REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 92 OF 2013

REPUBLIC...PROSECUTOR

VERSUS

SIMON MANGO OTIENO..ACCUSED

RULING

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which were that on 19th day of August, 2013 along Tom Mboya Street jointly with others not before the court murdered **JACKSON OUMA SANDE.**

2. He took his plea on 10/9/2013 before Korir J. when a plea of not guilty was duly entered in his favour. On 19/05/2015 his trial commenced before Ombija J, (as he then was) who took and recorded the evidence of four (4) prosecution witnesses before being transferring from the Criminal Division to the Civil Division of the High Court. On 4/5/2016 the matter was placed before Justice Lesiit the Presiding Judge of the Division who made the following order, the subject matter of this Ruling:-

> ***"Proceedings have been typed. Section 201(1) and Section 200 of the Criminal Procedure Code complied with. Both parties agreeable that matter should start de novo before another Judge as all witnesses are police officers. It is so ordered."***

3. On 20/09/2016, the matter was placed before me, when Mr. Magoma for the State indicated that he was unable to secure witnesses and therefore could not proceed causing the cause to be adjourned to 21/09/2016 when the prosecution once again applied for adjournment, on the basis that the investigating officer was not available, upon which I granted the prosecution a final adjournment on the ground of none-availability of witnesses and fixed hearing for 10/11/2016.

4. On 10/11/2016 Mr. Magoma once again applied for adjournment on the ground that the witnesses who were to testify had been transferred and sought time to trace them. This application was opposed by Mr. Kihanga Advocate for the accused person who sought for the discharge of the accused under **Section 202** of the **Criminal Procedure Code.** Upon the testimony of the new investigating officer to the effect that he decided to go into the police records to confirm the current stations of the intended prosecution witnesses, the court reviewed the order on final adjournment and granted the prosecution further adjournment to enable them secure the attendance of witnesses who had testified before Justice Ombija. For record purposes it must be stated that at this date, the court, the defence and the prosecution were well aware that the matter had to start afresh.

5. It is clear from record that after this Ruling Mr. Kihanga then Advocate on record for the accused person developed cold feet and stopped appearing in court on behalf of the accused, causing the court to discharge him and appoint the current Advocate for the accused.

6. On 17/10/2017 this matter came up for hearing before me when Mr. Meroka learned Prosecutor informed the court that he had one witness present in court and had three more to call, upon which they called and examined **PC BENARD KIRUI** as **PW5** who was duly cross-examined by Ms Ojiambo for the defence. On 18/10/2017 **DR. DOROTHY NJERU** testified as **PW6** and on 29/1/2017 **LAWRENCE KINYUA** testified as **PW7** upon which the prosecution closed its case.

7. By a Ruling dated 22nd day of February 2018 the court placed the accused on his defence, who proceeded to testify on oath and was duly cross-examined. The court reserved its Judgement for 13/2/2019. In the course of drafting the Judgement, it came to the notice of the court that the matter had proceeded against the order issued herein for the matter to start *de novo*, without the order being reviewed and or set aside. For judicial accountability I invited the parties to make submissions on the net effect of the court proceeding as if there was no order for fresh hearing and putting the accused on his defence.

SUBMISSIONS

8. It was submitted by Mr. Okeyo on behalf of the Prosecution that when the order was issued for the matter to start *de novo*, the accused was required at that stage to take fresh plea which did not happen and therefore the trial was a nullity. He sought that the court declares the matter a mis-trial to enable the accused take fresh plea and the matter to proceed as per the order issued thereon. On behalf of the defence, Ms. Ojiambo submitted that when the said order was made the accused was silent and did not make an election as required in law. It was his submission that having participated in the trial to its logical conclusion and taking into account the fact that he had been in custody since the year 2013, he had no objection to the court issuing a Judgement based on the evidence on record, since he was comfortable with the way the matter proceeded both before Justice Ombjia and this court.

ANALYSIS AND DETERMINATION

9. There are only two issues for determination in this matter, the net effect of proceeding with the matter from where it had reached in spite of an order for the cause to start *de novo*, and whether the court may proceed to issue a Judgement thereon.

10. To answer the first issue it is in the interest of justice that the court sets out the requirements as regards this cause under **Section 200** & **201(2)** of the **Criminal Procedure Code** which provides as follows:-

> ***"Section 200(1) subject to subsection (3), where a magistrate (judge), 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 (judge) who has and exercises that jurisdiction, the succeeding magistrate (judge) may -***
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> > ***(a) . . .***
> >
> > ***(b) . . .***
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> > ***(c) . . .***
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> ***(2) . . .***
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> ***(3) Where a succeeding magistrate (judge) 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 (judge) shall inform the accused person of that right."***

11. It must be pointed that whereas the accused has the right to demand for *de novo* hearing, there are factors which the court must consider while granting the said order as was stated by Justice Ngugi in **STEPHEN MBURU KINYUA v REPUBLIC [2016] eKLR** thus:-

> ***"Our case law has now made it clear that while section 200(3) makes it mandatory for the succeeding magistrate (or judge) to inform the Accused Person of his or her rights to request for a de novo trial, the succeeding magistrate or judge is not bound by the position taken by the Accused Person on whether to request for a de novo trial or not. The succeeding magistrate or judge must exercise his or her judicial mind to the issue and decide if, in the totality of circumstances, the case is an appropriate one for an order that it starts afresh.***
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> ***We can cull some of the considerations that a Court considering the issue should have in mind from our case law (principally the Court of Appeal guidelines in the Ndegwa v R case as well as in Joseph Kamau Gichuki v R case) as well as our emerging jurisprudence based on the Constitution of Kenya, 2010 as well as new legislative enactments governing criminal trials aimed at animating the Constitution. Some of these considerations that a Court considering the issue should have in mind include:-***
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> ***a) Whether it is convenient to commence the trial de novo, that is, the difficulty in mounting a new trial;***
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> ***b) How far the trial had proceeded;***
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> ***c) The availability of witnesses who had already testified;***
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> ***d) Possible loss of memory by the witnesses given the passage of time;***
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> ***e) The time that has lapsed since the commencement of the trial taking into consideration the constitutional requirement that criminal trials should commence and be concluded without undue delay;***
>
> ***f) The prejudice likely to be suffered by either the Prosecution or the Accused if a new trial is ordered; and***
>
> ***g) The interests of the victims of the crime and witnesses – including the impact a new trial will have on them balanced against the benefits of a new trial."***

12. In the case of **NDEGWA v REPUBLIC [1985] eKLR** before the Applicant's trial which had progressed about half way could be completed, the trial magistrate was transferred to another station. His successor took over and recorded in his Judgement that he had complied with the provisions of **Section 200** of the **Criminal Procedure Code**. The Appellant was subsequently convicted of stealing, contrary to **Section 279(a)** of the **Penal Code**. He appealed to the High Court which appeal was summarily rejected. He appealed again to the Court of Appeal where it was stated:-

“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.” (Emphasis added)

13. It is clear that the purpose of **Section 200** of the **Criminal Procedure Code** is to protect the rights and interest of the accused persons. In this case the accused was not prejudiced by the court proceeding on the basis that the matter was to proceed from where it had reached. It is also apparent from the record that the State conducted itself as if it was proceeding from where the matter had reached, as it only called and presented to court those witnesses who had not testified before Justice Ombija. In this case both the accused and the State have not been prejudiced by the court proceeding as it did noting that **Section 200** had been complied with as per the order of Justice Lesiit.

14. The State has sought for an order of mistrial. This court in the case of **REPUBLIC v PHILIP ONDARA ONYANCHA [2017] eKLR** set out conditions upon which the court may declare a mistrial:- if the procedural defect or error is likely to cause or has caused a gross miscarriage of justice to either the accused, the victims or the prosecution as stated thus:-

“25. The Court of Appeal in REPUBLIC v EDWARD KIRUI [2014] eKLR quoted with approval the Supreme Court of India decision in MURUGAN & ANOTHER v STATE BY PUBLIC PROSECUTOR, TAMIL NADU & ANOTHER [2008] INSC 1668, in which quoting the case of BHAGWAN SINGH v STATE OF M. P. [2002]4 SCC. 85 about miscarriage of justice the court said:-

“The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent.”

26. The court further stated in paragraph 21:- “A miscarriage of justice is the result of inter-a-lia an unfair trial and the trial under consideration was such as unfair trial with regard to the prosecution and the victims of the murder which the trial court found was committed. Both the victims and the families were deprived of fairness . . . A fair trial will attempt to ascertain the truth. Miscarriage of justice was discussed in the Indian case of ZAHIRA HABIBULLAH SHEIKH & ANOTHER v STATE OF GUJARAT & OTHERS, AIR 2006 SC 1367 wherein the Indian Supreme Court of India stated:- “It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted . . .”

15. In this matter I see no prejudice suffered by either the State or the defence in the matter having proceeded thus, guided by the Constitutional requirement under **Article 159 (2) (a)** which requires the court to administer justice without undue regard to procedural technicalities and further **Article 50 (1) (e)** which provides for the right to have the trial begin and conclude without unreasonable delay.

16. Having found that there is no prejudice suffered herein, I shall therefore proceed to write and deliver Judgement herein based upon the evidence tendered before Justice Ombija and myself so as to bring this matter to an end, noting that the accused has been in custody from the year 2013 and as stated for record purposes that he did not wish for the matter to commence *de novo* even at the time when the said order was made. I therefore find no merit on the submission by Mr. Okeyo that the court declares a mistrial at this stage.

Dated, signed and delivered at Nairobi this 20th day of June, 2019

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Mose holding brief for Ms. Ojiambo for the accused

Accused present

Court assistant Tabitha