



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL CASE NO 34 OF 2017**

**REPUBLIC.....DPP**

**VERSUS**

**SAMUEL NDUNGU NJOROGE.....ACCUSED**

**R U L I N G**

1. **Samuel Ndungu Njoroge** is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the **Penal Code**. He pleaded not guilty to that offence. His trial commenced before **Justice C. Meoli** on 9<sup>th</sup> December 2019. On that day two of the prosecution witnesses testified. These were prosecution witness number 1 (**PW 1**) and number 2 (**PW 2**). The trial was supposed to resume on 6<sup>th</sup> and 7<sup>th</sup> July 2020 but was further postponed because courts were not sitting due to the COVID-19 pandemic and the preventative measures taken by the judiciary.

2. On 10<sup>th</sup> December 2020 when this matter came up for mention before me I requested the accused to elect whether to start the case *de novo*, to recall witness who had testified or to proceed from where the trial stopped. This was in compliance with Section 200 of the **Criminal Procedure Code**. The accused elected to recall **PW1**.

3. The accused's Learned Counsel supported the application for recalling **PW1** on the submission that **PW1** did not voluntarily testify on 9<sup>th</sup> December 2019 but that she was forced, by the Court, to testify by being placed in custody before giving her testimony. It was on that basis that the accused stated he should be given an opportunity to test **PW1**'s testimony.

4. The application was opposed by **Director of Public Prosecution** (DPP). DPP stated that the accused had failed to state what part of **PW1**'s testimony she will be recalled to give. Further that her attendance will be difficult to obtain.

**ANALYSIS AND DETERMINATION**

Section 200(3) of the Criminal Procedure Code 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."*

5. That Section, as per Section 201 (2), applies *Mutatis Mutandis* to the High Court. The application of that Section was considered by the Court of Appeal in the case **Abdi Adan Mohamed -v- Republic (2017) e KLR** as follows:

*"The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly."*

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...."**

Because of the importance of having a trial conducted from commencement to conclusion by the same magistrate or judge **Section 200(4)** provides that;

**"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."**

**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."**

6. I therefore approach the request made by the accused on the basis that Section 200 is intended to ensure the accused person is not prejudiced by a magistrate/judge who take over of a partly heard case not being able to independently assess the *demeanour* or credibility of a witness. The case of **Abdi Adan Mohamed (supra)** makes it clear that the request for recalling of witness or for hearing the case *de novo* should not be made where the demands would be impossible to grant and should be made sparingly.

7. In this case DPP stated that it would be difficult to secure attendance that of **PW1** who resides in **Lari**. The accused's learned counsel did not contradict nor question that submission. This court therefore presumes that indeed is the position, that the attendance of **PW1** would be difficult to secure.

8. Further I have noted that the **Justice C. Meoli**, before **PW1** testified, made a finding that the accused, who is **PW1's** stepson, was interfering with **PW1** which interference was evident from **PW1's** reluctance to testify. As a consequence, the court on 4<sup>th</sup> June 2019 ordered **PW1** to be remanded in custody up to 10<sup>th</sup> June 2019 in compliance to Section 152 (1) (b) of the Criminal Procedure Code. The court did also on that date cancel the accused's bond and remanded him in custody.

9. **PW1** did eventually testify on 9<sup>th</sup> December 2019 and she was subjected to cross examination by the accused counsel. It is pertinent to note that no single question put to **PW1** in that cross examination was directed on whether or not **PW1** was testifying out of her own free will or not.

10. I have carefully considered the testimony of **PW1** given on 9<sup>th</sup> December 2019. I find that the stage at which this case, a 2017 case, has reached **and the fact that DPP's allegation that attendance of PW1** would be difficult and which did not get rebuttal and because the accused's counsel did not question **PW1** on her reliability, while cross examining her there is no basis for recalling **PW1** in this matter. I find the accused will not suffer prejudice/injustice for not recalling **PW1**.

11. In view of that finding the accused's request to recall **PW1** is denied. Further hearing date of this case shall be fixed at the reading of this Ruling.

**SIGNED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF FEBRUARY 2021.**

**MARY KASANGO**

**JUDGE**

11<sup>th</sup> February 2021

Before Justice Mary Kasango

C/A - Kevin

Accused – Samuel Ndungu Njoroge - Present

For the Accused – Mr. Olaka holding brief for Njehu

For the DPP – Miss Kathambi

**COURT**

Ruling virtually delivered in their presence.

**MARY KASANGO**

**JUDGE**