REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CRIMINAL REVISION CASE NO 308 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

VERSUS

THE CHIEF MAGISTRATES COURT KIAMBU..... RESPONDENT

AND

MUKTAR SAMA OLOW.....1ST INTERESTED PARTY

PIUS NGUGI.....`.. 2ND INTERESTED PARTY

REPUBLIC..... DPP

(Being a Revision of the Ruling of Hon. S. Atambo, SPM of her Ruling dated 12th June 2020 in Kiambu Chief Magistrate's Criminal Case No. 1170 of 2016 Republic -v- Muktar Olow Saman)

R U L I N G

1. The Director of Public Prosecution (DPP) has moved this court by Notice of Motion application dated 12th June 2020 seeking the following order:

> ***"That the court be pleased to review, vary, reverse and to alter the Ruling of the trial Magistrate (Hon. S. Atambo) delivered on 12th June 2020 directing that the trial start de novo. In lieu thereof, the court be pleased to order that the case proceeds to defence hearing as earlier ordered by the Hon. B. Khaemba.***
>
> ***That the case proceeds before any other magistrate other than the Honourable S. Atambo."***

BACKGROUND

2. Muktar Saman Olow, the 1st interested party in this action (hereinafter Muktar) was charged with eight counts. On the 1st count Muktar was charged with the offence of making a Document without authority contrary to Section 357 (a) of the Penal Code. On the second to Sixth Counts Muktar was charged with the offences of forgery contrary to Section 345 as read with Section 349 of the Penal Code. On the Seventh Count Muktar was charged with the offence of making a document without authority contrary to Section 357 (a) of the Penal Code. On the eighth count Muktar was charged with the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code. The trial for those offences proceeded before **Hon. B. Khaemba** (as he then was hereinafter Khaemba) up to July 2019. On 25th September 2018, Khaemba rendered a Ruling that Muktar had a case to answer in respect to counts one to the seventh. Muktar by that Ruling was found to have no case to answer in respect to the eighth count. He was therefore acquitted on that count under Section 210 of the Criminal Procedure Code.

3. Khaemba resigned from the Judiciary and the case was allocated to **Hon. S. Atambo** (hereafter the trial Magistrate) to proceed with the same. It would seem, from the trial court's proceedings, that on 5th August 2019, even before the trial Magistrate sought Muktar's election, as provided under Section 200 of the Criminal Procedure Code, Muktar's learned counsel informed the court that Muktar's election was for the trial to start *de novo.* The trial Magistrate by a Ruling dated 12th June 2020 ordered the trial to start *de novo*. It is that Ruling the DPP seeks this court does review, vary, reverse and/or alter.

4. It needs to be stated that the charges against Muktar were as a result of complaint made by **Pius Ngugi**, the 2nd interested party in this action (hereinafter Pius) in the year 2011.

DPP's ARGUMENTS

5. The application by DPP is supported by the affidavit of **Chief Inspector Humprey Kaimenyi.** He is the Investigating Officer (1.0.) of the case, the subject of this revision application. The I.O. in making reference to the affidavit, which he deponed in opposition to Muktar's application for the trial to start *de novo,* stated that nine prosecutions witnesses, out of 21 witnesses who testified in the trial before Khaemba, were for various reasons unavailable to testify and therefore that an order for the trial to start *de novo* would be in the absence of those witnesses and would be prejudicial to the prosecution.

According to the I.O. the application by Muktar to start the trial *de novo* was an attempt by him to delay the conclusion of the Criminal trial. The I.O. preceded to set out how the prosecution of the criminal trial had been delayed as follows; that Muktar was originally charged with the same offences in the year 2011 but because Muktar raised a complaint to DPP's office that case was withdrawn; Muktar was charged in the present criminal in case for the same offences in the year 2016, 5 years after the withdrawal of the initial case; Muktar after commencement of his trial in the year 2016 filed case in the High Court being **Petition No. 397 of 2016** seeking to stop the trial and on that prayer being rejected in the High Court he appealed the same before the Court of Appeal being **Civil Application No. Nairobi 250A of 2017,** this too was rejected by the Court of appeal. The I.O. also referred to various adjournment made by Muktar which adjournments Muktar made after the trial court made a finding that he had a case to answer. Further that Muktar by a letter dated 1st February 2019 wrote to DPP seeking that the criminal case be withdrawn because, as he stated, it was as a result of trumped up charges. The I.O. surmised and stated that the application to start the trial *de novo* was an attempt by Muktar to delay and defeat the course of justice.

