Director of Public Prosecutions v Chikamai (Criminal Revision E032 of 2021) [2022] KEHC 11282 (KLR) (31 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL REVISION E032 OF 2021

F GIKONYO, J

MAY 31, 2022

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

AND

JOHN CHIKAMAI ..... RESPONDENT

(From the Ruling of Hon. G.N. Wakahiu (C.M) in Narok CMCR No. 481 of 2015 on 13th February 2020)

RULING

1. The state has written an undated letter filed in court on 15th July ,2021 pursuant to Section 200(3) ,362 and 364 of the C*riminal Procedure Code*.

2. The State seeks a review of the orders issued in Narok Criminal Case No. 481 of 2015 on 13/2/2015 which directed that the said case to start de novo. The specific orders sought are:

    a. That the honourable court does call up criminal case no.481 of 2015 for review and stay the ruling issued on 13th February 2020 pending hearing and determination of the application,

    b. That the honourable court stays the proceedings in criminal case no. 481 of 2015 pending determination of this application,

    c. That the honourable court reviews the ruling issued on 13th February 2020 by the chief magistrate court no. 2 directing that the trial begins de novo on its correctness, legality and propriety; and

    d. The honourable court sets aside the ruling issued on 13th February 2020 and directs that the matter proceeds from where it had reached and the defence to proceed with their defence hearing.

3. The genesis of the complaint as captured in the said letter inter alia; that the trial commenced in the year 2015 before Hon. W. Juma chief magistrate court 1. The prosecution called its witnesses and closed its case on 11th September 2018. The court delivered its ruling on 25th April 2019 and placed the accused on his defence. The accused opted to give sworn evidence and was to call two witnesses.

4. On 16th July 2019, the defence applied to have the case transferred to a different trial magistrate and directions under section 200(3) of the Criminal Procedure Code were taken before Chief Magistrate G.N. Wakahiu court no. 2. The accused demanded that the case begins de novo. The prosecution objected to the accused's application for the matter to begin de novo. The court delivered its ruling on 13th February 2020 and directed the matter to begin de novo. The matter has not proceeded since then and it is only recently that the trial court file was traced.

5. The applicant contends that the trial court failed to consider the length of time that has passed since the onset of the trial, that the matter had already reached defence hearing, the difficulty the prosecution will have in tracing the witnesses, the possibility of memory loss on the witnesses due to passage of time and the prejudice to be suffered by the prosecution if the matter began de novo.

Applicant's submissions.

6. The applicant submitted that the order for the matter to begin de novo caused injustice to both the complainant and the accused person. This violates the principle that justice delayed is justice denied.

7. The applicant submitted that the trial court failed to consider the stage where the trial had reached before the respondent applied to have the matter begin de novo. The accused on the onset did not have legal representation when the evidence of the complainant was taken. The defence on appointment of counsel made an application to recall the witnesses who had already testified to test their evidence. The defence only recalled the complainant and withdrew their application to further cross examine other witnesses. When the accused was placed on his defence he indicated that he would give sworn evidence and call two witness an indication of how he would conduct his defence. therefore, there are no sufficient reasons that would warrant the prosecution witnesses to re testify six years after the commencement of the case.

8. The applicant submitted that the trial court failed to consider the prejudice the prosecution will suffer in tracing the witnesses who have testified in this case. The trial court failed to consider the effect it would have on the victim who under the law was still a child when the offence happened. Crucial witnesses testified in 2015.therefore, there is high likelihood of memory loss with passage of time. The witnesses are also not readily available.

9. The prosecution also contends that starting the case de novo would amount to the complainant reliving the heinous ordeal that she underwent and therefore re opening old scars causing psychological torture.

10. The applicant submitted that section 200(3) of the CPC is mandatory in so far as it places a duty upon the succeeding magistrate to inform the accused person his rights under that section. Where the accused makes his election, the court should weigh the circumstances of that particular case and either accede to the request or order the matter to proceed from where it had reached.

11. The applicant submitted the trial court failed to consider the rights of the victim that she was not summoned to give her own opinion on the accused's application before the trial court made a determination that would adversely affect her.

12. In conclusion, the applicant prayed that the court reviews the ruling issued on 13/02/2020 by the chief magistrate court 2 directing that the trial begins de novo on its correctness, legality and propriety and the court sets aside the aid ruling and directs that the matter proceeds from where it had reached and the defence to proceed with their defence hearing.

13. The applicant has relied on the following authorities;

    i. Article 50 (2) (e) ,53 (2), and 159 (2) (b) of *the Constitution*.

    ii. *James Omari Nyabuto & Another v Republic* [2009] eKLR

    iii. *Republic V Valentine Maloba & 2 Others* [2017] eKLR.

    iv. Section 146(4) of the *Evidence Act*

    v. *Republic v Benson Wangalwa* [2014] eKLR.

    vi. *Director of Public Prosecutions v Kipyegon Josphat & 2 Others* [2019] eKLR.

    vii. *Joseph Kamau Gichuki vs Republic* [2013] eKLR,

    viii. *Tom Ndombi Alias Shibundu & Anor v Republic* [2017] eKLR, and

    ix. *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 Others* [2015] eKLR.

Respondent's submissions.

14. The respondent submitted that the offence for which the respondent is charged is a serious offence whose penalty is long jail sentence. Therefore, there is need for succeeding magistrate to see the demeanor of the witnesses who testified before the former trial magistrate.

