



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 31 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHARLES MUNGERIA KARUMA.....ACCUSED**

**R U L I N G**

1. Vide the information lodged in this court on 9<sup>th</sup> April, 2008, **CHARLES MUNGERIA KARUMA (“the accused”)** was charged with the murder of Jane Kambura Baikilithu on the 26<sup>th</sup> March, 2008. Makau J heard four witnesses before he was transferred. On 6<sup>th</sup> October, 2015, Wendoh J gave directions that the matter do proceed from where it had reached.

2. Sometimes in 2016, differences arose between the accused and his then Counsel, Mr. Omari and the court ordered that a new Counsel be appointed for the accused. Accordingly, Mr. Muthomi was appointed on 11<sup>th</sup> May, 2016 to represent the accused. On 22<sup>nd</sup> June, 2016, Ms. Nelima held brief for Mr. Muthomi and informed the court that her instructions were that the matter do start *de novo*.

3. The court observed that the previous Counsel for the accused had taken instructions that the matter do proceed from where it had reached and ordered that the evidence of the doctor, who was the only remaining witness be taken on 7<sup>th</sup> September, 2016. On the 7<sup>th</sup> September, 2016, Mr Muthomi indicated that, since he had only been appointed recently, he needed time to study the matter before he could proceed.

4. On 4<sup>th</sup> October, 2016, Learned Counsel Mr. Muthomi informed the court that the accused had requested that PW1 to PW3 be re-called for cross-examination. The Court therefore directed that the prosecution do confirm the availability of the three witnesses before the prosecution can respond to the application for recalling them. On 15<sup>th</sup> October, 2016, the prosecution told the court that the Officer Commanding Laare Police Station had followed up with witnesses but could not trace any.

5. Chief Inspector **William Matu** of Laare Police Station swore an Affidavit on 1st December, 2016 detailing the frustrations he had undergone trying to trace the said witnesses. He concluded that he could not get the three witnesses to come to court for cross-examination. Subsequently, Wendoh J was transferred from this station and I took up the matter on 9<sup>th</sup> February, 2017. The court ordered that the proceedings be typed and be availed to Mr. Muthomi to enable him argue the recall application.

6. When the matter came upon 20<sup>th</sup> June, 2017, Mr. Muthomi submitted that it was not clear if the prosecution had closed its case as the doctor had not testified; that Inspector William Matu, the OCS Laare Police Station, and the Chief of Linjoka Location be summoned for cross-examination as to the whereabouts of the three witnesses. He further submitted that the accused wished that the matter do start *de novo* allegedly because, the accused did not have faith with his previous advocate. That because of the differences the accused had with the said advocate, the accused was of the opinion that he was not ably represented.

7. On his part, Mr. Mulochi Learned Prosecutor submitted that PW4 had testified on 21<sup>st</sup> January, 2014 and allowed to produce the Post Mortem after confirming to court that Dr. Macharia, the doctor who carried out the postmortem on the body of the deceased had left public service. That the evidence of PW4 was properly admitted under **sections 33 and 77 of the Evidence Act Cap 80 Laws of Kenya**. That the information he gave to court to the effect that the doctor was yet to testify was out of ignorance as he had not studied the file yet.

8. Mr. Mulochi therefore submitted that, the prosecution had closed its case and all the accused had was a right under **section 200 of the Criminal Procedure Code** to be informed that he could apply for the re-call of prosecution witnesses. That it was not mandatory for the matter to start *de novo*. That the accused had been informed of that right; that the prosecution had tried to contact the witnesses through the police without any success. Mr. Mulochi observed that the only differences the accused had with Mr. Omari was that, the accused had accused the said advocate of demanding Kshs.30,000/= from him which the advocate denied and recused from representing the accused. Mr. Mulochi did not object to the summoning of Inspector Matu and the Chief of Linjoka Location.

9. Upon hearing Learned Counsel, the court summoned Inspector William Matu and the Chief of Linjoka Location. The two appeared and testified on 9<sup>th</sup> November, 2017. IP Matu told the court that he had been the OCS of Laare Police Station for the last 4 years; that upon

receiving instructions to recall witnesses who had testified and present them in court; that, went to Mr. Miriti, the Assistant Chief of Linjoka sub-location to help him trace the witnesses. On arriving at the home of the witnesses, he found that they had moved away. He was only able to trace PW1 **Gerald Mithika** who had moved to Nanyuki. However, after getting in touch with the said witness, the witness told him that he will not come back to court as he had already testified. IP Matu concluded that he was therefore unable to produce the said witnesses.