6. The I.O. further deponed that in allowing Muktar's application, for the trial to start *de novo*, the trial Magistrate ignored the submissions made on behalf of DPP, that over 20 prosecutions witnesses had testified and were not available to testify again; that in that Ruling the trial Magistrate failed to consider the significant expense the state will incur to procure all the witnesses who had testified and who had relocated out of Kenya; further that the trial Magistrate had failed to consider the order for the trial to start de novo would lead to delay in the conclusion of the case in view of the COVID – 19 pandemic and the protocols that need to be observed; and that the trial Magistrate failed to note that Muktar, prior to applying for the trial to start *de novo,* had not complained nor challenged the authenticity of the proceedings recorded by Khaemba.

7. DPP amplified the deposition of I.O. in the written submissions before court. In that regard DPP submitted that this court has jurisdiction to entertain the present application placing reliance on the case **Joseph Nduvi Mbuvi -v- Republic (2019) eKLR**. In that case **Justice Odunga** stated.

> "*11. A strict reading of section 362 of the **Criminal Procedure Code**, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine **the regularity of any proceedings of any such subordinate court** as well.*""

8. DPP further submitted that this court should disturb the Ruling of the trial court because the Learned trial Magistrate failed to consider the tests, discussed in the decisions by the High Court and the Court of Appeal, before ordering the trial to proceed *de novo*.

9. DPP by its submissions also faulted the learned trial Magistrate for failing in her Ruling to consider submissions made on his behalf particularly on availability of prosecution's witnesses and the authorities cited. But that rather the Learned trial Magistrate made a decision for starting *de novo* on one ground only, that the proceedings recorded by Khaemba did not reflect the actual evidence adduced during the trial. That in making the Ruling the trial Magistrate also failed to consider the length of time the trial had been pending before court.

PIUS' ARGUMENTS

10. DPP submitted, which was later supported by counsel for Pius, that the order for the trial to proceed de novo was without merit and further that Muktar had been supplied with the typed proceedings of the trial immediately the Ruling by Hon. B. Khaemba was delivered on 25th September 2018.

11. Pius relied on his affidavit sworn on 17th august 2020. In that affidavit he deponed that in September 2011 Muktar led a group of people who invaded his property L. R. NO. 1870/1/240 and purported to evict him. That Muktar had forged the title of that property which was the basis of Pius complaint to the **Directorate of Criminal investigation**. Following that complaint Muktar was in the year 2011 charged with criminal offences before Kiambu Chief Magistrate court. Those charges were withdrawn by DPP in October 2011. Pius deponed that he was not aware why DPP withdrew those charges. That five years later Muktar was freshly charged with the same offences, in the case that is the subject of the order for *de novo* hearing. By the time the order for *de novo* hearing was made twenty one prosecution's witnesses had testified and the trial court by its Ruling of 25th September 2018 had found Muktar had a case to answer on seven counts. Muktar was therefore put to his defence. That it was thereafter the trial Magistrate, Khaemba, resigned from the judiciary and could not therefore, proceed with the trail. That prior to Muktar making an application for *de novo* hearing he had not complained about the allegation of the accuracy of the typed proceedings.

12. Pius deponed he was aggrieved by the order for the trial court to proceed *de novo* because the crimes occurred in the year 2011; most of the witnesses are either in poor health or had relocated from Nairobi and also out of Kenya; and that with COVID -19 pandemic it militates against *de novo* hearing. Also that Pius is an old man of 76 years, the age categorized as vulnerable age group in respect to the pandemic and he would be prejudiced if he was unable to testify in the *de novo* hearing, due to that vulnerability.

13. Pius buttressed his deposition by relying on cited authorities of decided cases.

14. One of the cases Pius relied upon is the case of **Joseph Lendrix Waswa -v- Republic,** a Supreme Court decision. By this case the Supreme Court underscored the need of the justice system to bear the interests of victims. The Supreme Court in that case had this to say;

> "***6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:***
>
> ***(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;***
>
> ***(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;***
>
> ***(c) Providing proper assistance to victims throughout the legal process;***
>
> ***(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;***
>
> ***(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."***

15. Pius also cited the case **Jasbir Singh & 3 Others -v- Talochan Singh Rai and 4 others (2013) e KLR** a Supreme Court decision where the apex court reiterated the need to pay homage to precedent. This is what the court stated in that case.

