



**Republic v Isabwa alias Chairman & 6 others (Criminal Case 29 of 2015)
[2023] KEHC 21430 (KLR) (Crim) (17 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE 29 OF 2015
K KIMONDO, J
AUGUST 17, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

ERIC MUNGERA ISABWA ALIAS CHAIRMAN 1ST ACCUSED

RAPHAEL KIMANI GACHII ALIAS KIM BUTCHER 2ND ACCUSED

MUSTAFA KIMANI ANYONI ALIAS MUSTO 3RD ACCUSED

STEPHEN ASTIVA LIPOPO ALIAS CHOKORE 4TH ACCUSED

JANE WANJIRU KAMAU ALIAS SHIRO 5TH ACCUSED

MARGARET NJERI WACHIURI 6TH ACCUSED

SIMON WAMBUGU GICHAMBA 7TH ACCUSED

RULING

1. The accused persons are charged with four counts of murder. A total of 35 witnesses have testified before two of my predecessors: Wakiaga J who heard the first 19 witnesses; and, Bwonwonga J who took the evidence of the next batch of 16 witnesses. The former judge is on transfer while the latter has retired from service.
2. The learned prosecution counsel informed me that there are 8 more witnesses to go. On June 22, 2023, and, as the succeeding trial judge, I explained on the record to each of the accused persons their rights under section 200 (3) as read together with section 201 of the *Criminal Procedure Code* (hereafter the Code). The 1st to 4th accused persons elected to have the trial start *de novo*. The 5th to 7th accused preferred the matter to continue from the point at which it had reached.



3. Considering the advanced stage of the trial and the history of the litigation, the court, *suo motu*, directed learned counsel for the Republic and the defence to file brief submissions on the phrase succeeding magistrate/judge and the efficacy of the election by the 1st to 4th accused. Only the learned counsel for the 3rd accused, Mr. Ongaro, and the learned Prosecution Counsel, Ms Maina, lodged submissions.
4. On 21st July 2023, I heard further submissions on the issue. In a synopsis, learned counsel for the 3rd accused submitted that the underlying foundation of section 200 of the Code was the right to a fair trial; and, that there was a mandatory direction to the court to ensure that the accused understood this right. Reliance was placed on a line of authorities including [Ndegwa v Republic](#) [1985] KLR 535, [Republic v Philip Domolina](#) [2020] eKLR, [Republic v Arnold Ouma Munyekenye](#) [2018] eKLR and [Director Public Prosecutions v Peter Onyango Odongo & 2 Others](#) [2018] eKLR.
5. The Republic on the other hand contended that there were no sufficient grounds to start the case afresh; that it would prejudice the rights of the co-accused to a speedy trial; and, that in view of the time taken and the number of witnesses, starting the trial de novo would defeat the concept of a fair trial guaranteed by Article 50 of *the Constitution*. Learned Prosecution Counsel cited [Charles Ogero Bosire v Republic](#) [2012] eKLR, [Abdi Adan Mohamed v Republic](#) [2017] eKLR and [Joseph Kamau Gichuki v Republic](#) [2013] eKLR.
6. I take the following view of the matter. Section 200 (3) as read together with section 201 of the Code requires the succeeding magistrate or judge to explain to the accused, on the record, of the right to recall any witnesses. Section 200 (3) is couched in mandatory terms: the succeeding magistrate shall inform the accused person of that right. See generally [Raphael v Republic](#) [1969] EA 544; [Republic v Wesley Chepchieng](#) High Court, Eldoret Criminal Case 4 of 2008 [2013] eKLR.
7. In the instant case, I explained the right on the record to all the accused and they made their election. The right exercised by the accused belongs to them. The submissions that I invited from counsel were thus merely for guidance to the court.
8. Like I stated earlier, I would be the third judge taking over the trial. Ideally, all the evidence in a criminal trial should be taken by one judicial officer. There is great merit in that proposition: the judge would not only have all the evidence at his fingertips, but would have the additional benefit of evaluating the demeanour and candour of all the witnesses. See [Ndegwa v Republic](#) [1985] KLR 535.
9. So much so that section 200 of the Code is not just a procedural rule but one of substantial justice anchored firmly on the right to a fair hearing. This also accords well with Article 50 (2) (e) of *the Constitution*. In the instant case, some of the accused have elected to proceed from where the case had reached. The court must then carefully balance the rights of all the accused, those of the victims' families and the wider interests of criminal justice.
10. There are conflicting decisions on the term succeeding magistrate. In the Tanzanian case of [Eustace v Republic](#) [1970] E.A 393, the court in interpreting section 196 of the Tanzanian Code (which was *pari materia* with our section 200) held that "one Magistrate may continue and complete a trial begun by another Magistrate but a trial cannot be conducted by a succession of Magistrates". Paraphrased, it was never contemplated that a third or further successor would take over the proceedings.
11. On the other hand, some judges have held that the court retains the discretion to determine, on the basis and circumstances of each case, whether the accused has a right to recall any witness. See for instance [Joseph Kamau Gichuki v Republic](#) [2013] eKLR; [Joseph Kamora Maro v Republic](#), Court of Appeal,



