



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 24 OF 2016

REPUBLIC.....PUBLIC PROSECUTOR

VERSUS

1. ELIAS PETER MUHUNYA.....1ST ACCUSED

2. DICKSON ODOUR OMOGA.....2ND ACCUSED

RULING

1. This ruling is on directions on the request by the accused persons' counsel Mr. Onyango Charles Advocate that the case commences *de novo* before the succeeding court following the transfer of the previous trial Judge, Hon Mr. Justice James Aaron Makau to Nairobi. The accused persons **Elias Peter Muhunya and Dickson Oduor Omoga** jointly face the charge of murder contrary to section 203 as read with section 204 of the Penal Code. The trial is still at the prosecution stage. Three witnesses have so far testified and the prosecution intimates that two more witnesses are yet to testify. Following the transfer of the learned Justice Makau, the matter has now come up before this Court for further hearing. Before the court could ask of the accused persons' preferences in terms of section 200 of the Criminal Procedure Code, the accused person's counsel Mr. Charles Onyango chose to have the trial begin *de novo*. The accused persons' counsel submitted at length contending that as this court had not had the opportunity to hear and see the witnesses who had testified against his clients first hand, it was only fair and just that this court determines that the trial commences *de novo*, taking into account the nature of the offence that the accused persons are charged with. It was also submitted that no prejudice would be occasioned to the complainant if the hearing commences afresh. Counsel resisted any reliance on the proceedings taken by Hon Justice James Makau to continue with the prosecution of his clients.

2. In opposition to the request for the case to proceed *de novo*, the prosecution counsel Miss Odumba submitted in contention that this was a 2016 matter and that the delay in prosecuting the case was occasioned by the defence counsel who was at all times not ready to proceed.

3. Further, it was contended that the accused persons who were released on bond were only released on condition that some witnesses testify in the case. That since the hearing commenced, the accused persons had had interactions with the witnesses who had already testified and that there was apprehension that the accused would interfere with the witnesses who had already testified in the matter if the case starts *de novo*. Miss Odumba urged the court to decline the request and continue the hearing from where Hon. Justice Makau left the matter.

4. Prosecution counsel further submitted that this being a court of record, all the evidence was on record and that as this court had not complained of inability to continue from where the case had reached, the defense should not complain. She further submitted that albeit she had not prosecuted the case initially, but that she was ready to proceed from where the case had reached. She submitted that the request to start the case *de novo* was not being made in good faith.

5. In a rejoinder, Mr. Onyango counsel for the accused persons maintained that the request was being made in good faith and that there was no indication on record that the accused persons were interfering with witnesses. It was submitted that the only delay was occasioned during the hearing of bail application as the court had to get a pre-bail report from the probation officer on the eligibility of the accused persons to be released on bail, and that the accused persons even contemplated an appeal but they abandoned it after the trial Judge favourably reconsidered his earlier decision and granted them bail pending trial. Counsel urged the court to allow the application.

6. The issue for determination is, therefore, whether the court will, in the circumstances of this case, order a trial *de novo* or continue from where the previous judge had left the matter.

7. Section 200 of the Criminal Procedure Code (CPC) provides for the procedure for the taking over of criminal proceedings between the magistrate's courts, which procedure is applicable *mutatis mutandis* the High Court as follows:

“200 (1) Subject to subsection (3), where a magistrate, 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 who has and exercises that jurisdiction, the succeeding magistrate may -

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(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 summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

8. Section 200 of the Criminal Procedure Code (CPC) is in my humble view, designed to give a fair hearing to an accused whose full trial is not possible before one judicial officer to the end of the case at the judgment and has to have his guilt or innocence established by a court which did not hear and see all the witnesses who testified in the case.

9. Section 201(2) of the same Code is clear that the provisions of section 200 of this Act shall apply *mutatis mutandis* to trials held in the High Court so that the accused is asked to confirm whether the trial should proceed to further hearing from the position it had reached with the previous court with or without recall of witnesses, or whether the entire trial should commence afresh in a *de novo* trial. The latter is, of course, subject to availability of prosecution witnesses.

10. However, where witnesses are not available by reason of death or cost of procuring their attendance or otherwise and the previous Judge is available, even if he or she is at a different station and at some cost, an order of the Court would usually be made to permit the trial to continue to hearing and determination before the Court that previously heard the matter.

11. Having heard all the submissions by both the defense counsel and the prosecution counsel, as the criminal proceedings had been had before the previous Court which only adjourned because the court was on transfer and not because witnesses were not available, and having perused the record of proceedings so far taken, I see no prejudice that would be occasioned to the prosecution if this court proceeds to accord the accused persons an opportunity to be heard *de novo*.

12. The Prosecution Counsel did not demonstrate that there was interference with witnesses by the accused persons and if that happens, then nothing will stop this court from considering such allegations on their merits with a view to cancelling the accused person's bonds for obstructing the cause of justice.

13. The procedure set out under section 200 of the Criminal Procedure Code is not an avenue for securing a retrial before a new Court after the Prosecution has called evidence before another Judge. However, the right to a fair trial as espoused in Article 50(1) of the Constitution cannot be limited. Under section 20 of the Criminal Procedure Code it is for the court to explain to the accused persons their right to demand for resubmitting and rehearing of witnesses where the trial has partially been conducted by a different Judge.

14. On the other hand, it is my view that where a previous court has heard all the witnesses for the Prosecution to the close of its case and has considered the evidence and found that the evidence establishes a *prima facie* case and put the accused on his or her defense, the hearing of the defense case should be had before the court that made ruling on the case to answer, unless the judge or magistrate is totally unavailable.

15. In this case, the previous trial Judge is already on transfer but after hearing 3 witnesses and other witnesses are remaining. The Judge did not make any conclusions as to whether there is *prima facie* case against the accused persons. It would therefore not be appropriate to order that the Judge who partially heard the case should find time to come and conclude the trial.

16. The accused's right to recall witnesses must however be balanced against the provisions of Article 50(1)(e) of the Constitution which espouses that the trial must begin and be concluded without unreasonable delay. This is a 2016 case. The prosecution have not claimed that witnesses are not available or that it will take a considerable period of time to secure their attendance in court. It is also not long ago since the witnesses testified.

17. I would therefore in the final analysis allow the application by the accused persons' counsel seeking to have their trial commence *de novo* and order that this matter proceeds to hearing *de novo*. All witnesses shall be bonded for the rehearing. The accused persons are however informed that they are not expected to interfere with the witnesses in any manner as that would lead to cancellation of their bonds.

Dated, signed and delivered in open court at Siaya this 28th day of May 2018.

R.E. ABURILI

JUDGE