> "*[40] This is a clear perception of the doctrine of precedent in the functioning of the superior Courts in the common law tradition. The message is simply this. As a matter of consistent practice, the decisions of the higher Courts are to be maintained as precedent; and the foundation laid by such Courts is in principle, to be sustained. This, of course, leaves an opening for the special circumstances which may occasionally dictate a departure from previous decisions…..*
>
> *[42] The immediate pragmatic purpose of such an orientation of the judicial process, is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations."*

16. Pius reliance on that above case was to emphasis the need of trial Magistrate to adhere to precedents, supplied to the court, which required her to apply the stated tests to determine whether a *de novo* hearing should be ordered. The need to follow precedent was emphasized in the case of **Mwai Kibaki – v- Daniel Toroitich Arap Moi (1999) eKLR**

> "*The principles of precedent and **stare decisis** are so well established in the Commonwealth jurisdictions that even the ever-crusading Lord Denning was hardly able to make any appreciable dent in them. In **BROOME V CASSEL & CO LTD [1971] 2 ALL E.R. 187** ……..*
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> *Here was Lord Denning at his intellectual best, not only criticising but refusing to follow the case of **ROOKES V BARNARD [1964] 1 ALL ER 367; [1964] AC 1129** which was a decision of the House of Lords, a court superior to the Court of Appeal of England where Lord Denning, as the Master of the Rolls, presided. Lord Denning not only refused to follow **ROOKES V BARNARD,** but went further to advise other courts below the Court of Appeal not to follow **ROOKES V BARNARD.** Not surprisingly, there was an appeal to the House of Lords from the decision of the Court of Appeal. Delivering his speech in the House of Lords, Lord* Hailsham of St. Marylebone, LC, had this to say, and we quote him:
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> *"The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in **YOUNG V BRISTOL AEROPLANCE CO LTD** offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even in this House, since it has taken freedom to review its own decisions, will do so cautiously."*

MUKTAR SAMAN OLOW's ARGUMENTS

17. Muktar swore his affidavit dated 21st August 2020 in opposition to the application. He began, by his deposition, in describing the application as "manifestly frivolous, vexatious an abuse of the court process" and alleged that the application was "fueled" by Pius.

18. Muktar deponed that the trial Magistrate, as the Succeeding Magistrate in his trial, was not in a position to assess and gauge the demeanour and credibility of the witness who testified at the trial before Khaemba. Muktar further deponed:

"That the typed proceedings in his matter contain some inconsistencies and thus cannot be fully relied upon to give a clear picture of the trial and as such, it is paramount to have the matter start de novo."

19. Muktar refuted DPP's claim that its witnesses could not be located because those witnesses are witnesses on behalf of Pius in Land case before **Environment and Land Court** (ELC). That accordingly DPP had failed to demonstrate how it would suffer prejudice now that *de novo* hearing was ordered.

20. Muktar referring to the provisions of Section 200 of the Criminal Procedure Code stated that he, as an accused person, has the right to demand any witness to be reheard or re-summoned. That it was on the basis of that right he sought before the trial Magistrate for *de novo* hearing of his trial. In his view the Ruling of trial Magistrate was sound in law and that it should therefore not be disturbed. He deponed that the evidence of witnesses who had retired could be received, at the *de novo* hearing, through video link to obviate escalation of costs.

21. Muktar is of the view that if the DDP's application is allowed it would severely infringe his right to fair trial as enshrined in the constitution.

22. By his written submissions Muktar in answer to the issue he identified, on whether this court has jurisdiction to determine DPP's application, he referred to the provisions of Section 362 of the Criminal Procedure Code. On this he submitted that the court cannot consider revision of an order which should be dealt with as an appeal. Muktar on that point referred to Section 364 (5) of the Criminal Procedure Code. That Section provides:

"When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

23. Muktar cited the case of **Joseph Nduvi Mbuvi** (supra) where the court warned against the High Court invoking its revision power which could lead to micro – managing the lower courts in the conduct and management of their proceedings. He also cited the case **R -v- Mark Lloyd Stevenson (2016) eKLR** where the High Court also cautioned against entertaining interlocutory appeal which would amount to entertaining appeal in piecemeal.

