REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CRIMINAL APPLICATION NO. 3 OF 2018

SLVESTER NJAGI NGUGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, Sylvester Njagi Ngugi has brought his notice of motion filed on 24th January, 2018 under Section 200(3) of the Criminal Procedure Code, Cap 75 (CPC). The Respondent who is the Director of Public Prosecutions (DPP) opposes the application.

2. Although the matter has come to me by way of a miscellaneous application, the same is essentially an appeal against the decision of the trial magistrate (D.M. Ndungi, SRM) denying the Applicant an opportunity to have his trial in Mariakani PM Criminal Case No. 583 of 2015 start *de novo*.

3. Briefly, the Applicant was charged with robbery in Mariakani PM Criminal Case No. 583 of 2015, Republic v Sylvester Njagi Ngugi. The magistrate (N.S. Lutta, SPM) who was hearing his case was transferred before concluding the trial. When D.M. Ndungi, SRM took over the trial, he complied with the requirements of Section 200(3) CPC and the Applicant exercising his right under that provision, demanded that the witnesses who had testified before the former magistrate be re-summoned and reheard. The Applicant's prayer was opposed by the prosecutor. In a ruling delivered on 14th September, 2017, the trial magistrate rejected the Applicant's decision to have the matter start *de novo*.

4. The Applicant had also applied to have his trial transferred to another court of competent jurisdiction. He also sought to be reinstated on bond.

5. The issue of bond is indeed straight forward. In a ruling delivered on 11th July 2017 the previous trial magistrate had concluded that the Applicant had jumped bail and thus cancelled his bond and remanded him in custody pending the hearing and determination of his case. Therefore, the decision could only be upset through a review or an appeal. However, the new magistrate appeared to have reviewed the issue in his ruling of 14th September, 2017 when he directed the Applicant to avail evidence that he had not jumped bail but was being held in respect of a different matter that was pending before Shanzu Law Courts. The Applicant was also directed to avail certified copies of proceedings from Shanzu Law Courts. I presume the trial court wanted to establish that at the time the Applicant was to appear at Mariakani Law Courts, he was already detained as a result of the charge at Shanzu Law Courts. This was a reasonable requirement by the trial court. The Applicant is yet to comply and his attempt to regain his freedom through the instant application is premature. His application to be reinstated on bond is therefore dismissed.

6. The next issue is the prayer for transfer of his trial to another court. That application was made because the Applicant felt that the previous magistrate was biased because he cancelled his bond. The reason for making the application disappeared the moment the previous magistrate was transferred.

7. In any case, a perusal of the proceedings that took place before the previous magistrate have the hallmarks of a fair trial. The Applicant was allowed to cross-examine witnesses. He was allowed adjournments whenever he gave good reasons. There was therefore no reason for transferring the matter from the previous magistrate and neither was any reason advanced for transferring the matter from the current trial magistrate. The application for transfer of the trial fails.

8. The core issue is the order declining the Applicant's request to have the matter start *de novo.* Section 200 CPC has been the subject of several judicial decisions. The extent to which an accused's demand under Section 200(3) CPC can be complied with was discussed by the Court of Appeal at length in **Abdi Adan Mohamed v Republic [2017] eKLR; Criminal Appeal No. 1 of 2017 (Mombasa)** where the Court stated *inter alia*:

"Section 200 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of the Constitution.

It must, however be remembered that it is the demand by the accused persons to resummon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where 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, time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."

9. The Court went ahead to state that:

"Where, in the language of Section 200(3) the accused demands that any witness be "re-summoned and reheard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impracticable where it is demonstrated that the witness sought to be re-summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith."

10. The demand by an accused person for re-summoning and re-hearing of witnesses who testified before another magistrate should be made in good faith and ought to be reasonable. Where there is impracticability in re-summoning the witnesses, the new magistrate is entitled to adopt and rely on the record of the previous magistrate.

11. A perusal of the proceedings shows that the Applicant's prayer to have the matter start *de novo* was opposed on the ground that the case was old. Further, that the witnesses which the Applicant wanted re-summoned had since left their place of employment and could not be traced.

12. Upon considering the application, the trial magistrate concluded that sufficient reasons had been adduced to warrant the rejection of the Applicant's request to have the matter start *de novo*. The fact that the witnesses could not be found was a good reason for declining the Applicant's request.

13. Considering the submissions placed before this court by the parties and taking into account the legal position stated above, I find the Applicant's application without merit. His undated notice of motion filed on 24th January, 2018 is therefore dismissed.

14. For avoidance of doubt, unless there are justifiable reasons, the Applicant's trial shall proceed before D.M. Ndungi, SRM at Mariakani Law Courts without any further delay.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT