



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 37 OF 2015

REPUBLICPROSECUTOR

VERSUS

MUTINDA MUNYOKI..... ACCUSED

RULING

1. On 10th December, 2018 this case came up for mention for purposes of directions being given under the provisions of Section 201(2) of the Criminal Procedure Code as to whether the case herein should be heard *de novo* or continue from where it had reached when it was being heard by Judge Ongeri.

2. The accused person was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 of the Laws of Kenya. It is alleged that on the 25th October, 2015 at Bombo Village, Bamburi Sub-Location, Bamburi Location in Kisauni Sub-County within Mombasa County, he unlawfully murdered (sic) Kariungi Kaguura.

3. The accused person took plea on 15th December, 2015. He denied having committed the offence and a plea of not guilty was entered. On 10th May, 2017 the case commenced hearing. Five Prosecution witnesses testified, namely-

- i) PW 1 - Rama Hamisi Juma
- ii) PW 2 - Bose Besharia
- iii) PW 3 - Jeremiah Machache
- iv) PW 4 - Kaugura Nyaaga Maora
- v) PW 5 - Mbura Njuhe

4. The case proceeded for further hearing on 12th July, 2017, when PW6, Dr. Jillian Njambi Muiruri testified. On 13th February, 2018, PW7 - Silas Nthiga Karoge gave evidence.

5. Upon the transfer of Judge Ongeri, this court on 10th December, 2018 informed the accused person of his rights under the provisions of Section 201(2) of the Criminal Procedure Code, on having this case starting *de novo* or proceeding from where it had reached. He responded in Kiswahili by saying "**ningependa kesi ianze upya**", which means that he would like his case to start afresh (*de novo*).

6. Mr. Magolo made brief submissions for his client and stated that the accused person wished to have the case start *de novo* for reasons that not only had he appointed a new Advocate to represent him but it was important for this court to resubmit the witnesses to see their demeanour as they testify. In his view, it was in the interest of justice for the case to start *de novo*. He pointed out that most of the witnesses come from Mombasa apart from one who comes from Ukunda.

7. The application was opposed by the Ms Marindah, Prosecution Counsel who submitted that the case herein was filed in the year 2015 and 7 witnesses had already testified. She indicated that 5 of the said witnesses come from Meru, Tharaka Nithi and some from Mombasa and tracing them would not be an easy task. She further submitted that the accused person was previously represented by Mrs. Kipsang who is a qualified Advocate. The Prosecution Counsel further stated that the hearing of a case *de novo* is not an absolute right and that parties had expended a lot of time in hearing this case. She prayed for the case to proceed from where it had reached.

ANALYSIS AND DETERMINATION

The issue for determination is if this case should start *de novo*.

8. The re-summoning of a witness or witnesses and re-hearing of a case is intended to ensure that the succeeding Magistrate and/or Judge is able to assess personally and independently the demeanor and credibility of a witness or witnesses and to weigh their evidence accordingly. In **Joseph Kamau Gichuki vs R** CR. Appeal No. 523 of 2010, cited in **Nyabutu & Another vs R** [2009] KLR 409, the Court of Appeal stated thus:-

“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.”

9. This court is further guided by the provisions of Section 34 of the Evidence Act which provide as follows:-

“34. (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

(a) the expression “judicial proceeding” shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused”. (emphasis added)

10. Having considered the proceedings in the court file, it is my finding that the accused person had the benefit of legal Counsel when the case was being heard by Judge Onger. The Counsel for the accused person was given an opportunity to cross-examine each prosecution witness in respect to the testimony they adduced before the trial court. I do note that 7 Prosecution witnesses have already testified. This court is alive to the environment it works in. PW6, Dr. Jillian Njambi Muiruri was an expert witness, whose attendance in court is difficult to secure by virtue of the work she does of attending to patients in hospital. It is common knowledge that recalling of witnesses to court leads to apathy and witness burn out. Testifying brings closure of the unfortunate events surrounding the deceased's death and witnesses thereafter carry on with their day to day lives without expecting to be called back to court to give the same narratives they had done in the past. The exception however is in situations whereby witnesses are directly affected by the offence that was committed as closure takes longer for them.

11. It is also common ground that as time progresses memories of witnesses start to fade. The best evidence in this case is that which was recorded by the trial court when the hearing of the case commenced. Three years have gone by since the offence was committed and the accused person charged in court. Courts are obligated to hear cases expeditiously and to do justice to all parties that come before it. Recalling of witnesses will lead to delay in finalizing the hearing of this case. It also comes with additional costs as the Judiciary has to cater for travel expenses for witnesses who will have to come to the Mombasa High Court once again from far flung areas such as Meru and Tharaka Nithi.

12. On the issue of demeanour of witnesses, a court that observes anything untoward about a witness is required to record its observation in the proceedings for future reference, so as to determine if a witness appeared to be reliable or not. Taking into account that this is a court of record, all the evidence of witnesses who have testified so far was put down in writing by Judge Onger. I do find that this Honourable Court is in a position proceed from where the trial court reached in the hearing of this case in line with the provisions of Section 34(1)(a) of the Evidence Act. The accused person failed to show the prejudice that he will suffer if the case does not start *de novo*. In the absence of sound reasons having been adduced in support of the application to have the case start *de novo*, the application by the accused person is hereby disallowed. This case shall proceed from where it had reached.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Magolo for the accused person

Ms Ogweno for the respondent

Mr. Oliver Musundi - Court Assistant