



**Republic v Njeru (Criminal Revision E108 of 2021)
[2022] KEHC 493 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E108 OF 2021
LM NJUGUNA, J
APRIL 26, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

JEREVASIO MWANIKI NJERU RESPONDENT

RULING

1. The applicant herein moved this court vide an application dated 10.11.2021 and filed under certificate of urgency and wherein the following orders have been sought;
 - a. That this Honourable court stay proceedings in MCSO 28 of 2020 (R Vs Jerevasio Mwaniki Njeru) pending the hearing and determination of this application.
 - b. That this court be pleased to call for the record in MCSO 28 of 2020 for purposes of satisfying itself on the correctness, legality and propriety of the orders of Hon. Nyakweba (SPM) issued on the 18th August 2021.
 - c. That this Honourable court be pleased to transfer MCSO 28 of 2020 to the Chief Magistrates Court in Embu or any other Court of competent jurisdiction for hearing and determination.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant. It is the applicant's case that the trial is in respect to the charges of rape contrary to section 3(1) (a) (b) as read with section 3(3) of the *Sexual Offences Act* and an alternative charge of committing an indecent act with an adult contrary to section 11 (a) of the *Sexual Offences Act*. That the trial commenced on 09.06.2020 before Hon. M.N.Gicheru C.M. (as he then was), the prosecution called a total of 18 (Eighteen) witnesses and a total of 23 documents were marked for identification and produced as evidence and only one witness is remaining before the prosecution can close their case.



3. That later the file was allocated to Hon. Nyakweba, Senior Principal Magistrate when directions were taken under section 200 of the Criminal Procedure Code whereby the accused person demanded that the hearing start de novo, an application which the state opposed via an affidavit sworn on 29.07.2021. It is the prosecution's case that having the matter start de novo would directly impact on the successful prosecution of the case and further that, putting the victim who has suffered emotional and psychological trauma on the stand again, will greatly be detrimental to the prosecution's case. It was further averred that it would be inconvenient for the case to start de novo given that the victim who was kept under witness protection under the state agency for purposes of her safety has been released and recently her whereabouts are unknown.
4. The applicant stated that one of the witnesses namely PC Nicholas Sang who previously testified as a prosecution witness is currently facing charges at the High Court at Nairobi and so, recalling him wouldn't be easy; that CCIO Madam Margaret Apima has also since relocated to France on official duties and is currently unavailable to testify and in that, the Officer Commanding Manyatta police Station, Mr. Yahya Abdullahi is no longer serving in Embu county and thus securing his attendance would require colossal expense on the state's financial resources thereby causing delay in the hearing and determination of MCSO 28 of 2020.
5. The application was opposed vide a replying affidavit sworn on 17.11.2021 by the respondent wherein he deposed that the application is brought in bad faith in that, the same is an afterthought. He deposed that if the applicant is not satisfied with the said order, the applicant ought to have preferred an appeal immediately the said order was issued. That the applicant has not stated how starting this matter de novo would impact on the success of this matter since the same would not water down any evidence unless the applicant had relied on untrue facts.
6. It was further deposed that the applicant has not imputed improper motive on the court since the alleged impropriety has not been pointed out. It was deposed that the witnesses are all within reach and that there will be no prejudice if the matter starts de novo. Further that the respondent will suffer greatly if this matter does not start de novo owing to the seriousness of the charges he is facing and the fact that the trial court will not be in a position to observe the demeanour of the witnesses who previously testified.
7. The application was canvassed by way of written submissions and wherein the applicant submitted to the effect that section 200(3) only makes it mandatory for the succeeding magistrate to inform the accused of his right to have any of the witnesses recalled for cross examination or to testify again but it is not mandatory to recall the witnesses for either cross examination or to give evidence. Reliance was made inter alia, on the case of *Ndegwa v Republic* (1985) KLR. It was submitted further that, the order to direct that SO Case No. 28 of 2020 should start de novo was incorrect, improper and illegal and the fact that the matter has only one remaining witness confirms that the applicant has a prima facie case to justify the orders. On the threshold for granting conservatory orders sought herein, the applicant relies on the decision in *Kelvin Mwiti & others Vs Kenya School of Law* and that of *Peter Ngunjiri Vs Director of Public Prosecutions & 2 others*.
8. On the grounds upon which the orders sought herein can be granted, the applicant cited and relied on the Supreme Court of India decision in the case of State of *Maharashtra & others Vs Arun Gulab Gawabi* (civil Appeal 590 of 2007). In concluding its submissions, the applicant submitted that the right for a matter to start denovo is not absolute and averred that, in this case, the exigencies of the circumstances require that the matter should proceed from where it had reached for ends of justice to be met and the order for the matter to start denovo is against the rules of natural justice and is unconstitutional for violating the rights of the victim.