Malindi Criminal Appeal No. 57 of 2014 [2014] eKLR. In *Kamora Maro's* case [supra] the learned judges of the Court of Appeal delivered themselves as follows-

After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left jurisdiction of the court as was the case here or some may have even died. 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 person of his right under section 200(3) of the Criminal Procedure Code. [underlining added]

12. In *Ndegwa v Republic* [1985] KLR 535, the Court of Appeal admonished succeeding trial judges or magistrates to employ section 200 of the Code with circumspection-

Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.

13. The Court of Appeal then gave exceptions when section 200 could be strictly applied, for instance, where the partly-heard case was-

A short one, it could be conveniently started de novo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.

14. I am persuaded by that argument. It would be fool-hardy to say that section 200 (3) as read with section 201 of the Code is cast in stone in all cases. Each case must be determined on its unique circumstances. Paraphrased, the interests of justice and fair trial may in some cases entitle the court to reject an election by the accused to recall a witness. Rephrased, section 200 (3) did not completely take away the discretion of the succeeding magistrate or trial court.

15. Applying that logic to the present case and guided by the precedent in *Ndegwa v Republic* [supra], I find further as follows. The current trial dates back to the year 2015. In those eight years, a large number of witnesses, to be precise 35 witnesses, have testified. Only 8 witnesses remain. Of those, 5 were stood down for reasons on the record while 2 were ordered to be recalled. In real terms, only two fresh witnesses are yet to take to the stand.

16. The 1st to 4th accused did not give any reasons why the trial should start afresh. True, section 200 (3) of the Code does not obligate them to do so. But considering such a huge number of witnesses have testified, I would have expected a basis for their election to be laid; or, paraphrased to demonstrate how their right to a fair trial would be prejudiced. I have kept in mind that a fair trial is not limited to the accused persons: it is a wide right that also extends to the prosecution and the victims' families.

17. In this case, all the accused have had counsel throughout and cross-examined the witnesses at length save for those that were stood down. 2 of the remaining witnesses are the subject of a recall order by the court. Like I stated earlier, ideally the trial should be handled by one court from plea to judgment. I have considered the years taken in the trial so far; and, taken judicial notice of the transfer policy or retirement age in the judiciary. So much so that even if the election by the 1st to 4th accused were to be



accommodated, I find that whereas it is possible it is highly improbable that a new judge would hear all the 35 witnesses afresh and conclude the trial within a shorter period.

18. In the upshot, the election by the 1st to 4th accused persons to recall all the witnesses or to have the trial commence afresh would defeat the ends of justice. It is accordingly disallowed. The trial shall thus proceed from the point at which Bwonwonga J had reached. To expedite the case, I will now grant hearing dates for 4 days back-to-back in the new court term to conclude the evidence of the remaining 8 witnesses.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF AUGUST 2023.

KANYI KIMONDO

JUDGE

Ruling Read Virtually On Microsoft Teams In The Presence Of: -

The accused persons.

Ms. Maina for the Republic instructed by the office of the Director of Public prosecutions.

Mr. Orlando holding brief for Mr. Wachira for the 1st accused.

Mr. Orlando for the 2nd accused.

Mr. Ongaro for the 3rd accused.

Mr. Mutitu for the 4th accused.

Mr. Mabachi for the 6th accused.

Mr. Mabachi holding brief for Ms. Nyamongo for the 5th and 7th accused persons.

Mr. E. Ombuna, Court Assistant.