24. In Muktar's opinion DPP had failed to show exceptional circumstances that would warrant revision, and nor had not been shown irregularity, illegality or impropriety of the proceedings that led to the order for *de novo* hearing. That the order for de novo hearing was necessary to ensure the final arbiter in the case was in a position to weigh the evidence and the demeanour of witnesses. Therefore in keeping with provisions of Section 200 (3) of the Criminal Procedure Code and because over 20 witnesses had already testified the Learned Magistrate was under mandatory duty to fully comply with the above stated Section.

25. Muktar submitted that the witnesses alleged by DPP where unavailable were also witnesses in the ELC matter and if the case was not heard *de novo* he would be prejudiced contrary to Article 50(4) of the Constitution which requires evidence should not violate fundamental freedoms in the Bill of rights. This is because as he alleged, the typed proceedings had discrepancies.

ANALYSIS AND DETERMINATION

26. In my view the following issues are before me for determination.

(a) What are the High Court's parameters of revision of lower court's order?

(b) Has the DPP met those parameters,

ISSUE (a)

28. To interrogate this issue I will begin by considering the Supreme Court decision, on that point, the case **Samuel Kamau Macharia and another -v- Kenya Commercial Bank Ltd and another (2012) e KLR.**

"[68] A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

29. Article 165 (6) of the Constitution clothes the High Court with supervisory power over the lower court. That Article provides:

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

30. The provision of that Article speaks for itself. It gives the High court unlimited supervisory power over subordinate courts and over any person, body or authority exercising judicial quasi-judicial function. In other word the High court is afforded the power to check on illegality or irregularity of such inferior tribunals. In doing so the High Court should not seem to wrestle from the lower court or tribunal its jurisdiction. This was discussed in the case of **Prosecutor -v- Stephen Lesinko (2018) e KLR**

"Further support for this view is to be found in the English Court of Appeal decision REX Versus Compensation Appeal tribunal 1952 IKB 338 – 347 where it was stated:

"The court of Kings Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control tends not only to seeking that the inferior tribunals keep within their jurisdiction, but also to seeking that they observe the law."

The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it offends against the law, when the kings Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it.

It is only exercising a jurisdiction which it has always had."

31. Section 362 of the Criminal Procedure Code further equips the High Court with power, in criminal matters, to call and examine the lowers court's record to satisfy itself as to the correctness of, legality or proprietor of an order of the lower court. That Section 362 is in the following terms:

"The High Court may 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"

32. In response to the issue (a) identified above it is clear that the Constitution under Article 165 (6) the High Court may supervise subordinate court or tribunal. It is clear from that provision that the High court has a general supervisory power over subordinate courts or tribunals. Further the Criminal Procedure Code under Section 362 delegates to the High Court power to call for record of subordinate court to examine proprietary of its orders. It follows that because the above stated power exists for the High court to move as appropriate. Muktar erred to argue that in entertaining the application of DPP this court would be usurping the discretion of the trial court. To the contrary this court is enabled to call and examine the record of subordinate court and if the subject order is wanting the High Court can, in exercise of its power, revise such an order.

33. In answer to the issue (a) therefore I find and hold that the Criminal Procedure Code under Section 364 limits the High Court's power to deal with orders that are not subject to appeal and then Section 362 delineates the extent of the High Court's power to revise a subordinate court's order, which is for the purpose of satisfying itself on the correctness, legality or propriety of an order.

Issue (b)

34. As I begin to consider this issue I do recognize that indeed, as submitted on behalf of Muktar, that the rights of an accused person are sacrosanct and are so recognized by the Constitution. Amongst other rights an accused person has a right to fair hearing. See Article 50 (1) of the Constitution. Those rights however must always be balanced with the victim's or complainant's rights which are recognized under the **Victims Protection Act** (VPA). This indeed was the holding of the court of appeal in the case **Joseph Lendrix Waswa - v- Republic (2019) eKLR** thus:

"The fact that the rights of an accused person to fair trial are enumerated and the rights of victims of offences are recognized by Article 50(9) but to be stipulated in a legislation indicates that the Constitution intends, as a principle, that the constitutional rights of an accused person to a fair trial should be balanced with the statutory rights of the victim of the offence as stipulated in VPA and further that the rights of the victim of crime should be exercised without prejudice to enumerated rights of an accused person to a fair trial."

