



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Ochieng (Criminal Case 52 of 2018)  
[2025] KEHC 3215 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 3215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA**

**CRIMINAL CASE 52 OF 2018**

**AC BETT, J**

**JANUARY 28, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**DAVID OCHIENG ..... ACCUSED**

**RULING**

1. This is a Ruling on the objection by the Accused person's counsel to the production of the original copy of the Firearm Movement book by the prosecution. The Accused herein is charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* with the particulars being that on 6<sup>th</sup> August 2018 at Matoyi Village in Sirigoi Sub-location, Nambacha Location within Navakholo Sub- County of Kakamega County, David Ochieng murdered Francis Wekesa Karakacha. The Accused is also charged with a second count of grievous harm contrary to Section 234 of the *Penal Code* with the particulars being that on 6<sup>th</sup> August 2018 at Matoyi Village in Sirigoi Sub-location, Nambacha Location within Navakholo Sub- County of Kakamega County, David Ochieng caused grievous harm to Suleiman Ekesa.
2. The Firearm Movement book was produced during the testimony of PW6 No. 239949, one Inspector Emmanuel Kiprop who was formerly stationed at Navakholo Police Station as the in-charge armoury where the accused person who was a police officer was also stationed at the time of the incident.
3. Inspector Emmanuel Kiprop (PW6) had initially testified and produced an uncertified copy of the Firearm Movement book as evidence and, without any objection by the Accused's counsel, the same was admitted by the court and PW6 cross-examined on its contents after which he was discharged as a witness.



4. Later, with the permission of the court, PW6 was later recalled to testify. Upon the recall of the witness, the prosecution led the witness to produce the original Firearm Movement Book. The Accused's counsel vehemently objected to the production of the said book which led to the instant contention.
5. The Accused's Counsel, in his oral submissions, argued that when PW6 was first in court, he was extensively cross-examined and that he admitted that he lacked the original copy of the Firearms Movement Book. Counsel also submitted that the copy of the Firearms Movement Book initially produced in court was not certified. He contended that the purpose for the recall was neither disclosed to him nor to the court and that the recall is an attempt to fill the void exposed during cross-examination. Counsel averred that the production of the original copy of the Firearms Movement book at this point is prejudicial to the Accused and will destabilize the defence case.
6. In response to the objection, the prosecution counsel stated that the objection is not founded in law. She contended that the document had been furnished to the defence counsel by way of a copy of the Firearms Movement Book. She averred that the Accused cannot claim to be prejudiced since the information in the book is the same as what is in the copy that was furnished to the Accused person. She further stated that the accused will have an opportunity to cross-examine the witness, and that late production of a document does not render it inadmissible.
7. The Defence counsel, in rejoinder, submitted that their objection is not premised on the late production of the document. He stated that the witness (PW6) was cross-examined and admitted to not having the book and that the copies of the book produced were neither signed nor certified and therefore it held no probative value. He advanced that the prosecution has never given a reason why the original Firearms Movement book, having been in the possession of the state all along, has never been brought to court and that for this reason, the document is rendered a dangerous document for the court to rely on since it is not credible.

### **Analysis**

8. I have considered the oral submissions made by counsel for both parties. I find that the main issue for determination is whether this court should allow the production of the original copy of the Firearm Movement book.
9. The defence counsel contends that the failure of the prosecution to produce the original copy of the Firearm Movement book at first instance casts doubt as to the credibility of the document and that producing the document would lead to the detriment of the defence case. The prosecution on the other hand asserts that production of the original copy of the Firearm Movement book would not prejudice the accused person since the uncertified copy that was initially produced contains the same content as the original copy of the book.
10. The laws on evidence under Section 67 of the [Evidence Act](#) dictate that documents are supposed to be proven by way of primary evidence. The exception to this rule is under Section 68 of the [Evidence Act](#) which provides: -
  - “ 1. Secondary evidence may be given of the existence, condition or contents of a document in the following cases—
    - a. When the original is shown or appears to be in the possession or power of—
      - i. the person against whom the document is sought to be proved;



