 of 2024)  
[2025] KEHC 670 (KLR) (Crim) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 670 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E1453 OF 2024  
AM MUTETI, J  
JANUARY 29, 2025**

**BETWEEN**

**DAVID MACLEAN ARUBA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant in this matter has approached this court by way of revision seeking to have the decision of the learned Honorable magistrate in Makadara Chief Magistrate’s MSCSO No. 194 of 2018 reviewing its earlier decision allowing the recall of PW2 for further cross-examination reviewed by this court.
2. The application is expressed to be brought under Articles 25 (c), 27, 48, 50 (c) (g) (k) 159 (2) (d) of the *Constitution*, Section 150, 362, and 364 of the *Criminal Procedure Code* and Section 148 of the *Evidence Act*.
3. The applicant sought to have the order of the Magistrate issued in 22<sup>nd</sup> February 2024 revised and pending the hearing of the application a Stay Order be issued.
4. The matter came up for hearing before this court on 20<sup>th</sup> November 2024 when Mr. Muhindi Counsel for the prosecution sought time in order to file submissions. However, on the 9<sup>th</sup> December 2024 when the matter came up again before me, Mr. Chebii for the prosecution submitted :  

“I have perused the file. There are no submissions from our end. We are not opposed to the application.”
5. The court was therefore left to consider the application on the basis of the material filed by the applicant.



6. It is clear from a reading of the applicants application and submissions that there was an order issued by the learned Honorable Magistrate for the recall of PW1 and PW2 for further cross-examination.
7. The order was made at the request of the applicant who had engaged counsel after the two witnesses had already testified.
8. The applicant has deposed that on 22<sup>nd</sup> February 2024 was recalled and cross-examined and from her evidence it turned out that PW2 was under bed rest having recently delivered.
9. According to the applicant following that representation the court proceeded to review its earlier decision allowing the recall of PW2, and ordered the prosecution to close its case and went on to place the accused (applicant) on his defence.
10. It is the regularity of the order made on 22<sup>nd</sup> February 2024 that the applicant is challenging before this court.
11. The applicant contends that the order reviewing the order of recall of PW2 was prejudicial to him and a blatant breach of his constitutional right to a fair trial.
12. I have independently perused the record of proceedings of the 22<sup>nd</sup> February 2024 and I have noted it is true that PW2 was meant to be recalled for cross examination but she was absent on that date.
13. The record of that date reads;-

“Prosecution: The other witness who had been recalled is PW2. She is not present in court. In the circumstances I wish to close the prosecution case. I am not able to bring Patrick Magondu.”

Nyamanga

The witness PW2 is available but audience has been denied because she is pregnant and on a bed rest.

Court

Noted. However, PW2 had already been cross-examined at the first instance. Being pregnant and on bed rest puts prosecution at a difficult position. In any case, it is the prosecution has the mandate to prosecute the case.

Nyamanga

We can take a Ruling date.

Court

Noted. Ruling on 14<sup>th</sup> March 2024 proceeding to be typed.”

Signed

22/2/2024

14. The above excerpt of proceedings is what is at the center of contention before me on the right of the accused to a fair trial and whether the order by the learned Honorable Magistrate prejudiced the accused.
15. To contextualize the proceedings of 22/21/2024, this court has had to revisit the proceedings of the lower court when the order for recall of PW1 and PW2 was made.



16. It is clear from the record of 7<sup>th</sup> September 2023, Mr. Nyamanga counsel for the accused sought to have PW1 and PW2 recalled for further cross examination and the court allowed the prayer to recall.
17. In fact it is indicated that:-  
Court:-  
Noted. Matter is taken out.  
By consent hearing on 29/11/2023.  
Witness summons to issue to:  
i. Catherine Kerangati  
ii. Sheila Wanjiru both to PC Waweru of Kayole Police Station  
Signed  
7/9/2023.
18. On 29/11/2023 when the matter came up the defence through Mr. Nyamanga indicated they were ready to proceed.
19. The prosecution indicated on that date the two witnesses were not present and sought an adjournment and it was then that the court filed the matter for further hearing on 22<sup>nd</sup> February 2024 and re-issued summons for the two witnesses but in 22<sup>nd</sup> February 2024 only one of the witnesses showed up and that was PW1.
18. The matter proceeded with PW1 being cross examined and the prosecution closed its case and a Ruling was reserved for 14<sup>th</sup> March 2024.
19. On 14<sup>th</sup> March 2024 the applicant was placed on his defence prompting the instant application.
20. The scope of a revision is well defined. Under Section 362-367 of the *Criminal Procedure Code* the High court in considering a Revision is enjoined to look into the legality, propriety correctness and the regularity of an order. If the court is satisfied that the impugned decision fails to meet any of those tests then the court will not hesitate to revise the decision.
21. The role of the court is further entrenched in Article 165 of the *Constitution* on the supervisory role of this court over the subordinate courts. See *Director of Public Prosecutions Vs. Perry Mansukh Kansagara and 8 Others* [2020] eKLR where Justice R. Mwangi held:  
“What is clear from the foregoing analysis of the history and law and the present statutory provisions is that: statutory Revisional Jurisdiction concerns a narrow scope of review over criminal proceedings as set out in sections 362-367 of the CPC. On the other hand, constitutional Supervisory Jurisdiction confers on the High Court an extremely broad-based authority with which to call up proceedings of both civil and criminal matters from all subordinate courts, tribunals and authorities (except superior courts) without limitation. No limitations of timeframe or nature of the case are imposed on the High Court’s jurisdiction; the authority may be exercised at any time; and given there are no limits as to who should invoke the power, presumably it may be invoked at the instance of either the Court or upon being moved by a party.”
22. The court having been moved by the applicant can fold its hands and say like the Lower court that it is the duty of the prosecution to prosecute thus if they elect not to call a witness then, so be it,



