



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Muhanda & 3 others (Criminal Revision Application  
E237 of 2020) [2023] KEHC 26767 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL REVISION APPLICATION E237 OF 2020  
SC CHIRCHIR, J  
DECEMBER 19, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NANCY KEGODE MUHANDA ALIAS CLEMENTINA APONDI  
OBINYO ..... 1<sup>ST</sup> RESPONDENT  
BENSON CHIBAYI NYAPOLA ALIAS JOHNSON WETAVA  
WALUNYA ..... 2<sup>ND</sup> RESPONDENT  
TITUS BUSHEBI KANDALA ..... 3<sup>RD</sup> RESPONDENT  
MESCHACK OSUKA OWIRA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant herein filed a Notice of motion dated 15<sup>th</sup> May 2023 seeking the following orders;
  - a. That the application be certified as urgent and be heard on *ex parte* in the first instance (spent).
  - b. That this honourable court be pleased to call for the file in *Republic Vs. Nancy kegode Muhanda alias Clementina Apondi Obinjo & 2 others* (Kakamega Chief Magistrate’s criminal case No 196 of 2015) to examine the records of the subject criminal proceedings therein for the purpose of satisfying itself as to the correctness, legality and or the propriety of the order issued by Hon. Linus Kassin, CM on 16<sup>th</sup> November 2022 directing that the criminal case start de novo (hereinafter the impugned order).
  - c. That the honourable court be pleased to revise the impugned order and replace the same with an order directing that the criminal case proceeds from the last point that it had reached being the cross examination of the investigating officer, who had been stood down on 16<sup>th</sup> November 2020 upon the transfer of then trial magistrate.



- d. That the court be pleased to issue any other orders that the ends of justice demand.
2. The Application was supported by the affidavit of the prosecution counsel ,Ms Kagai. She states that although the Accused reserves the right to have a hearing of a case to start denovo when there is a change of the presiding Magistrate, that right is not absolute in instances where the matter had substantially proceeded and where it would be impossible to recall the witness.
  3. She avers that the said suit is a fairly an old one ; that it began in 2015; that it had progressed and therefore it is in the interest of justice that the matter proceeds from where it had reached.
  4. The Applicant further states that all the 5 prosecution witnesses had already testified and cross-examined ,save for the investigating officer who was stood down when the trial magistrate got a transfer.
  5. She states that due to medical reasons and effluxion of time, the witnesses can not recalled to testify and thus the order for de novo hearing would go against the interest of criminal justice. A medical report of the complainant was attached.
  6. According to the applicant, PW1 who is currently 87 years was extensively examined by the respondents and is at the moment paraplegic. And it would be a great injustice if the case would be concluded without his testimony.
  7. The Applicant further states that part of the exhibits produced being the Kshs 1.5 million which had been produced in court , for which the respondent had been charged for obtaining by false pretence, had already been refunded to PW1, the complainant in the case. . The money had already been used a been used and as such it was unavailable to be produced in court again if the hearing is to start afresh.
  8. She further states that when the impugned order was made, the then prosecution counsel failed to oppose the application as he was unaware that the circumstances of the complainant, in particular that the complainant had now been rendered paraplegic.
  9. She avers that none of the respondent would be prejudiced if the matter proceeded from where it stopped since each of the respondent had been represented by counsel and they had an opportunity to cross examine the witnesses which she claims was done extensively.
  10. The 3<sup>rd</sup> respondent filed a replying affidavit dated 5<sup>th</sup> June 2023. He stated that the issue of whether the criminal case against him and his Co- accused should start de novo was first brought up by the counsel on record on 8<sup>th</sup> February 2022. Then it was scheduled for mention on 8<sup>th</sup> and 28<sup>th</sup> April 2022 then on 13<sup>th</sup> and 14<sup>th</sup> march 2023 . That all these mentions was to enable the Applicant decide on whether the hearing should start denovo or not.
  11. He further sates that the delay in prosecution of the case , which is now being given as a reason against a fresh hearing was mainly caused by the Applicant.
  12. That in any event , the applicant did not oppose the application for the matter to proceed de novo and a consent was recorded to that effect.
  13. He believes that the reason why the Applicant is against the recall of the complainant is that the investigations officer in the case is apprehensive that the complainant would disclose to the court the fact that the ksh. 1.5 million had never been released to him.
  14. The respondent further claims that the copies of the medical report which suggested that the complainant was incapacitated mentally and unable to comprehend the proceedings and unable to be cross examined are wanting.



15. Benson Chibaya Nyapola, the 2<sup>nd</sup> respondent, too opposed the Application. He asserts that under section 200 of the criminal procedure code. the right on how the case proceeds belongs to him as the Accused person; that he now has a new Advocate and it is necessary that the case starts denovo for the new Advocate to understand the case well; that the prosecution had conceded to the Application for the case to start denovo and they cannot now turn around and oppose it.
16. The 2<sup>nd</sup> respondent further contends that the prosecution is responsible for the delay that has been occasioned in this matter and they cannot use same delay to deny him the election he has opted for.
17. It is further his contention that the medical documents submitted does not show that the complainant is incapable of giving evidence.
18. The rest of the respondents did not oppose the Application.

