REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL CASE NO. 7 OF 2017

REPUBLIC.....PROSECUTOR

-VERSUS-

STEPHEN KIAGO WANGARI.....ACCUSED

RULING

1. The Accused has been on trial for murder since 6th April, 2017 when a plea of not guilty was entered before Meoli, J. As the trial approached, the Accused offered to enter into a plea bargaining arrangement, but the discussions collapsed, and the matter went to trial. The accused is out on a bond of Kshs 500,000/= and a surety of like amount.

2. The Pre-trial conference was held on 27th July, 2017, and the case fixed for hearing over two days. The state indicated it had three witnesses. Hearings of testimony begun on 9th October 2017. PW1 Damaris Wanjiku, PW2 V W (a minor) and PW3 Josphat Maina Mwangi, testified and concluded their evidence on that day. PW4 Teresia Wanjiku Wangare, testified on 13th November, 2017, and on that date the state indicated that it had five remaining witnesses. On 26th February, 2018, the matter was fixed for hearing on 9th and 10th July, 2018. It came before court for the said further hearing.

3. The learned Judge, Meoli, J., having then been transferred from Naivasha in the usual course of employment pursuant to the provisions of the **High Court (Organisation and Administration) Act, 2015**, the case cannot proceed under her. Through his counsel, Mr Wairegi, the Accused has now applied for directions under **Section 200** of the **CPC**, seeking that the matter should commence *de novo*. The reasons given are that he feels that the witnesses, who testified, in particular PW2 V W, the minor, should be heard afresh by this court because this court needs to see their demeanour. The Accused says that they have not contributed to delay and have sought to conclude the matter swiftly.

4. Counsel submitted that starting *de novo* will not prejudice the prosecution, and cited the Court of Appeal case of **Abdi Adan Mohamed v R Criminal App No 1 of 2017** in support of their application.

5. Mr Koima for the State, opposed the application to start *de novo*. He argued that the State has only four more witnesses to go, and that two were presently in court to continue with the hearing. He pointed out that the evidence of V W was given when she was 4 years old, and she is now five. She was traumatised after testifying, and returning her to the stand to testify again may affect her psychologically; that the provisions of **Section 200 CPC** for starting *de novo* are not absolute; that the court has not been told whether there was any issue with respect to the proceedings which necessitates starting afresh; that the counsel on record is the same counsel who has been on record all along and nothing would change. Counsel urges that there is no merit in the application.

6. I have carefully considered the Accused's application; the law and the authorities and the circumstances surrounding this case.

7. The Accused was particularly concerned about the demeanour of the the minor, PW 2 who gave evidence before Meoli J. I have perused the record of proceedings and seen that in the evidence of PW2 V W who was four years old, Meoli, J, did in fact record her impressions of the demeanour of the girl. This was in accord with **Section 199 CPC** which requires that as a judicial officer should ensure he:

> ***"…has recorded the evidence of a witness, he must also record such remarks (if any) as he thinks material respecting the demeanour of the witness whilst under examination***

8. In line with that provision, the Judge recorded the evidence of the minor and also the demeanour at the end of her evidence as follows:

> ***"A very intelligent and straight forward child. Maintained positive demeanour with confidence in her evidence."***

This aspect should assuage the Applicant.

9. The provisions of **Section 200** of the **CPC** which the Applicant has invoked provide as follows:

> ***"200. (1) Subject to sub-section (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-***
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> > ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
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> > ***(b) where judgment has not been written and signed by predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.***
>
> ***(2) …..***
>
> ***(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 re-heard and the succeeding magistrate shall inform the accused person of that right.***
>
> ***(4) ….."***

10. The Court of Appeal at Nakuru in **Peter Karobia Ndegwa v Republic[1985] eKLR** explained the above section 200 as follows:

> ***"Section 200 is not to be invoked where, as seemingly in the instant case, such a half-heard trial is a short one, it could be conveniently started de novo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.***
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> ***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.***
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> ***It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion. The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation."***

11. As earlier stated, the present case commenced in April last year and four witnesses have since given evidence, leaving another four yet to testify. At the rate at which the case has proceeded so far, and given the court caseload, the remaining evidence could potentially be adduced within another three days of hearing, if the trial were to proceed from where the matter reached with the previous judge. A de novo trial would require some backtracking, including some slack time to enable past witnesses to be found and brought to re-trial. Once found another four or five days of hearing would be required, which, given the court's calendar and without leap-frogging other cases in the hearing track, would mean the re-trial would itself be pushed into next year. These are the practical consequences that parties must appreciate when this kind of application is made.

12. Looking at **section 200 CPC,** what the Accused actually has under that provision is the right or, more precisely, the discretion to re-summon any witness for re-hearing; (the wording used is *"the accused may demand that any witness be re-summoned and reheard.…"*). It is not a general right to restart the case *de novo*. The restarting of a case de novo is generally prompted by the necessity to ensure the accused's rights to a fair trial are protected. This includes the need for the judge –newly seized of a case partly heard by another judge – to hear the evidence and see the demeanour of the witnesses who had already testified, and thus properly appreciate and understand such evidence and do justice in determining the case.

13. This court is enjoined to not only protect the rights of an accused, but also balance the rights of parties in a case. Before the onset of the Constitution 2010, both the Accused and the State were the generally recognised parties in the jurisprudence of criminal cases. Pursuant to Art 50(9) of the Constitution, 2010 however, Victims of offences have since been incorporated as parties in a criminal case with rights such as are legislated under the Victims Protection Act. Their rights and interests too must be considered in the whole equation when determining whether to allow a case to be commenced de novo when an accused chooses to exercise his discretion.

14. In the case of **Abdi Adam Mohammed -Vs- Republic [2017] eKLR** the court held that reading **Sections 200** of the Criminal Procedure Code together with **Section 34** of the Evidence Act and **Article 51** of the constitution an accused person's rights to a fair trial are clearly entrenched in the constitution. The court went on to say:

> ***"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. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."

15. Taking into account all that I have said above, and balancing the rights of the parties, and in particular being cognizant that the protection of the liberty of an accused person or convict is sacrosanct, I am inclined to order that the applicant is at liberty to identify the specific witnesses that he wishes to re-summon for evidence.

16. Accordingly, the orders are as follows:

(a) The applicant shall make specific application for the re-summoning of any particular witness who has already given evidence and in respect of whom the applicant has a particular reason to re-summon to give evidence.

(b) To that extent, the applicant's application succeeds

Dated and Delivered at Naivasha this 25th Day of July, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Wairegi for the Applicant

2. Mr. Koima for the State

3. Court Clerk – Quinter