23. The duty of a court is hearing a criminal case is to ensure justice is served to both parties.
24. The learned trial court did not seem to realize that the request for the recall of PW2 having been made by the accused, it was only the accused who could waive the right to have the witness recalled but not the prosecution.
25. To the extent that the court did not address its mind to that aspect, the decision allowing the prosecution to close its case was irregular, improper and incorrect in law thus susceptible to review.
26. The right to a fair trial under Article 25 of the *Constitution* is inalienable. The fact of a prosecution witness being unavailable for the reason that they were pregnant at the time and on bed rest could not justify the limiting of the accused's right to tender a defence in the manner he had elected through further cross-examination.
27. The *Constitution* under Article 50 (2) (c ) provides that "Every accused person has the right to a fair trial which includes the right:-
  - (a) to be presumed innocent until the contrary is proved;
  - (b) to be informed of the charge, with sufficient detail to answer it;
  - (c) to have adequate time and facilities to prepare a defence
28. The trial court having scheduled the matter for hearing on 22/2/2024 and the witness PW2 having failed to appear, the court should have considered to have the matter adjourned until such time the witness PW2 would have been available to testify so that the accused could exercise is right to cross-examine with the aid of counsel.
29. The fact that the accused had cross-examined the witness before should not have been reason enough to find that there was no need for further cross examination.
30. That decision could only be made by the parties seeking to cross examine the witness further.
31. The applicant having expressed that desire to have counsel undertake further cross-examination, the court should have accorded him that opportunity.
32. Article 50 (2) k underscores the importance of allowing the recall of PW2 by the applicant his right to adduce and challenge evidence could not simply be wished away simply because PW2 was unable to attend court. The failure to recall that witness denied the applicant his right to a fair trial thus any further proceedings in the matter would amount to nothing but a mistrial.
33. In *Paul Kinyanjui Kimauku v Republic* [2016] eKLR, the Court of Appeal addressed the issue of cross-examination of unsworn witnesses as follows:

"(23) Again, the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the *Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between



an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined.”

34. If this court were to allow the decision allowing the prosecution to stand the court would be guilty of aiding a mistrial. Since the matter has already been brought to this court’s attention under Section 362 of the Criminal Procedure Code the court has a duty to correct the undeniable anomaly in the procedure adopted by the court. The prosecutions’ case should immediately be reopened to allow the further cross-examination of PW2.
  35. The applicant has presented a compelling case for intervention by this court by way of Revision. The trial court should have considered the effect of letting the prosecution leave out a witness that had been ordered to be recalled by the court at the instance of the accused.
  36. The trial court having had made an order under Section 150 of the Criminal Procedure Code it should have ensured that the order was complied with by the prosecution.
  37. It cannot be gainsaid that before the court made the decision to recall PW1 and PW2, it must have been persuaded that recalling the two witnesses would advance the course of justice. The accused would have had an opportunity to challenge the prosecution and also tender his defense through cross-examination as well.
  38. In Angechel Lotip v Republic [2017] eKLR, the Court of Appeal held that:

“... The record shows that after AA testified, the court went on to hear the evidence of PW 2, without the appellant cross -examining AA. No explanation or reasons were provided for this omission. As such, the appellant was denied the opportunity to cross examine the complainant, resulting in a misstep in the criminal justice process, which has led to a mistrial.”
  39. The position in this matter clearly mirrors what happened in the decision cited above thus this court comes to the irresistible finding that the decision of the learned honorable magistrate is fit for revision and is hereby set aside as the same was irregular and improper considering that Pw2 was to be recalled at the instance of the applicant not the prosecution.
  40. The prosecutions’ case is therefore ordered to be reopened to allow the further cross-examination of PW2.
  41. The applicants’ application is hereby allowed.
- It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY 2025.**

**A.M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Kiptoo: Court Assistant

Nyamanga for Applicant



Chebii for the Respondent

