Republic v Khaemba (Criminal Case 16 of 2020)
[2024] KEHC 16305 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 16305 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL CASE 16 OF 2020

DO CHEPKWONY, J

OCTOBER 30, 2024

BETWEEN

REPUBLIC ..... STATE

AND

SAMUEL SIMIYU KHAEMBA ..... ACCUSED

RULING

1. The Accused person, SAMUEL SIMIYU KHAEMBA is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

   The Particulars of offence are that;

   > " On the 29th April, 2020 at 1900hrs along Ruiru-Kiambu road, Ruiru Sub County within Kiambu County, the accused murdered MANASE KURIA WAMALWA".

2. The accused was arraigned before court on 13th May, 2020 when he was informed of the reason he was before court and referred for mental assessment and assignment for legal representation. On 19th May, 2020 the accused person was informed of the charges and information thereof and he

   pleaded 'Not Guilty' to the offence of Murder.

3. The hearing of this trial commenced on 20th June 2023 and the matter proceeded for hearing before different Judges.

4. On 19th September, 2024, the matter came up before the court as a part-heard and the court informed the accused of his rights under Section 200 of the Criminal Procedure Code. In response, the Accused person indicated to court that he would like the case to start afresh (de novo).

5. The Prosecution's counsel strongly opposed the option elected by the accused person on the basis that he had not given any reason why the case should start de novo. She argued that the case was filed in the

year 2020 and so far, three (3) witnesses had testified whereby the court gave the Accused significant time to cross examine the prosecution witnesses.

6. The Prosecution stated that she has not consulted with the investigating officer to establish the viability of the witnesses to be called again to testify. She argues that it would be an abuse of the court process and a delaying tactic in having the matter start afresh. She further contends that the family of the victim have been waiting for four years for the matter to be heard and determined. She therefore urged the court to decline the accused's prayer for the case to start de novo.

7. In response, M/S Nebuye counsel for the defence submitted that Section 200 of the Criminal Procedure Code allows for the court to resummons witnesses and for the case to start afresh before Judgment has been rendered on any matter where the Presiding Judge or Judicial Officer has been transferred or is no longer available to continue with the hearing. It is their argument that since the court is new, it would be important to start the matter de-novo so as to have the opportunity to see the demeanor of witnesses while testifying fo an informed decision to be arrived at. As for traceability of witnesses, counsel has argued that the accused stand to suffer great prejudice in that not all witnesses are called but urges that the prosecution be made to avail all the remaining witnesses in the interest of justice. She contends that the accused person be accorded his right under Article 200 of the Criminal Procedure Act.

Analysis and Determination

8. Having listened to both counsel in their arguments before court, I have

analysed the same and found that the issue for determination before this

court is whether or not the case should start de novo.

9. It is worth-noting that hearing in this case was instituted on 13th May, 2020

and after several adjournments having commenced on 20th June, 2023 whereby the court heard the testimonies of PW1, PW2 and PW3, it is also noted that during the hearing the accused person was in court together with his advocate who cross examined the said witnesses. It is further noted that the accused person did not raise any issues with their evidence. All the three witnesses testified on one day and it is less than a year ago, so that it cannot be said that due to inordinate lapse of time, the accused may have forgotten some issues that the witnesses raised in their evidence.

10. In a part-heard case, th Directions of court are made pursuant to the provisions of Section 200 of the CPC which provides as follows:-

200 (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

a) deliver a Judgment that has been written and signed but not delivered by his predecessor; or

b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

11. On 19th September, 2024, the court complied with the provisions of Section 200 (3) of the Criminal Procedure Code by informing the accused of his right. Thereunder. This was the position of the Court of Appeal in the case of John Bell Kinengeni –vs- Republic [2015] eKLR, where it held that:-

> " The duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200(3) requires in a mandatory tone that the succeeding magistrate (read Judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding Magistrate.

12. In view of this, while the Accused has a right to request for a case to start denovo, the court agrees with the prosecution's counsel that this right is not an absolute right as the court has to consider other factors based on the circumstances of the case. The Court of Appeal in the case of Joseph Kamau Gichuki –vs- Republic [2013] eKLR held that the court should consider how far the trial had proceeded, availability of witnesses who had already testified, time that had lapsed since commencement of trial and the prejudice likely to be suffered by either party. The Court of Appeal stated that:-

> " This Court has previously held that Section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking Section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."

13. It is note-worthy that this provision of the law is not couched in mandatory terms that the case must start de novo. What is mandatory is that the accused be informed of his right to either elect for the case to start de novo or to have a witness recalled. See Joseph Kamara Maro –vs- Republic [2014] eKLR where the Court of Appeal held that:-

> " ...To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code." (emphasis added).

14. Having considered he circumstances of this case, it is the court's view that starting the case afresh would be prejudicial to the prosecution and victim's family who must be anxious about their loss as a further delay in the case may be caused cowing to the fact that the case has been pending since 2020 and this is contrary to Article 50 (2)(e) of *the Constitution* which provides for one of the rights to a fair hearing in the following terms:-

(e) "to have the trial begin and conclude without unreasonable delay."

15. In conclusion, having pointed out that three witnesses have already testified

in this case, the court finds that the accused has not given any cogent reason(s) to warrant the matter to start afresh and proceeds to direct that the matter proceeds from where it had reached.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF OCTOBER ....., 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ndeda counsel for the State

M/S Nekonye holding brief for Mr. Simiyu counsel for the Accused

Accused - Present

Court Assistant - Martin