REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPLICATION NO.62 OF 2019

DOUGLAS MUTHURI KARIANJI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant filed an application in the trial court to recall and rehear witnesses under Section 200(3) of the CPC. The application was declined and instead of filing an appeal, the applicant has filed a fresh application.

2. The background picture which emerges from all this jumble is that the applicant was charged before the trial court on 10.6.2016 and the trial commenced in earnest with seven witnesses testifying. The applicant applied that Pw1, 5 and 7 be recalled and the court granted his request. The applicant again applied that the trial court recuse itself which request was denied. The applicant then filed an application that the suit commence de novo and which was equally declined and when the trial was scheduled to proceed in the trial court, the court was notified by the applicant of the instant application.

3. For all intents and purposes the instant application is tantamount to an appeal that is camouflaged as an application. However in light of the treacherous manner that this matter is being handled, I shall address the same.

4. The provisions of Section 200 of the Criminal Procedure Code which the Applicant has invoked provide as follows:

> "***200. (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may:-***
>
> (a) ***deliver a judgment that has been written and signed but not delivered by his predecessor; or***
>
> ***(b) where judgment has not been written and signed by predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.***
>
> ***(2) …..***
>
> ***(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 re-heard and the succeeding magistrate shall inform the accused person of that right.***
>
> ***(4) ….....***"

5. The Court of Appeal in **Peter Karobia Ndegwa v Republic[1985] eKLR** stated that:

> "*Section 200 is not to be invoked where, as seemingly in the instant case, such a half-heard trial is a short one, it could be conveniently started de novo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.*
>
> *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.*

It could be also 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 the 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. The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation."

6. As earlier stated, the present case commenced in 2016 and as per the record the trial court has since had seven witnesses testify and there are two yet to testify. At the rate at which the case has proceeded so far, and given the court caseload, the remaining evidence could potentially be adduced within another one day of hearing, if the trial were to proceed from where the matter reached with the previous judicial officer. A de novo trial would require some time to enable past witnesses to be found and brought to re-trial. Once found another four or five days of hearing would be required, which, given the court's calendar would mean the re-trial would itself be pushed into the next two years. There is also a victim who is waiting for justice from 2016 and that seems to be turned into a mirage every other day.

7. Looking at section 200 of the Criminal Procedure Code, the same confers discretionary powers on a magistrate to take over the trial of a suit from the stage where his predecessor has left. Neither this provision, nor any other, appear expressly to allow a magistrate to try afresh a suit uncompleted by his predecessor.

8. My view, however, is that a retrial (or trial de novo) of a suit the hearing of which is uncompleted by one magistrate can be invoked under inherent powers necessary for the ends of justice or to prevent abuse of the process of the court.

9. Whether an order should be made for a suit to be tried de novo depends, in my view, on the circumstances of each case. In the instant case, most of the evidence had been heard by Hon Kassan who was unable to complete the hearing as he was transferred and the only reason given by the applicant was that he lacked faith in Hon Kassan. It is not said or demonstrated that the learned magistrate was biased. In the circumstances, I think that no satisfactory reason existed to allow the suit to begin de novo or for Hon Kassan to disqualify himself. It is instructive that the applicant saw and heard the witnesses and did cross examine them and that implies that he is fully aware of the evidence already tendered. The speedy determination of the matter is beneficial to both the applicant and the respondent.

10. In the result it is my finding that the instant application lacks merit and is dismissed. The applicant's case is ordered to proceed in earnest in the trial court so as to enable its logical conclusion and determination.

It is so ordered.

Dated and delivered at **Machakos** this **30th** day of **January 2020**.

D. K. Kemei

Judge