



**Mboya v Republic (Criminal Appeal 180 of 2023)
[2025] KEHC 9279 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 180 OF 2023
DR KAVEDZA, J
JUNE 30, 2025**

BETWEEN

TOM OYWA MBOYA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, Tom Oywa Mboya, was charged with two counts of offences: attempted murder contrary to section 220(b) of the *Penal Code*. After a full trial, he was convicted of attempted murder under section 220(a) in count one and of unlawful wounding contrary to section 237(a) in count two. He was sentenced to twenty years and three years respectively.
2. Dissatisfied, he appealed against the conviction and sentence. On 28th May 2024, this court set aside the conviction and sentences and directed that the matter be placed before a different magistrate for the purposes of taking evidence from additional defence witnesses and reallocation to another magistrate for just determination.
3. The applicant has now filed the present application dated 14th March 2025 seeking leave to recall PW13, Sgt. Charles Musyimi (the investigating officer), the accused himself (DW1), and DW2 Benson Otieno Orieny, for further examination and cross-examination.
4. He contends that when the defence was ready to proceed on 22nd January 2025, the trial magistrate, Hon. Susan Shitumbi, raised concerns over the proper interpretation of the judgment delivered by this court. The magistrate was uncertain whether she was to record only the additional evidence and return the file to the former trial magistrate, who is no longer stationed at Milimani, or proceed to hear and conclude the matter.
5. There was consensus that only this court could interpret its judgment. Consequently, the magistrate directed that an application be filed to that effect. He therefore seeks leave under section 146(4) of



the *Evidence Act* to recall the three identified witnesses before a new magistrate to clarify the record and ensure the matter is concluded fairly. He asserts that this is necessary to uphold the principles of natural justice, and argues that no prejudice would be occasioned to the prosecution if the application is allowed.

6. In response, the complainant, William Osewe, filed a replying affidavit dated 10th April 2025 opposing the application. He states that the magistrate’s directive of 22nd January 2025 only sought an interpretation of paragraph 20 of this court’s judgment, not a substantive re-litigation of the case.
7. He argues that the applicant has misrepresented the scope of this court’s directions, which allowed the defence to call additional witnesses, and not to recall those who had already testified. He expresses concern that the application is a veiled attempt to reopen the trial or appeal the original decision through a different magistrate, contrary to the intention of this court’s judgment.
8. He further states that allowing the recall of witnesses already heard would contravene the doctrine of finality in litigation and amount to an abuse of process. He highlights the personal toll the delay is taking on him, having been permanently disabled due to the incident, and urges the court to give firm timelines for the calling of the additional witnesses, to avoid further prejudice.
9. He prays that the application be dismissed and that this court limits its intervention to interpreting paragraph 20 of the judgment as originally directed by the trial court.
10. I have considered the application dated 14th March 2025, the complainant’s replying affidavit dated 10th April 2025, and the parties’ submissions, which I do not find necessary to restate in full.
11. The key issue is whether this court can allow the applicant to recall PW13 (the investigating officer), DW1, and DW2 for further examination before a new magistrate, in light of paragraph 20 of this court’s judgment dated 28th May 2024, which provided:

“In the interest of justice, I therefore direct the matter to be transferred to another magistrate for the purpose of taking the evidence of the additional defence witnesses only.”
12. The complainant contends that the applicant’s request to recall PW13 goes beyond the scope of this paragraph. However, the paragraph must be interpreted in the context of the entire judgment and the principles of fair trial under Article 50(1) and (2)(k) of the *Constitution*. While the court indeed specified “additional defence witnesses,” it did so in response to the applicant’s constitutional complaint on the conduct of the trial and allegations of bias by the previous magistrate.
13. The applicant has raised legitimate concerns that the original record is incomplete or inaccurate, and that the former trial magistrate may have mis recorded evidence. In these circumstances, the recall of PW13 who played a central role in the investigation is necessary not to reopen the prosecution case, but to clarify matters that may affect the fairness of the trial.
14. Section 146(4) of the *Evidence Act*, Cap 80, grants the court discretion to allow recall of any witness. It provides thus:

The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re- examination respectively.



15. It is entirely within the discretion of the court to recall witnesses. The stated power is also enshrined in Section 150 of the [CPC](#) which provides thus:

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 a 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, either party may be prejudiced by the calling of that person as a witness.

16. Section 150 of the [Criminal Procedure Code](#) thus empowers the court to, at any stage of the trial, summon a new witness or recall a witness already examined for re-examination. Thus, where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power to call or recall a witness, the court should however ensure the protections afforded to the parties in the proviso are adhered to.

17. In *Kulukana Otim v R* [1963] EA 257, cited by Ngugi, J in *Stephen Mburu Kinyua v Republic* [2016] eKLR, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the [Criminal Procedure Code](#) stated that:

“It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself...”

18. Ngugi, J further held, in the above-cited case and I concur that it was necessary for the court to form an opinion that it would be essential to the just decision of the case to call or recall a witness. The learned judge stated:

“This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the CPC.”

19. The trial court retains the power to recall witnesses before the defence closes its case. This court, under its inherent jurisdiction and section 146(4) of the [Evidence Act](#), may issue orders necessary to advance justice or prevent abuse of process.

20. The evidence sought to be recalled is critical to the fair resolution of this case. As supported by Article 50(1) of the [Constitution](#) and relevant case law, justice demands that all parties be given a full and fair



opportunity to present and test evidence. Refusing the recall of PW13, despite serious concerns over the accuracy of his evidence, would undermine these principles.

21. The matter is now before a different magistrate. The recall will be limited in scope and conducted under the court's supervision. The complainant's concerns about re-litigation are misplaced. This is not a fresh trial but a procedural step to clarify disputed facts fairly and lawfully. I am persuaded that recalling PW13, DW1, and DW2 will not prejudice the prosecution
22. The upshot of the above analysis is that the application dated 14th March 2025 is allowed. The applicant is granted leave to recall PW13, DW1, and DW2 for further examination in chief and cross-examination. The trial magistrate shall allocate reasonable and limited time for this exercise and proceed to conclude the matter expeditiously.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE 2025

D. KAVEDZA

JUDGE

In the presence of:

Ms. Onsando h/b for Prof Ojienda for the Applicant

Ms. Maina h/b for Osiemo for the Victims

Mr. Mogere for the Respondent

Tonny Court Assistant