35. The above holdings of the Court of Appeal was upheld by the Supreme Court.

36. The Learned trial Magistrate in ordering *de novo* hearing needed firstly to balance those rights and needed to consider the submission made before her and more importantly the Learned Magistrate needed to consider the principles set out by the court's decisions before concluding that the hearing should start *de novo*. Those principles were discussed by the Court of Appeal in a case that was cited on behalf of Pius, the case **Abdi Adan Mohamed -v- Republic (2017) eKLR.** The Court of Appeal state this in that case:

"**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, where the Court stressed that:*

"**By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge 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. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time**

militated against the trial being started *de novo*. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."

37. The take from that case which the Learned trial Magistrate should have taken notice of before ordering *de novo* hearing is whether it was impossible to recall prosecution witnesses for the *de novo* hearing, that is whether such witnesses can be traced; there was need to consider whether it was convenient to commence the trial; there was need to consider how far the trial had reached; there also was need to consider the possibility of loss of memory by witnesses; and the Learned Magistrate needed to consider what prejudice would be suffered by all the parties. Had the Learned trial Magistrate considered the case of **Abdi Adan Mohamed** (Supra) she would have noted that the Court of Appeal cited with approval the holding in the case **Nyabutu & Another -v- R (2009) KLR 409** where the court stated that Section 200 Criminal Procedure Code was to be used "very sparingly and only in cases where the exigencies of the circumstance, not only are likely but will defeat the ends of justice."

38. The Learned trial Magistrate by her Ruling of 12th June 2020, where *de novo* hearing was ordered failed to take into considerations the circumstances set out in the Court of Appeal decision of **Abdi Adan Mohamed** (supra). That failure went against the principle of precedent and stare decisis.

39. By that Ruling the Learned trial Magistrate although alluding to submissions by DPP and Pius, that there was difficult in availing the witnesses for a *de novo* hearing, and further alluded to DPP's submissions that to order *de novo* hearing, after the previous trial magistrate put Muktar to his defence, would be tantamount to setting aside that Ruling; however the Learned trial Magistrate failed to analyze those submissions. This is evident from the trial Magistrate's Ruling. The Learned trial Magistrate after reproducing Section 200 of the Criminal Procedure Act concluded her Ruling thus:

"Having considered the pleadings, proceedings, submissions and authorities relied by the advocates, and the status of the case. The court having been informed that the proceedings does not reflect the actual submission and evidence adduced during trial, such would be against the spirit of Article 50(4) of the Constitution, "evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of Justice."

The application is hereby allowed that the case to start de novo and the case to be heard on priority basis."

40. The Learned trial Magistrate failed to state in her Ruling how her consideration of the pleadings, proceedings, submissions and authorities reflected to the facts of the case. By the time the Learned Magistrate took over the trial, twenty-one prosecution witnesses had testified. Out of those witnesses the Learned trial Magistrate was informed by the I.O., through his affidavit, that nine of those witnesses were unavailable with at least two, probably three, being out of the jurisdiction of court, that is out of Kenya. Therein lay prejudice to the prosecution's case. The consideration of that prejudice is absent from the Ruling of the trial Magistrate ordering the trial to start *de novo*.

41. But perhaps the one thing that uppermost shows incorrectness and lack of propriety of the Ruling is the fact the previous trial Magistrate had placed Muktar on his defence. Was the trial Magistrate going to set aside or review that finding? Wouldn't that be tantamount to the trial Magistrate sitting in appeal against her colleague Magistrate? This questions should have exercised the mind of the trial Magistrate and the Learned Magistrate needed to resolve those questions in her Ruling. That is one consideration she needed to have, as held by the court of appeal in the case **Abdi Adan Mohamed** (supra) that is "how far has the trial reached."

