Republic v Ateya (Criminal Case 16 of 2017) [2023] KEHC 21120 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL CASE 16 OF 2017

PM MULWA, J

JULY 27, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

DOUGLAS OKWARA ATEYA ..... ACCUSED

RULING

1. The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* in that on the night of February 26, 2017 at Yokahoma Building, Githurai Location, Ruiru Sub-County within Kiambu County murdered Mercy Kanario Rose.

2. The accused was arraigned on May 4, 2017 and denied the charge. The hearing of the prosecution's case commenced on June 12, 2018 and on that day five (5) witnesses testified before Lady Justice Meoli who was later transferred.

3. When Hon Lady Justice Kasango (now retired) took over the matter on March 8, 2021, the accused person in accordance with Section 200 *Criminal Procedure Code* elected to have the case start de novo which was opposed by the prosecution. Having considered the submissions from both sides the court on March 24, 2021 declined the accused's election and ordered that the case proceed from where it had reached. It is worth to note that no other witness testified after the directions of Lady Justice (rtd) Kasango.

4. I took over this matter on March 1, 2023. The accused person is now seeking that the matter start *de novo*. In an affidavit sworn on March 31, 2023, the accused depones, incorrectly so, that this matter was partly heard by Hon. Lady Justice Ng'etich who was later transferred. And that during the trial he could not attend court due to his poor health. And further that the matter ought to start afresh so that he could defend himself.

5. The accused person's request has been countered by the prosecution who filed a replying affidavit on May 18, 2023 wherein it is deponed that his prayer is without merit as the same is meant to defeat the

ends of justice by unnecessarily delaying the matter. And further that if the matter proceeds from where it had stopped the accused person will not suffer prejudice as himself and his counsel were present when the witnesses testified and were accorded the opportunity cross-examine and indeed cross-examined the witnesses.

6. Ms Mwonyah, counsel for the accused person filed written submissions to reiterate the prayers by the accused person that the trial start afresh. I have had the chance to look at the same plus the cited authorities.

7. Section 200(3) of the Criminal Procedure Code provides:

> "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 re-heard and the succeeding magistrate shall inform the accused person of that right."
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> Section 201 (2) thereof provides: "The provisions of Section 200 of this Act shall apply mutatis mutandis to trial held in the High Court."

8. Whereas Section 200(3) of the C P C mandatorily provides for the succeeding Magistrate or Judge to inform the accused of his right to request for the case to start de novo, the court may not be bound by the decision made by the accused person. There are circumstances which will make the court to overrule the choice.

9. Section 200 (3) of the C P C gives courts discretion even where the accused wishes to have the case start de novo. In so doing the court will consider whether to allow the case to start 'de novo' depending on the circumstances of the case. The court has to consider the implications which may result in the administration of justice by allowing the accused to have his way. Such circumstances include the availability of witnesses who may be fatigued and unwilling to testify all over again. The court will also consider the number of witnesses who have given evidence and depending on the nature of the charge the trauma that the witnesses have to undergo by repeating their testimony all over again.

10. In *Stephen Mburu Kinyua v Republic* [2016] eKLR, Ngugi, J (as he then was) stated: "Our case law has now made it clear that while section 200(3) makes it mandatory for the succeeding magistrate (or judge) to inform the accused person of his or her rights to request for a de novo trial, the succeeding magistrate or judge is not bound by the position taken by the accused person on whether to request for a de novo trial or not. The succeeding magistrate or judge must exercise his or her judicial mind to the issue and decide if, in the totality of circumstances, the case is an appropriate one for an order that it starts afresh.

> We can cull some of the considerations that a Court considering the issue should have in mind from our case law (principally the Court of Appeal guidelines in the Ndegwa v R case as well as in Joseph Kamau Gichuki v R case) as well as our emerging jurisprudence based on the *Constitution* of Kenya, 2010 as well as new legislative enactments governing criminal trials aimed at animating the *Constitution*. Some of these considerations that a Court considering the issue should have in mind include:
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> a. Whether it is convenient to commence the trial *de novo*, that is, the difficulty in mounting a new trial;
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> b. How far the trial had proceeded;
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> c. The availability of witnesses who had already testified;

d. Possible loss of memory by the witnesses given the passage of time;

e. The time that has lapsed since the commencement of the trial taking into consideration the constitutional requirement that criminal trials should commence and be concluded without undue delay;

f. The prejudice likely to be suffered by either the prosecution or the accused if a new trial is ordered; and

g. The interests of the victims of the crime and witnesses – including the impact a new trial will have on them balanced against the benefits of a new trial.

1. This case is a 2017 matter whereby 5 witnesses had already testified and the prosecution was only remaining with about 4 witnesses. It is now 5 years since the 5 witnesses testified and to order the matter to start a fresh will result in unreasonable delay and there might be a challenge in obtaining the witnesses owing to lapse of time.

2. As stated by Ngugi, J (as he then was) one of the considerations is whether it is convenient to start de novo. One year after the accused took plea, 5 witnesses were availed and testified. Later, on March 24, 2021, a decision was made to have the case proceed from where it had stopped. And now the accused person wants that direction reversed when the case has been pending for the last six years. Article 50(2) (e) of the *Constitution* provides that every accused person has a right to a fair trial, which includes the right -

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

13. It would not be in the spirit of the *Constitution* to start the case de novo. The court has to consider whether it is practical to start the case de novo.

14. In the case of *Abdi Adan Mohamed v Republic* [2017] eKLR the court held:

> "...we think this appeal demonstrates quite clearly how Section 200 has been applied mechanically in disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate, for example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates... Starting one hearing afresh...can cause witness fatigue and apathy. Trial courts ought to comply with the guidance given in the case of Ndegwa v. R [supra] that Section 200 should be used sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered."

15. In this case a ruling had already been made in respect of section 200 CPC and thereafter no other witness testified. I am not persuaded to review that decision that directed the case proceed from where it had stopped. And considering the number of witnesses who have testified and the lapse of time, this is not an appropriate case for the case to start *de novo*.

16. I decline to allow the application and order that the case shall proceed from where it has reached.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF JULY 2023

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P.M. MULWA

JUDGE

In the presence of:

Duale – court assistant

Mr. Gacharia for the state

N/A by Adv. for the accused person

Accused - present