



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 03 OF 2018

(CORAM: F.M. GIKONYO J.)

REPUBLIC

VERSUS

DAVID CHEPKWONY KIBOR

RULING

Directions under Section 200 C.P.C

[1] When I took over this case, two witnesses had already testified before Bwonwong'a J. On 8th December, 2020 **Mr. Karanja** holding brief for **Ms. Koina** for the state proposed that the matter to proceed from where it had reached. This request was not opposed by **Mr. Kariuki** who appeared for the accused herein. The court then ordered that the matter do proceed from where it had reached and the Proceedings to be typed. The accused person was present and the order was explained to him.

[2] Later on the same day, the accused person sought to the case to start *de novo*. **Mr. Karanja** opposed this application stating that no reason had been advanced why the matter should start *de novo*. He went on to state that the accused person was represented and had the two witnesses who testified cross examined. He, however, requested time to find out from the investigating whether the said witnesses could be traced. On the basis of the renewed application and the request by the prosecution, the court stayed its earlier orders on how the matter should proceed.

[3] On 10th February 2021 **Ms. Koina** stated that witnesses are not easily available. Others cannot be reached through the phones numbers they had provided. She told the court that other witnesses had relocated. Given the nature of information coming from the prosecution counsel, the court ordered the prosecution to file affidavit on availability of the witnesses.

[4] From the affidavit sworn on 12th May, 2021 by PC Dennis Masaki, the Investigating Officer, the State has opposed the request to have the matter start afresh. The State's case is that three witnesses have already tendered their testimonies in court. The said witnesses hailed from an area called Usweti within Sagamian location. The prosecution believes that the said area forms part of the Mau forest and the witnesses who have already testified were part of the people affected during the second phase of Mau evictions.

[5] According to the prosecution, they are unable to trace their current places of abode therefore it may be difficult for them to procure their attendance in court if the matter stars afresh.

[6] The prosecution asserts that it is only just and fair in the circumstances that the matter continues from where it had reached.

ANALYSIS AND DETERMINATION

[7] I have carefully considered the explanations in the affidavit by the IO on why this case should not start *de novo*, and the submissions of both learned Counsel. I have also considered the record of the trial court.

[8] Should the case start *de novo*?

[9] The governing law of such applications is Section 200(3) of the Criminal Procedure Code which 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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of the right”.

[10] Of jurisprudence in respect of section 200(3) of the CPC, enough judicial ink has been spilt, leaving it no longer in doubt that the **Section** is not a peremptory command that partly heard criminal cases must always start *de novo* every time a trial court changes. A fundamental reality of Section 200 of the CPC as an existing law is that, it does not imprison the rights and protections which the Constitution has vested in and proclaimed of victims of crime. Thus, fair trial serves substantial meal; to all parties in the criminal trial and administration of justice. Accordingly, the long string of judicial precedent states that in giving effect to section 200 of the CPC, courts must consider, *inter alia*; 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. In my considered view, the test should be whether fair trial would be materially prejudiced.

[11] I do not wish to multiply the decisions on this subject except I am content to cite the case of ***Lenyesio Lekupe & Another v Republic [2016] eKLR*** where the Court of Appeal cited its decision in ***David Kimani Njuguna v Republic, Nyeri CRA No. 294 of 2010*** where it was held that:

“In all these pronouncements, this Court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale, and philosophy behind Section 200 of the CPC more than thirty years ago. In NDEGWA VS REPUBLIC [1985] KLR 534 where it held that;

1) The provisions of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.

2) The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.

3) No rule of natural justice, statutory protection, and evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.

4) The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanor and credibility of witnesses should always be maintained.

5) A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanor of all the witnesses.”

[12] Applying the test, in this case, three prosecution witnesses have already testified. They all testified in 2020- over twenty-two months after the crime was allegedly committed by the accused person. One year later the accused person has asked this Court to have his matter start afresh.

[13] I do not find anything to doubt the prosecution’s assertion that they are unable to trace the three witnesses who have testified in this case. They have given convincing and plausible reason that the witnesses live in Mau forest but were evicted by government. The evictions of persons who had illegally occupied Mau forest is in public domain. Accordingly, the prosecution has shown that they may not be able to procure the attendance of the three witnesses for purposes of the trial.

[14] The accused had been duly informed of his right under section 200 of the CPC and has exercised his right to demand recalling of witnesses. Nonetheless, the court has not been given any reason to be of the opinion that the accused would be materially prejudiced unless the case is heard *de novo*. The accused was represented by able counsel during the trial and is still represented in the trial. In the circumstances, insistence on hearing *de novo* would materially prejudice the entire case and administration of justice for all parties including the victims.

[15] In the upshot, the interest of justice for both the prosecution as well as the accused, commend that the court should reject the demand to start the case *de novo*. Accordingly, I direct that this case will continue from where it had reached when I took over the trial. It is so ordered.

Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application This 26th Day of July, 2021

F. M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for the Respondent

2. Accused in person

3. Mr. Kasaso – CA

4. Kariuki for accused - absent

F. M. GIKONYO

JUDGE