



REPUBLIC OF KENYA



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**Ngome v Republic (Criminal Appeal E041 of 2022)
[2022] KEHC 17152 (KLR) (22 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E041 OF 2022
A. ONG'INJO, J
DECEMBER 22, 2022**

BETWEEN

NYAWA MBETSA NGOME APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Ruling by Hon. Rita Orora, Resident Magistrate on 30th April 2022 in Mombasa Chief Magistrate's SO No. E094 of 2021, Republic v Nyawa Mbetsa Ngome)

JUDGMENT

Background

1. The appellant herein filed a petition concurrently with a Notice of Motion application dated April 7, 2022 and filed on April 8, 2022 under Certificate of Urgency, brought under section 200 (3) and (4) of the *Criminal Procedure Code* and all other enabling provisions of the law. The court ordered that the application be heard and determined on appeal where the appellant prayed for the following orders: -
 1. That the application is urgent and be heard on a priority basis.
 2. That this honourable court stay the proceedings in the Magistrate's court till the hearing and determination of this appeal.
 3. That this honourable court set aside the ruling and order a new trial as per section 200 (4) of the *Criminal Procedure Code*.
 4. That the court be pleased to make such other or further orders as may appear just and expedient.
 5. That there be no orders as to costs.



2. The application was supported by the grounds therein and the supporting affidavit sworn by the Advocate herein, Charity Wanjiku Gituire, on April 7, 2022.

Appellant's Submissions

3. The appellant submits that he was charged with the offence of defilement contrary to section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#) No. 3 of 2006, a matter which is still pending in the Magistrate's Court.
4. The Appellant submits that the case was succeeded by a new magistrate, Hon. Rita Orora, Resident Magistrate. That the magistrate read to the Accused section 200 (3) and (4) of the [Criminal Procedure Code](#) since the part of the evidence had already been recorded by her predecessor. That the accused person demanded that the matter starts de novo but the State Counsel objected stating that the Accused had already cross-examined the witness and therefore the reasons provided was not sufficient.
5. The appellant submits that the honourable magistrate ruled on March 30, 2022 that the matter do proceed from where it had stopped despite the fact that he had demanded the witnesses who had testified be resummoned and reheard, necessitating this appeal.
6. The appellant submits that on 19th July, this High Court partially allowed the Appellant's Notice of Motion and Petition of Appeal dated April 7, 2022 where it was ordered that PW2 be recalled for hearing of her testimony and cross examination. That the submissions herein are to determine whether PW1 should be recalled for hearing of her testimony and cross-examination. That PW1 is a minor aged 11 years and the sentence according to section 8 (2) upon conviction is life imprisonment. That this charge is mandatory and its penalty is harsh.
7. The Appellant submits by citing the case of Office of [Director of Public Prosecutions v Peter Onyango Odongo & 2 others](#) [2015] eKLR, at the High Court of Siaya, Makau Aaron James in his judgement among other orders stated that: -

“Section 200 (3) of the [Criminal Procedure Code](#) (cap 75) laws of Kenya is Constitutional and valid as it protects the rights of an accused person to a fair trial in terms of article 50 of the Constitution of Kenya 2010, however the same is not exhaustive in that it is silent on the rights of the Complainant in cases taken over by the succeeding magistrate, however that notwithstanding the succeeding magistrate has an obligation before making final orders to invoke the provision of the Bill of rights to ensure the Complainant's rights to a fair trial is factored in.”

8. The appellant submits by citing the case of [Anthony Otieno Ndonji v Republic](#) (2019) eKLR, where the appeal was allowed. The appellant further cited the case of [Paul Mwangi Wathika v Republic](#) (2021) eKLR, where the court stated as follows: -

“The conclusion that witnesses could not be traced was obviously not based on any evidence. That this allegation of non-availability of witnesses came from the bar; the investigation officer who is alleged to have been the source of this information never informed the court on oath whether he had made any efforts to trace any of the witnesses who had testified and that such efforts had not yielded any fruits. As much as the trial court retained the discretion to recall or not to recall any or all the witnesses who had testified, the decision not to recall them in this instance was more or less speculative.”