### **Applicant's submissions**

19. The Applicant has relied on the case of *Stephen Mburu Kinyua vs. republic* HCCR 4 of 016 which sets out the guiding principles that the court ought to apply when making a determination based on section 200 (3) of the *criminal procedure code*.
20. The Applicant reiterated that it would be impossible to start a new trial as the complainant who was the key witness was sick and was mentally incapacitated since he had memory loss and could not remember the events of the case
21. On the time that has lapsed since the commencement began , the Applicant cites the constitutional requirement that a trial should commence and be concluded without undue delay. The Applicant further places reliance on the case of *Ndegwa versus republic* (1981) KLR 543 .
22. The Applicant further submits that the interests of the complainant ought to be safeguarded. In support of this argument the applicant has relied in the case of *Nyabuto & another versus Republic* (2009) KLR 409 and *Peter Onyango Odongo & 2 others* (2015) eKLR which emphasizes the need to balance the rights of the victim and the accused .

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' submissions**

23. The 1<sup>st</sup> and 3<sup>rd</sup> respondent submit that the order for the case to start denovo may not necessarily require the recalling of all witnesses; that there is no evidence submitted to show that the complainant is incapable of testifying; and finally that no prejudice will be suffered by any of the parties if the case starts denovo.

### **Determination.**

24. The issue before Court is the exercise of the trial court's discretion under section 200(3) of the *Criminal Procedure Code*. The section provides as follows: -
  - (1) Subject to sub-section (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) .....
- (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 re-heard and the succeeding magistrate shall inform the accused person of that right.
- (4) ....."
25. In the case of *Abdi Adan Mohamed v. Republic* [2017] eKLR the court of Appeal had this to say about the Application of section 200(3) of the *Criminal procedure code*: "Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the *Constitution*. It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial *de novo*, how far has the trial reached, 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. See *Joseph Kamau Gichuki v. R* CR. Appeal No. 523 of 2010, cited in *Nyabutu & Another v. R*, (2009) KLR 409....."
26. What are the circumstances in this case? The case started in 2015, that is about 8 years ago. The prosecution has called a total of 5 witnesses; it is reported that the matter has been heard by about 4 magistrates. The key witness, the complainant was reportedly 87 years at the time of filing of this Application. A medical report dated 25.4.2023 was produced showing that he suffers from Parkinson disease. The medical report dated 25.4.2023 concludes by stating that " currently he has tremors of upper limbs and paralysis of lower limbs therefore he cannot write or sign any document"
27. The world health organization ( WHO) defines Parkinson disease as "a brain condition that causes problems with movement , mental health, sleep , pain and other health issues- common symptoms include tremors, painful muscle contractions and difficulty speaking" ( Ref: <https://www.who.int>)
28. In the light of the above medical evidence presented , and the understanding of the nature and effect of the complainant's medical condition , to insist that he comes back to testify would be to pay lip- service to the course of justice. It is clearly evident that the complainant is unlikely to be an effective witness .
29. I have noted the respondent's complaint that the Applicant is responsible for the delay that has been occasioned on this case, and presumably the prosecution should carry its own cross. However I have perused the record, and the scenario is different . Whereas it is true that the case has been bedevilled by several adjournments , the said adjournments have not been on account of the prosecution alone. For instance, I counted two Applications by the respondents for recusals by the trial magistrates . Each of these Applications were granted , and meant an adjournment on the dates that the case was otherwise meant to proceed; I also counted six ( 6) adjournments caused by the absence of the various Accused persons on grounds of illness ;one by one of the defence counsel on account of illness also. In short, it is not true to state that the Applicant has been solely responsible for the delay in the prosecution of the case.
30. Nevertheless, delay means the memories are fading and apart from the complainant, the other witnesses too, on account of the 8 years that have gone by.



31. I have also considered that all the prosecution witnesses had testified, save the investigation's officer who was stood down before cross- examination.
32. The Accused persons were represented throughout the trial by Advocates who duly cross- examined the witnesses.
33. The hearing of this matter has also been characterised by a lot of "push and pull" between the parties and a lot of unnecessary drama. Litigation on this matter needs to come to an end , and starting the case denovo will not help in achieving the said objective.
34. Duly guided by the guidelines in *Adan's case*( *supra* ), am of the considered view that starting the hearing denovo in this case will negate the interest of justice.
35. I consider the order of the trial court to start the hearing denovo to have been improper to warrant the revision by this court within the context of section 362 of the criminal procedure code.
36. consequently I hereby make the following orders:
  - a). The lower court order of 16<sup>th</sup> November 2022 directing the case to start denovo is hereby set aside .
  - b). The hearing of Kakamega chief Magistrate court criminal case No. 196 of 2015 to proceed to proceed from where it had reached.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER, 2023.**

S. Chirchir.

In the presence of :

E. Zalo- Court Assistant.

Ms. Osoro for the Applicant.

