REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 41 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

KELVIN OPIYO.....RESPONDENT

Coram: Hon. Justice R Nyakundi

Ms Sombo for DPP

RULING

This ruling deals with an application filed by the Director of Prosecution dated 3rd October, 2019 in terms of Article 165(6)(7) of the Constitution and Section 362 of the Criminal Procedure code seeking the following orders:

> ***1. That a writ of certiorari do issue to quash the decision by the trial magistrate in exercise of discretion under Section 200(3) of the CPC in Criminal Cases No. 210 of 2015 and 245 of 2016 to order for proceedings to start Denovo.***

The facts of the present matter

The accused person was charged with the offence of burglary contrary to Section 304(2) of the Penal Code. The second count was that of stealing from a dwelling house contrary to Section 279(b) of the Penal Code on 11th April, 2016.

The accused pleaded not guilty to both counts necessitating the prosecution to call evidence under Section 107(1) of the Evidence Act to discharge the burden of proof beyond reasonable doubt.

The trial began in earnest on 27th April, 2016 when the first witness for the prosecution took the witness box. The prosecution called a total of 5 witnesses and closed its case on 2nd April, 2019. Thereafter the accused person absconded from the jurisdiction of the court and a warrant of arrest was issued and a notice to show cause to the surety.

On 7th June, 2019 the accused submitted himself to the court and a ruling of a case to answer made on 21st June, 2019. On 21st August, 2019 during the taking over from proceedings by Hon. Chepseba from the original trial magistrate Hon. Wewa who had proceeded on transfer ordered as follows in terms of Section 200 of CPC:

> ***"Section 200 of the CPC completed with the proceedings to be typed."***

Further in his ruling the learned trial magistrate ordered as follows:

> ***"The matter to start afresh to enable the accused cross-examine the witnesses again."***

Analysis

The Law

It is the dictate of the Evidence Act under Section 146(4) that the accused person has the right to recall and cross-examine the witnesses

respectively. Section 150 of the CPC donates the power for the court to summon witnesses to be recalled for purposes of examination in chief, cross-examination and re-examination if it appears essential to that decision of the case. Further Article 50(2)(4) provides that an accused person has the right to adduce and challenge evidence in any criminal proceedings.

The test should be whether the opposing party was given a full opportunity to test the evidence of the witness. The violation under Article 50 does not if a witness is not fully cross-examined by an accused person. It is a fundamental principle that the accused should be allowed to present his case in court in effective manner. The right to present ones case is also subject to the principle of equality of arms. The principle of equality of arms is a plausible. That both sides will be given the same procedural opportunities to prove their case. Therefore the court cannot act in a way which gives the prosecution an advantage over the defence.

It is noteworthy that under Section 200 of the CPC the right is not absolute; the court is entitled to test the following:

> ***"The right to cross-examine is not a fundamental human right; rather it is part of the court's obligation to ensure that there is a fair trial one which fairly balances the interest of the accused with those of the prosecution."***

In the persuasive authority by the Supreme Court of Canada **R v Fanjoy 1985 21 CCC 312** the court held that:

> ***"It is the duty of the trial judge to ensure that recall of witnesses, for examination in chief, cross-examination does not offend the trial fairness."***

In my view the application of Section 200 of the CPC and exercise of discretion by the trial magistrate is resonated when the prosecution and the defence has closed its case. It is only in the normal sense the prosecution and the defence will be permitted to re-open its case.

In the case of **R v Marsh 1941 D-LR Fording, R v Day 1940 27 CR Appeal R 168**, the court held:

> ***"When the proceedings are at a stage where both the state and defence have closed their case the discretion to re-open the proceedings ought not to be exercised except in a case where some matter arises eximproviso which no human ingenuity could have foreseen."***

The Court of Appeal in the case of **Nyabuto v R 2009 KLR 409** held:

> ***"By dint of Section 200(1) of the CPC succeeding judge may act on the evidence recorded wholly by his predecessor."***

However, Section 200 of the Criminal Procedure Code though predicated on a right to a fair hearing the efficacy of it requires that certain threshold parameters be considered by the court in a manner which does not prejudice or occasion an injustice. The succeeding judge or magistrate ought to construe the provisions in a manner which endears towards just, fair and proportionate administration of justice. (See **Ndegwa v R 1985 KLR 535**).

In this case the trial judge passed on after having fully recorded evidence form 7 witnesses and form the two appellants and had in fact summoned up to the assessors. The trial, moreover, was not a short one but a protracted one which had been in the system for over five years to conclude.

The passage of time is not compatible with the trial being ordered to start denovo. Though the prosecution witnesses might have been available within the jurisdiction of the court, there is always fatigue on the part of the witnesses who are called upon from time to time to take the witness box and give evidence on the same subject matter. One cannot rule out an account of loss of memory to recall the events which formed the basis of them being enlisted as witnesses.

In the case of R v Wellington 2014 eKLR the court held interalia

> ***"In considering section 200 (3) as regards the information given to the accused the same information should be extended to the complainant in equal measure. Article 159(2)(a)(b)a and (c) of the Constitution deals with justice to all irrespective of status, justice not being delayed and being administered without undue regard to procedural technicalities. That the accused and the complainant should get justice without delay and should be administered without undue regard to procedural technicalities. That the accused and the complainant are entitled to justice without procedural technicalities and decimation."***

In the premises the learned magistrate exercised discretion in excess of jurisdiction. The order to re-open the proceedings is dismissed. The order by the trial court is hereby quashed. The trial do proceed before the same magistrate to take over proceedings without the reopening the prosecution's case.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER, 2019.

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R. NYAKUNDI

JUDGE