10. In cross-examination, IP Matu told the court that even if the court sent an officer to Linjoka, such officer would confirm what he had told the court. That he had established that PW1 was a brother to the accused and had obtained that witness' mobile number from the Assistant Chief of Linjoka sub-location.

11. **John Miriti** is the Assistant Chief of Linjoka sub-location of Ntunene Location of Laare Division. He told the court that the said witnesses come from his area of jurisdiction. He named them as **Doreen Kendi, Gerald Mithika and Phineas Mugambi**. That every time he tried to call PW1 who is in Nanyuki, PW1 would switch off his phone. That he was unable to trace the other two witnesses who are children of the accused. In cross-examination, he stated that his home is about 5 km from the home of the said witnesses. He gave the number of PW1 as 0718[...].

12. Both Mr. Muthomi and Mr. Namiti for the prosecution relied on the evidence on record. The court has considered the entire record. As already stated, four witnesses testified before Makau J before he was transferred from this station. On 6<sup>th</sup> October, 2015, Wendoh J gave directions that the matter do proceed from where it had reached. It is only after the accused disagreed with his previous advocate, Mr. Omari that he first applied that **PW1, PW2 and PW3** be recalled.

13. *Section 200(3) of the Criminal Procedure Code Cap 75 of the Laws of Kenya* provides:-

***“200. (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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”***

14. The above provision applies as well to trials in the High Court by dint of *section 201(2) of the CPC*. It is clear from *section 200* that an accused has a right to demand that witnesses who testified before a previous judge be recalled and reheard. Because of the use of the term “may” in that section, the recalling cannot be said to be mandatory. Once an accused exercises the right of recall, the court is under a duty to effect the recall. However, this will depend on the availability of the witnesses sought to be recalled.

15. In the present case, directions had been taken that the trial continues from where it had reached. The accused changed his mind to demand the recall of PW1, PW2 and PW3 only after he changed his advocate. He is entitled to that recall. The prosecution called Chief Inspector William Matu and Mr. John Miriti, the Assistant Chief of Linjoka Area where the three witnesses are said to come from. Both narrated to the court the effort to trace they had made to trace the said witnesses but without success. That they traced PW1 who had moved to Nanyuki but he was not willing to come to court. PW1 would always switch off his phone once he sees their calls. He is said to be the brother to the accused and he intimated to IP Matu that since he had already testified, he was not ready to come back to court.

16. As regards PW2 and PW3, they were said to be children of the accused. They moved away from their home and nobody knows where they went to. This court observed both the OCS of Laare Police Station and the Assistant Chief testify. It appeared to this court that they were not honest. Indeed they even disclosed the mobile telephone number of PW1 who kept on switching it off whenever they tried to call him. The court believed them. In the circumstances the court is satisfied that the witnesses sought to be recalled, PW1, PW2 and PW3 cannot be found, or are not available to be recalled.

17. Mr. Muthomi submitted that the accused wanted the matter to start *de novo* on the grounds that the accused felt that due to the differences he had with Mr. Omari, he was not properly represented. The record shows that, when the trial commenced before Makau J on 30<sup>th</sup> January, 2012 a Mr. Omayo Advocate appeared and represented the accused. He cross-examined PW1, PW2 and PW3 on behalf of the accused.

18. Mr. Omari came on record for the accused on 21<sup>st</sup> January, 2014 and on the following day, 22<sup>nd</sup> January, 2014 took the evidence of PW4. There were several court appearances from then until 26<sup>th</sup> April, 2016 when the accused claimed that Mr. Omari had demanded money from him and they parted ways. Two years previously, when Mr. Omari cross-examined PW4 on behalf of the accused, there had been no disagreements. In this regard it is not Mr. Omari who conducted the case of the accused when the witnesses who are sought to be recalled testified. Accordingly, I reject the application for the matter to begin *de novo*.

19. As regards the position of the prosecution case, it is clear that PW4 had produced the postmortem report. It is for them to indicate whether they will be calling the doctor or not.

20. Accordingly, the directions this court makes is that this matter will proceed from where it had reached.

**DATED and DELIVERED at Meru this 15<sup>th</sup> day of February, 2018.**

**A. MABEYA**

**JUDGE**