- ii. or a person out of reach of, or not subject to, the process of the court;
  - iii. or any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;
- b. When the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is proved, or by his representative in interest;
  - c. When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in a reasonable time;
  - d. When the original is of such a nature as not to be easily movable;
  - e. When the original is a public document within the meaning of section 79 of this Act;
  - f. When the original is a document of which a certified copy is permitted by this Act or by any written law to be given in evidence;
  - g. When the original consists of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.
2. In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1), any secondary evidence of the contents of the document is admissible.
- (b) In the case mentioned in paragraph (b) of subsection (1) of this section, the written admission is admissible.
  - (c) In the cases mentioned in paragraphs (e) and (f) of subsection (1) of this section, a certified copy of the document, but no other kind of secondary evidence, is admissible.
  - (d) In the case mentioned in paragraph (g) of subsection (1) of this section, evidence may be given as to the general result of the accounts or documents by any person who has examined them, and who is skilled in the examination of such accounts or documents.”

11. The Firearms Movement book falls within the meaning of a public document under Section 79 which provides that: -

“(1) The following documents are public documents—

- a. Documents forming the acts or records of the acts—



- i. of the sovereign authority; or
    - ii. of official bodies and tribunals; or of public officers,
    - iii. legislative, judicial or executive, whether of Kenya or of any other country;
  - b. public records kept in Kenya of private documents.”
12. From the provisions of Sections 68 and 79 of the [Evidence Act](#), it is clear that the prosecution, when producing copies of the Firearms Movement book at first, ought to have certified the copies so as to meet the requirements of Section 68 of the [Evidence Act](#) which they failed to.
  13. In *Lwangu Vs Ndote (2021) eKLR*, the court held as follows:
 

“The mischief section 67 of the Act sought to remove is the maze of situations where, for instance, a party approaches to court with a document other than the original but which appears to be a replica of it, only for it to turn out to be a ‘clone’ and therefore a “fraud” in the court process. Even where there are exceptions to the production of primary evidence, the law has put in place safeguards against the sneaking into evidence of ‘clones’ and documents that may be referred to as frauds.”
  14. The failure of the prosecution to certify the copies of the Firearms Movement book they produced at first offends the provisions of Section 68 which also seeks to ensure that in the event that primary evidence cannot be procured, the secondary evidence produced still aligns with the principles of good evidence.
  15. It is trite that primary evidence is considered to be the best evidence, and the law requires it to be given first. The court in *re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu – Deceased [2016] eKLR* held that: -
 

“The best evidence rule is a legal principle that holds an original copy of a document as superior evidence. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, means that so long as the higher or superior evidence is within the possession of a party, or may be reached by the party, no inferior proof will be allowed. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the exceptions provided under Section 68 of the [Evidence Act](#).”
  16. It is therefore evident that primary evidence is the most preferred type of evidence. In the instant case, although PW6 Emmanuel Kiprop in his initial testimony given during cross-examination claimed that he could not obtain the original Firearms Movement book, it is clear that there was a possibility of obtaining it since it is what they now seek to produce in court. The prosecution therefore bore the burden of producing the original Firearms Movement book or, in absence thereof, a certified copy of the same at the first instance.
  17. PW6 testified that he could not access the original Firearms Movement book but he did not lay down a proper explanation as to why he was unable to procure the original Firearms Movement book to warrant the production of secondary evidence, which in this case is the copy of the Firearms Movement book which did not meet the threshold of secondary evidence envisioned in Section 68 of the [Evidence Act](#) since it was not certified. The prosecution, therefore, being well versed with the rules of evidence,



had the duty to present the best evidence within the confines of their reach to prove their assertions to the required standard.