15. The respondent submitted that the provisions of Section 200 of the CPC are mandatory and cannot be sacrificed, wished away or abandoned in protecting the liberty of the subject. It is upon the respondent to choose whether he wants the case to start de novo or the magistrate to adopt the evidence recorded by his predecessor.

16. In conclusion, the respondent submitted that it is only fair and in the interest of justice that the trial starts de novo.

17. The respondent has relied on the following authorities;

    i. Section 201(2), 200, and 199 of the CPC.

    ii. *Ndegwa v R* [1985] eKLR 535.

    iii. *Kabiro v Republic* [2004] eKLR.

    iv. *Ibrahim Adan v Republic* [2001] eKLR.

    v. *Joseph Gituku Wangai &5 Others v Republic* [2005] eKLR.

    vi. Petition 2 Of 2015 *Office of The Director of Public Prosecutions v Peter Onyango Odongo And 2 Others* [2015] eKLR

    vii. Article 50, 50 (1) Of *the Constitution* Vs Wellington Lusiri [2014] eKLR

    viii. *Republic Versus Tititi Potot & Another* Narok Criminal Case No. 19 Of 2017.

Analysis and Determination

18. I have carefully considered the application and the parties' rival submissions together with the authorities relied on. I have also considered the record of the trial court.

19. Much judicial ink has been spilt on the purport and scope of Section 200 of the CPC. I do not wish to multiply those judicial authorities. Except to state that; whereas it is important for the predecessor court to conclude a trail, for it had the advantage of observing the demeanor of witnesses, contingencies in life, and demands of justice justify a successor court to continue with a case on the basis of evidence taken by the predecessor. And, it is now generally accepted that section 200 of the CPC only obligates the court to inform the accused of his right to demand that any witness be re-summoned and reheard, but leaves the determination of the request thereof to the discretion of the court, of course upon legal consideration.

20. The major considerations in the exercise of discretion under section 200 include; whether it is convenient to commence the trial de novo, how far the trial has reached, the availability of witnesses who have already testified, possible loss of memory by the witnesses, the time that has lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused (*Abdi Adan Mohamed v. Republic* [2017] eKLR)

21. I should add a new element to these considerations; prejudice to the rights and protections of the victims during trial under the *Constitution* and the Victims Protection Act. More specifically, a reading of section 9 of the *Victims Protection Act* reveals inter alia, that a victim has a right to have the trial begin and conclude without unreasonable delay, and to present view on important stages or incidents of trial such as plea bargaining, bail and I should add, whether the trial should start de novo. Section 200 certainly affects the trial; duration as well as the core thereof where witnesses may not be found or have suffered memory loss.

22. Therefore, the overall threshold in determining whether a trial should start de novo should be; if the trial will be materially prejudiced, the court must not order a case to start de novo under section 200 of the CPC.

23. On the basis of the foregoing discussion, the respondent's argument that it is either the accused to choose whether he wants the case to start de novo or the magistrate or judge can adopt the evidence recorded by his predecessor, is erroneous.

Applying the test

24. In the present case, the trial began on 7th April 2015 before C.M. W. Juma, when the accused took plea. At that time the accused was acting in person. The complainant testified in the year 2015 and the accused person cross examined her.

25. On 15th March 2016 Mr. Kamwaro came on record for the accused person and sought to recall prosecution witnesses for purposes of further cross examination- that is PW1, PW2 and PW3. He however dispensed with the recall of PW2 and PW3 and sought only to cross examine PW1.

26. The Prosecution closed its case on September 11, 2018 after it had called all of its witnesses. The court then delivered its ruling on a case to answer on April 25, 2019 and placed the accused person on his defence. The accused person opted to give sworn evidence and call two witnesses.

27. On July 16, 2019 the defence applied to have the case transferred to a different trial magistrate. Directions under Section 200(3) of the CPC were taken before Hon. G.N. Wakahiu court no. 2. The accused opted to have the matter begin de novo.

28. The prosecution objected to the accused's application for the matter to begin de novo. The trial court in its ruling delivered on February 13, 2020 directed that the matter begins de novo.

29. The trial has taken over 7 years. Further the trial has advanced and was at the defence stage.

30. Fatigue of the witnesses, the likelihood of the unavailability of witnesses, the prolonged period that has lapsed since commencement of trial in 2015, and prejudice to victim as well as the prosecution's case were raised before the trial court, but the Learned Magistrate seemed not to be persuaded. These are important considerations that guide exercise of discretion. Of value, the trial court did not consider these as important considerations, thus, injudicious exercise of discretion.

31. In sum, I find that; first, the trial court did not consider the relevant factors and/or principles before it ordered that the case should start de novo. Second, the trial court did not consider the objection raised by the prosecution. Third, the did not consider or weigh prejudice to the prosecution, victims as well as the accused in making directions under Section 200 of the CPC.

32. The prosecution has candidly stated the difficulties it will face in procuring witnesses. Section 200 of the CPC is not intended to aid, or decimate a case against the accused especially where the time that has lapsed is quite considerable in that there is high possibility that witnesses may not be found or have suffered memory loss. Court should be careful not to allow section 200 of the CPC to become a source of injustice.

33. In the premises, I am satisfied that the order of the trial Magistrate was made without consideration of relevant factors, thus, in error of principle. I set aside the order of *de novo* hearing ordered on 13/2/2020 and in lieu thereof, direct and order under section 200 of the CPC; that the trial shall proceed from where it the predecessor trial magistrate left.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31ST DAY OF MAY 2022

F. GIKONYO M

JUDGE

In the Presence of :

The Respondent

Ms. Torosi for the Applicant

Mr. Kasaso - CA