9. The Respondent in opposing the application submitted that the same has been brought in bad faith in that it took the applicant more than two months to seek for revision of the said order. It was submitted that the applicant has not shown the illegality caused by the order to have the matter start de novo in that a matter can start de novo even at the point when the matter in question had reached defense stage so this should not be an exception. It was his case that apart from the complainant and the doctor, all the other witnesses are police officers whose attendance can easily be procured. That the seriousness of this case demands that the magistrate hearing it should see, hear, assess and gauge the demeanour and credibility of the witnesses. Reliance was made on the case of *Ndegwa v R* (1985) and in the end, the respondent prayed that the application herein be struck out for lack of merit.
10. I have considered the application herein, the reply by the respondent and the rival submissions by the parties. I note that the application has been brought under section 362,364 of the *Criminal Procedure Code*, Section 3(b) (v) and 9 of the *Victim Protection Act*, No. 17 of 2014. Section 362 bestows this court with jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying 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. As can be seen from this section, this court's jurisdiction under that section is not only exercisable where the subordinate court has made a finding, sentence or order but it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.
11. I note that the application herein is in regards to the proceedings and orders of Hon. Nyakweba, Senior Principal Magistrate made on 18.08.2021. The question which ought to be answered in my view is whether the trial court's proceedings and or orders on the material date ought to be subjected to revision under the jurisdiction bestowed on this court by section 362 of the Criminal Procedure Code.
12. Under Article 165, this court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This is in addition to the revisionary jurisdiction under section 362 of the *Criminal Procedure Code*.
13. Under section 364(b) of the *Criminal Procedure Code*, this court in exercise of its revisionary jurisdiction is bestowed with the powers to alter or reverse an order (in the case of any other order other than an order of acquittal). Section 367 further provides that when a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.
14. Section 200(3) of the *Criminal Procedure Code* provides:-
 - “ 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.



- (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”
15. It should be noted Section 200(3) of *C.P.C.* gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witnesses recalled for cross-examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned.
16. Section 200 (3) of *CPC* entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.
17. In the case of *Ndegwa v Republic* [1985] KLR at 534 the Court of Appeal stated:-
“Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of 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 or owing to the latter becoming unavailable to complete the trial.”
18. In the same breadth, in the case of *R v Wellington Lusiri* [2014] eKLR the Court emphasized the need for succeeding magistrate to continue with the proceedings under Section 200 by informing the accused of his rights.
19. In my considered view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by the constitution under Article 50. (2) of the constitution which states every accused person has the right to a fair trial, which includes other rights as set out thereunder. Section 200 (3) of Criminal Procedure Code as couched or framed is silent on the rights of the complainant.
20. In considering Section 200 (3) of the Criminal Procedure Code as regards the information given to the accused, the same information should be extended to the complainant in equal measure, Article 159 (2) (a) (b) and (d) of the Constitution deals with justice to all irrespective of status, justice not being delayed and being administered without undue regard to procedural technicalities. That the accused and the complainant should get justice without delay and should be administered without undue regard to procedural technicalities.
21. The Court in determining an application under Section 200(3) of Criminal Procedure Code should comply with Article 28 of the constitution which provides every person has inherent dignity and the right to have that dignity respected and protected. Further under article 47(1) of The Constitution every person has the right to administrative actions that is expeditious, efficient, lawful, reasonable and procedurally fair. [See *Director of Public Prosecution v Kipyegon Josphat & 2 Others* [2019] eKLR].
22. In *Ndegwa V. R* (Supra) it was held that Section 200 (3) *CPC* should sparingly be applied. The application of Section 200 (3) *C.P.C.* in my view is commonly abused especially where the application is made with a view to defeat the ends of justices and especially where the accused knows the witnesses cannot be traced or procuring their presence may be difficult, the complainant cannot be traced or cannot get the witnesses without enormous expense. In my view, such applications should not be granted more so if as per the provisions of the law, the applicant had an opportunity to cross-examine witnesses who already testified in the matter. [See *Joseph Kamau Gichuki v Republic* [2013] eKLR].



23. In my view the ruling of the learned trial magistrate made on 18.08.2021 ordering the case to start de novo was incorrect as it was granted against the rights of the complainant given that only one witness remained for the applicant to complete its case and of course with the would be challenges that the prosecution would have to contend with in order to finalize the matter herein.
24. In view of the foregoing, I find that the application has merits and it is hereby granted in terms of Prayer 2. As for prayer 3, I find not merit as no reasons have been given to this court why the case should be transferred to another court.
25. It is ordered.

DELIVERED, DATED AND SIGNED ATEMBU THIS 26TH DAY OF APRIL, 2022.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