18. The court in the case of *Clement Maskati Mvuko Vs Republic* (2018) eKLR held as follows on the court's discretion to recall witnesses: -

“It is my considered view that whereas a trial court has the discretion to summon a fresh witness or recall a witness who has testified, this discretion should be exercised with caution so as to ensure that the prosecution does not use the opportunity to clean up its act. Much greater caution is called for when the court decides to act suo moto. It is always better to let the parties present their cases in the manner they think best.”

19. It is apparent that the prosecution sought to recall PW6 to produce the original Firearms Movement book after the realization during cross-examination of PW6 that the initial copies they had produced might have offended the requirements of Section 68 of the *Evidence Act* since the copies were uncertified.

20. In the case of *Stephen Mburu Kinyua v Republic* [2016] eKLR, the court held that:

“Finally, I am of the view that the fair rights provisions enshrined in *the Constitution* of Kenya, 2010 seen in context lead to the unmistakable conclusion that the discretionary power donated by section 150 of the CPC to the Trial Court to call or permit the calling of Prosecution witnesses must be constrained and not expanded to the bare needs of justice in each particular case. In particular, in interpreting the proper limits of section 150 of the CPC, one must have in mind the very strident and categorical right that in Article 50(2)(j) of *the Constitution* that every Accused Person has a right to “be informed in advance of the evidence the Prosecution intends to rely on, and to have reasonable access to that evidence.” It follows that this right can be severely restricted when the Prosecution calls witnesses after the Defence has already responded to the Prosecution's case.”

The court further held that: -

“The Prosecution must demonstrate that:

- I. The calling of evidence in rebuttal is not a ploy to reopen its closed case with a view to curing certain perceived defects or shortcomings in the Prosecution case;
- II. That the rebuttal evidence is not being called to merely confirm or reinforce the Prosecution's case or to respond to contradictory evidence adduced by the Defence;
- III. That the rebuttal evidence is not being called on a collateral issue related to the credibility of the witness.
- IV. That the granting of permission to adduce the evidence in rebuttal will not in any way violate the principles that underlie the doctrine of equality of arms between the Prosecution and the Defence, or otherwise do violence to the doctrine of fundamental fairness or unduly delay the proceedings thereby compromising the Constitutional obligation of ensuring a fair and expeditious trial without unduly jeopardizing the rights of the Accused Person.”



21. Although the above cited decision relates to the recalling of witnesses after the close of the prosecution's case, which is not the case herein, I find that the principles enunciated in the decision are applicable to the instant case. It would be unfair to the Accused person if the prosecution is allowed to produce the original Firearms Movement book, in place of the uncertified copies that they had initially produced long after the witness who had produced the uncertified copy had been cross-examined and put to task as to its credibility. It is the mandate of each party to ensure that the evidence they produce in court is well suited to their claims and well aligned with the provisions of the law. The prosecution's application is a clear attempt to readdress their case and to close the gaps that became apparent when PW6 was cross examined on the uncertified exhibit that he had produced.
22. Additionally, the principle of equality at arms is an important legal principle that ensures that parties have the same procedural rights in legal proceedings .It is a principle that seeks to guarantee both parties in any proceedings a fair and balanced opportunity to present their case and the Accused should have equal access to information and the ability to present his defence effectively as the prosecution has.
23. In the case of Kallfrican v Belgium Convention Decision of 9<sup>th</sup> December 1986 as cited in the case of Joseph Njoroge Kimondo & Another v MMW,( a minor suing through her next friend and father JWM [2018] eKLR, it was held:-
- “Equality of arms i.e. the premise that everyone who is a party to proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent.”
24. In my considered view the production of the original Firearms Movement book by the prosecution at this stage would disadvantage the Accused and prejudice his defence . This would offend the very principle that ensures an accused person has the right to a fair hearing as espoused by Articles 50 and 27 of *the Constitution*.

### **Determination**

25. In the premises therefore, I find that the objection of the defence counsel is merited, and it is hereby sustained. Consequently, I dismiss the prosecution's application.
26. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JANUARY 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Ms. Chala for the Prosecution

Mr. Shifwoka for the Accused persons

Court Assistant: Polycap