Respondent's Grounds of Opposition

9. The respondent opposed the application on grounds: -
 1. That the application amounts to an abuse of the process of the court and is purely vexatious and unmeritorious and is intended to delay the conclusion of the trial case.
 2. That the prosecution case will be prejudiced as there will be difficulty to find all the witnesses who had testified.
 3. That the accused person had participated in the trial by cross-examining the witnesses whom he now wants recalled.
 4. That the accused has not demonstrated how he would suffer prejudice if the case is heard to its logical conclusion.
 5. That the application is merely meant to delay the trial and occasion a declaration of a mistrial thereby necessitating the recalling of all prosecution witnesses without a proper legal basis.
 6. That it is to the public interest that criminal cases be heard and concluded without parties seeking intervention of the appellate court at an interlocutory stage.
 7. That it is in the interest of justice and public interest that the orders sought herein be declined and the application be dismissed.
 8. In view of the above, this appeal and application is merely a fishing expedition and the same ought to be dismissed.

Analysis and Determination

10. Having considered the petitioner's Petition of Appeal, the submissions and the respondent's grounds of opposition, the issue for determination is whether PW1 can be recalled for hearing of her testimony and cross examination.
11. The appellant's prayer for recalling PW1 for hearing of her testimony and cross examination in accordance with section 200 (3) and (4) of the *Criminal Procedure Code* was on the basis that the penalty for the offence herein is mandatory life sentence and is harsh. The said section provides: -
 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
 4. Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.
12. Upon perusal of proceedings of the lower court, this court has established that on January 13, 2022, the said court gave directions that the accused person was given an opportunity to cross examine the witness and his statement that he did not ask all the questions during cross examination is not sufficient reason why this matter should start de novo. The court ordered that the matter proceeds from where it had stopped.
13. Upon further perusal of the proceedings, on March 30, 2022, an advocate for the accused came on record and prayed for review of earlier directions for the case to start afresh and that failure to recall the



witnesses would prejudice the accused. The court gave an order that it already made its determination and that the accused and his counsel had not given sufficient reasons why the matter should start de novo. The court stated that if the accused felt that he did not ask proper questions, cross examination, the proper application was re-call of witnesses. The court then ordered that the matter proceeds from where it stopped.

14. In *Ndegwa v. R* (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A held: -

“It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion.for these reasons we have stated, in our view the trial was unsatisfactory.”

15. The learned Judges in *Ndegwa (supra)* emphasised that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They said: -

“...No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration....”

16. In *Abdi Adan Mohamed v Republic* [2017] eKLR, Makhandia, Ouko & M’inoti, JJ.A held: -

Where, in the language of section 200(3) the accused demands that any witness be “re-summoned and re-heard,” the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re-summoned is deceased, to insist on calling such a witness. Similarly, if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith.

17. This court finds that the law is very clear on section 200 (3) and (4) of the *Criminal Procedure Code*. The prosecution has not established that the witness is unavailable due to death, or cannot be found, or is incapable of giving evidence, or whose presence cannot be obtained without unreasonable delay or expense. The petitioner herein prayed for recalling of one witness, PW1, who is available. This court further finds that the trial court applied section 200 of the CPC without considering the overall implications on the administration of justice. Additionally, there is no proof by the prosecution that prejudice will be suffered by the complainant.

18. In conclusion, the appeal herein is allowed. PW1 should attend for purposes of cross examination by the defence counsel.

Dated, signed and delivered in Open Court/online through MS TEAMS,

This 22th day of **December 2022**



HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Barile- Court Assistant

Mr. Ngiri for Respondent

Ms. Wanjiku Advocate for the Appellant

N/A for Appellant

