Kamau v Republic (Criminal Appeal E028 of 2024)
[2025] KEHC 11816 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11816 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E028 OF 2024

HI ONG'UDI, J

AUGUST 6, 2025

BETWEEN

JAMES KARANJA KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the ruling of Hon. Ndeng'eri on the issue of recalling prosecution witnesses for further cross examination dated 26th June 2024 & 10th July 2024 respectively in Naivasha CMCR S. O. No. 27 of 2019)

JUDGMENT

1. The appellant herein is the accused in the lower court case Naivasha CMCR S.O. No. 27 of 2019 where he is charged with attempted defilement contrary to section 9[1] & [2] of the *Sexual Offences Act* No. 3 of 2006. The said matter was first heard by Hon. E. Kimilu who took the evidence of PW1 – PW4. Later on other Magistrates took over the hearing of the matter. The appellant alleges that on two occasions the trial court denied him an opportunity to recall witnesses for purposes of cross examination.

2. Being aggrieved with the said orders he filed this appeal on 28th August 2024 raising the following grounds;-

    1. That, the Hon. learned magistrate erred in both law and fact by acting against article 50[2] [k] of *the Constitution* of Kenya which guarantees an accused person right to adduce and challenge evidence against him.

    2. That, the Hon. learned magistrate erred in both law and fact by acting against the provisions of section 146[4] of the *Evidence Act* Cap 80 which provides that, 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.

3. That, the pundit trial Magistrate erred in law by acting in contravention of Section 150 of the Criminal Procedure Act Cap 75 Laws of Kenya.

4. That, the Hon. learned magistrate erred in both law and facts by failing to allow his application for adjournment for the reason that he was not ready to proceed as he had not been supplied with the important document [First Report] and proceeded to compel him to proceed with the hearing. This was in contravention of article 50[2] [j] which guarantees an accused person right to have reasonable access to evidence the prosecution intends to rely on.

5. That, the Hon. learned magistrate erred in law by failing to allow adequate time and facilities to prepare his defense which is in contravention of article 50[2] [c] of *the constitution* of Kenya 2010.

3. The appeal was canvassed by way of written submissions.

4. The appellant in his undated submissions contends that section 150 of the Criminal Procedure Code & Section 146[4] of the *Evidence Act* provides for recalling of witnesses for their cross examination. Reference was made to the case of Republic v Wilson Chelelgo Cheponin [2019] eKLR where it was stated;-

> " 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 Constitutinal Right to fair trial guaranteed under Article 25 [c] of the Constistution is observed. Of significance to upholding the right to fair trial in the 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]".

5. It is his submission that denial to have him recall a witness violates his right to fair hearing. He relied on the case of State v Titus Kipchirchir Kirui [2022] eKLR where D.O. Chepkwony J had this to say:-

> " The court being a custodian of the law, should however ensure that constitutional safeguards are upheld all the time and jealously protected so that the accused is accorded true investigations and fairness in compliance with the basic rule of accorded true investigations and fairness in compliance with the basic rule of law. That is a fundamental canon of our criminal jurisprudence and quite in conformity with the constitutional mandate contained under Article 50 of *the Constitution* of Kenya, 2010... Suggestively from the Kenyan jurisprudence, an application to recall witness for cross-examination can only be denied when the prosecution proves to the satisfaction of the court that; the request to have the witness re-called is based on ulterior motive and meant to be a delay tactic; that the witness has travelled out of the country and it would lead to unnecessary travelling expenses, and lastly, in circumstances where the witness cannot completely be traced."

6. He finally stated that his application was not intended to cause delay in the case. That the witnesses are available within Naivasha town. He just wanted to be given the first report. He thus urged the court to allow the appeal and have the four [4] witnesses recalled.

7. The respondent filed grounds of opposition and submissions both dated 12th March 2025 through prosecution counsel Mueni Mutua. Counsel opposed the appeal arguing that the right to recall witnesses is not absolute under Article 50 [2] of the Kenya Constitution & Section 146[4] of the *Evidence Act*. Further that the application sought is meant to delay the case as the appellant has not

pointed out the areas he seeks clarification on. In support of this counsel relied on the case of James Kamau Kithui v Republic Criminal Appeal no. 17 of 2014.

8. He additionally submits that the case has been pending since April 2019. That the appellant was given sufficient time to cross examine witnesses. That directions under Section 200[3] Criminal Procedure Code were taken on 15th January 2020 and on 1st November 2023, where the appellant was always ready to proceed with the case. Further that the appellant absconded court from 30th September 2020 till 1st November 2023 hence delaying justice. He confirmed that the appellant had been served with the 1st report. He urged the court to have the hearing before the lower court expedited as was held in Abdi Adan Mohammed v Republic [2017] eKLR.

9. This being a first appeal this court has a duty to re-evaluate and assess the evidence and arrive at its own independent conclusion. In the case of Gabriel Kamau Njoroge v Republic [1982 -88] 1 KAR 1134 the Court of Appeal held;-

> " It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and law and the court is required to weigh conflicting evidence and draw its own interferences and conclusions, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this."

10. In line with the above directions I have perused and considered the record of appeal, submissions by both parties, cited authorities and the law. The issue I find falling for determination is whether the provision of Section 200[3] of the Criminal Procedure Code was complied with. This is the secton that deals with the manner part heard cases [as was the case here] are handled.

11. The said section reads as follows:

> Section 200[3]
>
> > " Where a magistrate commences the hearing of procedings and part of the evidence has been recorded by his predecessor the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

12. Whether or not there was compliance can only be ascertained from the record. As is stated earlier the first Judicial Officer to hear this case took the evidence of PW1 – PW4. All these witnesses testified on 2nd October 2020. The next hearing date was 15th January 2021 when a new Judicial Officer Hon. Sarapai - Senior Resident Magistrate came on record, and this is what transpired;-

> Prosecutor: The witness we were expecting is not in court. The matter is part heard. We pray for another date and directions.
>
> Court: Section 200 Criminal Procedure Code explained.
>
> Accused: I have no objection. I want the case to proceed from where we left.
>
> Court: Case will proceed.
>
> Prosecutor: I pray for extension of the summons.
>
> Court: Further hearing 15/04/2020 witness summons extended.

13. The record shows that the appellant disappeared and never appeared in court until 18th October 2023, when he was presented by the surety.

14. On 1st November 2023 the appellant appeared before another Judicial Officer Hon. J. Ndengeri – Principal Magistrate. This again is what transpired;-

> Accused: I went to work in Nairobi and I did not have funds to come back home. The police arrested me from home.
>
> Court: The accused has contravened his terms of release. From where I sit he is not eligible for release on bond. In the meantime Section 200[3] is explained to the accused person. Accused opts for the trial to proceed from the last stop. File to proceed to the typing pool. Mention on 6/2/2023.

15. When the matter next came for hearing on 17th April 2024, the appellant requested to be supplied with the 1st report, statements of PW3 and PW4, and for the matter to start de novo as he could not recall what transpired. A ruling was delivered on the same day by Hon. J. Ndengeri dismissing the request. The matter was then given a mention date when it was fixed for 26th June 2024 when the appellant again raised the issue of recalling PW1. The court in a brief ruling dismissed the request, saying the previous ruling had not been set aside, reviewed or appealed against.

16. The matter next came up for hearing on 10th July 2024. On this day the appellant repeated that he had not been served with the 1st report and so was not ready to proceed. The court proceeded and took the evidence of PW5 and PW6. The next hearing date was set for 16th October 2024 but it could not proceed as the appeal herein had already been lodged on 28th August 2024. I have deliberately set out what transpired in court during the time it is said Section 200[3] Criminal Procedure Code was complied with. We are courts of record and our records must speak for themselves.

17. When Hon. Sarapai took directions under Section 200[3] Criminal Procedure Code it is shown that the appellant said he wanted the case to proceed from where it had reached. He did not say anything about recalling of witnesses, because that was not explained to him as per the record.

18. When he next appeared before Hon. Ndengeri, the court did not record what the appellant said in response to her explanation of Section 200[3] Criminal Procedure Code. It is nowhere shown what he said about the recall of witnesses.

19. It is not enough just to state that one wants a matter to proceed from where it had reached. It must be clearly indicated whether the accused person wants any of the witnesses recalled for further cross-examintion. I agree with the respondent when he submits that the right to recall witnesses is not absolute under Article 50[2] of *the Constitution* and Section 146[4] of the *Evidence Act*. However that can only be addressed after absolute compliance with Section 200[3] Criminal Prodecure Code.

20. Once an accused indicates that he/she wishes to have certain witnesses recalled, the court then confirms from the prosecution about the availability of the witnesses sought to be recalled. In the case before this court it is clear that on both occasions the two learned trial Magistrates [Hon. Sarapai & Hon.Ndengeri] never inquired from the appellant whether he wanted any witness recalled. My advice to the said Judicial Officers is for them to be recording verbatim what the accused persons state after section 200[3] Criminal Procedure Code has been fully explained to them. It helps a lot in cases like what is now before this court.

21. That having not been complied with I find merit in the appeal which I hereby allow and order as follows;-

    i. The Rulings of 26th June 2024 and 10th July 2024 are hereby set aside.

ii. To avoid further delay in the matter before the lower court let the prosecution re-serve the appellant with copies of the witness statements for PW1 – PW4 plus the 1st report within 7 days.

iii. Given the long period the case has taken this court declines to order for the case to start denovo. I direct that the matter be fixed for hearing and PW1 – PW4 be recalled for Cross-examination Only. There shall be an option for PW1 and PW2 to undertake the cross-examination virtually.

iv. Mention before the trial court on 12th August 2025, for fixing a hearing date.

22. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE