



REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL REVISION NO. 170 OF 2019

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

KIPYEGON JOSPHAT.....1ST RESPONDENT

ROSE KAJIRA.....2ND RESPONDENT

WINNY CHEBET.....3RD RESPONDENT

R U L I N G

1. This is a ruling on the Notice of Motion dated 10/9/2019 brought under to **section 362 as read with Section 364 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya**. The applicant seeks that this court reviews the orders issued in **Meru Criminal Case No. 1973 of 2016 (“the said case”)** on 9/9/2019 which directed that the said case do start de novo.

2. The application was based on the grounds on the face of it and in the supporting affidavit of **Eliud Mate Murithi**, who deposed that he is the complainant in the said case and was the Deputy Governor – Tharaka Nithi County at the time the offence occurred. He alleged that he was robbed by the 1st respondent who was at the material time his body guard. The incident happened in the presence of **Jackline Muthoni Kimenya and Dennis Murithi Kabii** who at the time were employed by the County Government at his residence. During the trial the availability of the two was difficult since their contract was never renewed by the county government.

3. He further deposed that; so far, six prosecution witnesses had testified and only 3 expert witnesses remain to conclude that case; that to secure the attendance of the witnesses who have already testified would be difficult considering that their current whereabouts are unknown. If the matter should start de novo, it would be extremely prejudicial to the prosecution as it would not be able to mount a new trial.

4. The application was opposed by all the respondents. In his replying affidavit, the 1st respondent stated that it is not true that some witnesses cannot be traced. That the prosecution has not demonstrated how it cannot procure the said witnesses. That the court had ordered the matter to start de novo for two reasons, to wit, lack of supply of crucial prosecution exhibits to the defense and for the defence being compelled to proceed even when the prosecution admitted to not supply the same. The 3rd respondent reiterated and supported what the 1st respondent had sworn.

5. In her replying affidavit sworn on 23/9/2019, the 2nd respondent stated that she had not been furnished with all the exhibits at the trial and had only been provided with **Pexh. 3, 9 and 13** out of the 13 exhibits. That the prosecution has been conducting ambushed hearings and there was no averment that the witnesses were dead or had left the jurisdiction of the court.

6. I have carefully considered the affidavits, the submissions of learned Counsel together with the authorities relied on. I have also considered the record of the trial court.

7. The issue before Court is the exercise of the trial court’s discretion under **section 200(3) of the Criminal Procedure Code**. That subsection 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”.

8. This subsection has been the subject of various judicial pronouncements both by this Court and by the Court of Appeal. In **Ndegwa v Republic [1985] eKLR**, the Court of Appeal held:-

“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.”

9. In Abdi Adan Mohamed v. Republic [2017] eKLR, the Court of Appeal held:-

“As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanor of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-

‘It could also be argued that the statutory and time honored formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanor and credibility of witnesses. It has been and will be so in other cases that will follow. ...’

In other words Section 200, as was emphasized in Ndegwa (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates.

...

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”.

10. In Joseph Kamau Gichuki v Republic NRB [2013] eKLR, it was held: -

“This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, 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”.

11. In the present case, the trial began on 14/3/2018 before **C.M. L. Ambasi**. On the said date, 3 witnesses were heard and the matter adjourned to 7/6/2018 when two witnesses testified. The sixth witness testified on 7/3/2019. After the said hearing, the trial Magistrate was transferred and the matter was placed before **Hon. T. Muraguri SPM** on 9/9/2019.

12. On that day, **Mr. Nyadimo**, Learned Counsel for the 1st and 3rd respondent applied that; the **PW6** be recalled for cross-examination and **PW1, PW2 and PW3** do testify afresh. On his part, **Mr. Mutegi** for the 2nd accused applied that the case do start *de novo*. The prosecution opposed that application on the grounds that the prosecution could not guarantee the attendance of **PW3 and PW4**. It further indicated that the complainant will suffer trauma having to repeat his testimony afresh.

13. In a terse short ruling, the trial court directed that the case commences *de novo* and that the defence be supplied with witness statements and documentary evidence. It is against this order that the present application is predicated upon.

14. I have already set out what **section 200(3) of the CPC** provides. From that section and the case law set out above, the desirability of the trial Magistrate commencing and concluding a trial is central. However, due to the vicissitudes of life a trial Magistrate may pass away, retire, leave service or be transferred or become incapable of exercising his/her jurisdiction over a trial for one reason or another. This is a reality of life and that is why **section 200 of the CPC** and **section 34 of the Evidence Act** have been enacted to take care of such eventualities.

15. The present application is predicated on the premise that; the prosecution will be unable to procure the witnesses whom it has been stated cannot be traced. In paragraph 15 of their replying affidavits, the 1st and 3rd respondent admit that the case had taken so long because of the unavailability of witnesses. The trial has taken 3 years and only 6 witnesses have testified. Further, it has been stated that only 3 expert witnesses are remaining. The trial has advanced.

16. The view this Court takes is that, **section 200 of the CPC** is not a *carte blanche* license for criminal cases to always start *de novo* every time a trial court changes. It is a desirable idealistic aspiration. However, like all aspirations, it has limitations. The limitation is what the Court of Appeal set out in the case of **Abdi Adan Mohamed v. Republic (supra)** The aforesaid limitation include; 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.

17. Despite the issue of the fatigue of the witnesses, the likelihood of the unavailability of witnesses being raised before the trial court, the Learned Magistrate neither considered nor referred to the same. Those are issues the trial court should have considered before it ordered the trial to commence *de-novo*.

18. The respondent's opposition to the application was based on the allegation that they had undergone the trial without vital documents being supplied by the prosecution. With due respect, firstly, **section 200 of the CPC** is not meant to assist an accused to better or modify his case where he has already squandered his chance and secondly, there is no evidence on record that the respondents protested to the original court from proceeding with the trial for lack of supply of the evidence by the prosecution or for any of the reasons being advanced now.

19. Weighing all the factors in this case, I find that firstly the trial court did not consider the relevant factors and/or principles before it ordered that the case start *de novo*. Secondly, the trial court did not consider the objection raised by the prosecution. Thirdly, the interest of both the prosecution as well as the accused must be considered when making directions under **section 200 of the CPC**. The prosecution has candidly stated the difficulties it will be under if the case is ordered to start *de novo*.

20. In the premises, I am satisfied that the order of the trial Magistrate was wrongly made. I set aside the order of *de novo* hearing ordered on 9/9/2019 and replace therefor with the following direction:-

a) that **PW1 and PW6** be recalled for purposes of cross-examination and re-examination only.

b) that the trial does proceed from where it had reached.

It is so ordered.

DATED and DELIVERED at Meru this 31st day of October, 2019.

A. MABEYA

JUDGE