



**Mbugua v Republic (Miscellaneous Criminal Application
50 of 2023) [2024] KEHC 6139 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION 50 OF 2023**

DR KAVEDZA, J

MAY 30, 2024

BETWEEN

ALFRED GATHECHA MBUGUA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application of revision of the order of 21st November 2023 by JKIA Chief Magistrate's Court Criminal Case no. E034 of 2023 Republic vs Alfred Gathecha Mbugua)

RULING

1. Before the subordinate court, the applicant is facing a charge of dealing in endangered wildlife species contrary to section 92 (2) as read with section 105(1)(b) of the [wildlife conservation and management act](#). Before the prosecution closed their case, the applicant through his advocate made an application to recall four (4) prosecution witnesses. The trial court considered the application and dismissed it on 21st November 2023.
2. On 4th December 2023, the applicant filed a revision application of the ruling delivered by the trial court. The application is supported by an affidavit of the same date. The averments made are that on 10th July 2023, the trial court directed the defence prayed for an adjournment on the grounds that counsel handling the matter was unwell. The court declined to grant the adjournment and directed that the prosecution witnesses testify. On 23rd October 2023, before the prosecution closed their case, the court refused to allow a recall of the said witnesses for purposes of cross-examination. It was this decision that the applicant is preparing to be revised.
3. The respondents did not file a response to the application.



4. I have considered the application, the applicable law. Looking at the entire application, the crucial issue is whether there was a miscarriage of justice when the trial court denied the applicant the opportunity to recall witnesses.
5. The power of this court in its revisionary jurisdiction is founded under Section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.
6. Article 165(6) of the Constitution provides that:

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. Consequently, this court has jurisdiction to entertain the application before me. In the instant application, the applicant sought the revision of the orders made by the trial court. He sought to recall four prosecution witnesses for purposes of cross-examination.
8. The operative law that provides for recall of witnesses is consisted in section 150 of the Criminal Procedure Code which 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 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.
9. The proviso to section 150 allows witnesses recalled to be cross-examined by the prosecution or the defence counsel and the case of Joseph Ndungu Kagiri v R (2016) eKLR, Justice Mativo (as he then was) observed as follows:

“The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record, he had just been supplied with the proceedings and prosecution witnesses’ statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses’ statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application.”
10. The above case seemed to suggest that there may be situations which would persuade a trial Judge to allow recall of witnesses and such a situation would be valid only if it is based on sound reasons. In the instant case, the accused person was represented by counsel on 10th July 2023 who made an application for adjournment. The said counsel indicated that he was holding brief as the applicant’s counsel was unwell. He was therefore not well versed with the facts of the prosecution’s case and could not cross-



examine the prosecution witnesses. The application was however declined with the court directing the witnesses to testify without being cross-examined, the defence was further given an opportunity to recall the said witnesses for cross-examination when their counsel on record was available.

11. When the defence finally made their application to recall the said witnesses for cross-examination, the court declined. In my view, the applicant's concerns are justified in view of the purpose of section 150 of the Criminal Procedure Code, the trial is not concluded, and the discretion may be exercised. In the case of *De Souza v Uganda* [1967] EA 784 it was observed that trial in the Magistrates court ends with the close of the defence case.
12. I am of the view that allowing the application would be a measure against miscarriage of justice. In this regard, I find that the trial court went into error in disallowing the application to recall the four prosecution witnesses for cross examination. This does not amount to starting the case de novo. There will be no prejudice caused to the prosecution if the witnesses are recalled for further cross examination as the prosecution counsel will have an opportunity to re-examine those witnesses if need be.
13. In the result I find merit in the request for revision by the applicant. The same is allowed. The order by the trial court dated 21st November 2023, is hereby set aside. The four (4) prosecution's witnesses shall be recalled for cross- examination by the defence.

Ruling dated and delivered virtually this 30th day of May 2024

D. KAVEDZA

JUDGE

In the presence of:

Ms. Tumaini for the Respondent

Applicant Absent

Joy Court Assistant