42. Instead of considering the principles set out by the Court of Appeal the Learned trial Magistrate based her decision on the information of Muktar that the proceedings did not reflect the evidence adduced. The trial Magistrate stated this in her Ruling: "***The court having been informed that the proceedings does not reflect the actual submission and evidence adduced during trial."*** One is left to ask, when did Muktar know that the proceedings were not reflective of the evidence adduced? I ask this question because the trial court put Muktar on his defence on 25th September 2018. On being put on his defence Muktar sought and obtained several adjournment from Khaemba, the very Magistrate who put him on his defence. The record does not reflect that Muktar complained before Khaemba, when those adjournments were sought, that the proceedings did not reflect correctly the evidence adduced. Indeed what the record shows is that each time while seeking an adjournment Muktar requested for further dates for his defence hearing without further ado. On 29th March 2019 Khaemba gave Muktar the last adjournment for his defence hearing. Muktar nevertheless did again on 11th April 2019 seek and was granted an adjournment for his defence hearing. Throughout his trial Muktar has been represented by Counsel. There is therefore no reason that can be raised why no complaint was made of proceedings not been recorded correctly before Khaemba the Magistrate who initially heard the case.

43. It was not until 5th August 2019 that counsel for Muktar informed trial Magistrate that Muktar wished to have *de novo* hearing of his trial. Even then, on that day, Counsel for Muktar stated that the reason Muktar sought *de novo* hearing was for following reason that:

"I need time to dwell on the same intend to take investigating officers minutes."

44. I am unable to understand the above reason given by Muktar's Counsel why *de novo* hearing was sought but on that day on hearing opposition raised by other Counsels to his request and on the trial court ordering him to make a formal application, he did so. I have looked at Muktar's affidavit dated 10th September 2019 in support of that application for *de novo* hearing. In that affidavit Muktar gave only one ground for seeking *de novo* hearing, thus:

"That I wish to state that the proceedings do not reflect the actual and true reflection (sic) of what transpired in court and what witnesses said."

45. In my view it was erroneous for the trial Magistrate to base the decision for *de novo* hearing on that single unsubstantiated ground. One is even left to ask, which part of the proceedings failed to reflect the evidence adduced? After all 21 witnesses testified but Muktar failed to state with specification which of those witnesses their evidence was incorrectly recorded.

46. In making the order for *de novo* hearing the Learned Magistrate failed to take note that the Muktar was first charged with the same offences in the year 2011. Those charges were withdrawn by DPP. He was again arraigned for the same offences in the year 2016 and that is the trial that proceeded before Khaemba up to September 2018 when Muktar was put on his defence. The matters therefore for which Muktar was tried occurred before the year 2011. The passage of time from when the offences was alleged to have been committed to the time Muktar sought *de novo* hearing was material to be considered before an order for *de novo* hearing was made.

47. Having called for the trial court's record I am unable to make a finding that the order for *de novo* hearing was correct, regular or legal. I find that DPP squarely met the parameters of revision of the Ruling of the trial court dated 12th June 2020.

48. Having made that determination, it falls upon me to give directions to ensure the trial is back on tracks and it does proceed without hitches.

CONCLUSION

Following the findings made above I make the following orders:

(a) This court does hereby review and reverse the order made in Kiambu Chief Magistrate Criminal Case No 1170 of 2016 and made on 12th June 2020. The order for *de novo* hearing of that criminal case is hereby set aside.

(b) In view of where the Criminal case had reached and because of the unavailability of witnesses and to ensure the ends of justice is not compromised I order the trial to proceed from where it ended on 25th September 2018.

(c) This matter shall be heard by any other Magistrate but **Hon. S. Atambo.**

(d) The Kiambu Chief Magistrate Criminal Case No.1170 of 2016 shall be mentioned before the Kiambu Chief Magistrate P. Gichohi on a date to be fixed at the reading of this Ruling.

(e) The Chief Magistrate Criminal Case No. 1170 of 2016 shall henceforth be returned to Kiambu Chief Magistrate's Court.

Orders accordingly.

SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY 2021.

MARY KASANGO

JUDGE

11th February 2021

Before Justice Mary Kasango

C/A - Kevin

For the Applicant DPP – Mr. Muteti with Ms Thuguri

For the 1st Respondent – No appearance

For 2nd Respondent - Mr. Owiti holding brief Kimani Karagu

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE