



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 215 OF 2015**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS....APPLICANT**

**VERSUS**

**JOHN NJOROGE NGUGI..... RESPONDENT**

**RULING**

The Applicant, represented by prosecution counsel, Ms. Muthuri made the present application by way of a letter dated 30<sup>th</sup> September, 2015. It is an application for revision of an order in **Criminal Case 297 of 2012, Republic v. John Njoroge Ngugi** pending at the Milimani Chief Magistrate's Court. The genesis of it is an order issued by Hon. Nyangena on 30<sup>th</sup> September, 2015 pursuant to directions under Section 200 of the Criminal Procedure Code. The accused person, the Respondent herein, elected that the matter be heard *de novo*. The prosecution opposed the application citing problems tracing witnesses and further that they had called all their witnesses and intended to close their case. The following prayers were sought in the review application, namely; that this court pronounces itself as to the legality and propriety of the order, that this court orders the former trial magistrate recalled to hear the matter to its conclusion or in the alternative it orders that the evidence of PW1, PW2, PW4 and PW5 adopted under the provisions of Section 34 of the Evidence Act.

The Respondent filed an affidavit in reply in which he stated he wanted the matter to begin *de novo*. He deponed that the prosecution's application was riddled with falsehoods particularly with regard to the fact that they could not trace certain witnesses. He concluded by stating that it was in the interest of justice, fairness and expedience that the present application should be dismissed.

The Applicant, through Ms. Ntabo, filed a Replying Affidavit on 12<sup>th</sup> July, 2016 in which she deponed that the Respondent was just but vexing the court. She stated that it was not until the last minute that he changed his mind by indicating that the trial should start *de novo*. Further that the Respondent had intended to retract on his intention but since he wanted the trial pro longed, he insisted on this application proceeding. She informed the court that PW1, PW2, PW5 and PW6 would only be availed with undue difficulties. PW1 was terminally ill, PW2 was a resident of Malawi and PW5 had since left government employment and relocated to Dubai. With regard to PW5 she stated that the Respondent had exhaustively cross examined her.

The Respondent filed an affidavit on 31<sup>st</sup> August, 2016 in which he deponed that all the witnesses who had testified were available. In any case, it was his right under Section 200 of the Criminal Procedure that his request to have the witnesses recalled be honoured by the court.

The application was canvassed before me on 26<sup>th</sup> September, 2016 by oral submissions. Nothing new arose other than what was canvassed in the parties' respective affidavits. Miss Ntabo relied on the cases of **Republic v. Welington Lusiri** and **Republic v. Benson Wangalwa[2014] eKLR** in support of the application.

In the present application, the Applicant opposes that the trial be heard afresh because of the difficulties some of the witnesses may have in testifying afresh. It then behooves me to revisit the record to confirm the status of each of the witnesses whom the Respondent wants recalled.

PW1 is the complainant. There was no contestation on his availability. It was however submitted that he is ailing from cancer. He has been in and out of the country seeking treatment. It is also factual from proceedings that his evidence could not be completed at a go due to his illness. He once testified on 5.10.2012 and again on 27.4.2015. This court had an opportunity of seeing him in court and honestly he is a frail man. Being the director of the complainant company he has long been waiting to see justice take its course and this can only be achieved by disposing of the trial expeditiously. Besides, the Respondent did not submit on what he hopes to achieve if the witness is recalled. It is also on record that the Respondent was accorded an opportunity to have him recalled after he claimed that he had produced some documents as exhibits and had not cross examined him on them. It is therefore a delaying tactic that he should testify a third time. Furthermore, owing to his ill health, his attendance cannot be guaranteed. I rule therefore that he should not be recalled.

With regard to PW2, she has already relocated to Malawi. The submission by the Respondent that she frequently travels to Kenya is not true. Annexure EON3 (Travel history) attached to the Applicant's Replying Affidavit and which the Respondent did not contest shows that the witness was last in Kenya on 9.4.2015. Other visits are scattered in the years 2013 and 2014. The Respondent did not also demonstrate what he hoped to achieve by recalling the witness. His request in my view is but vexatious and is intended to derail the trial.

With respect to PW5 and PW6 Grace Mumo and Benwell Nyagweso respectively, the Respondent claimed that the witnesses should be recalled because by the time they testified he had not been supplied with their witness statements. He referred the court to the proceedings of 25<sup>th</sup> August, 2014 when the court directed that the trial proceeds despite the fact that he had not been furnished with witness statements. I have made reference to the proceedings dating back to 17<sup>th</sup> June, 2014. The trial was taken over by Hon. Nzakyo from Hon. Shikwe. The Respondent stated that he wished the matter to proceed from where it had reached. This was the case again on 7<sup>th</sup> July, 2014 when Hon. Cherono took over from Hon. Nzakyo. It is on 17<sup>th</sup> June, 2014 that the Respondent informed the court that he had not been supplied with statements of the remaining witnesses. The court made the order accordingly. No witnesses testified both on 17<sup>th</sup> June and 7<sup>th</sup> July, 2014. On 25<sup>th</sup> August, 2014, the prosecution had two witnesses in court. The Respondent informed the court that he had been supplied with witness statements for the two witnesses who were in court including the document examiner. On this day, PW4 and 5 testified. On 28<sup>th</sup> October, 2014, PW6 and 7 testified without the Respondent raising any concern. And the same happened on 14<sup>th</sup> January, 2015 when PW8 gave evidence.

After the testimony of PW8, the Respondent applied to recall PW1 citing that he had not been able to cross examine him when some document was adduced. Further that he had been stood down to pave way for the testimony of PW2 who wanted to travel out of the country. The Respondent's request was granted and indeed PW1 re-testified on 27<sup>th</sup> April, 2015.

It is then interesting that the issue that all witnesses who had testified arose on 30<sup>th</sup> September, 2015 when Hon. Nyangena took over the conduct of the trial from Hon. Cherono. Further, the reasons the Respondent advanced for the recalling of the complainant are not plausible. According to him, the complainant company has many directors and so any of them would testify in place of the other. That may be the case but the prosecution elects which witnesses to call for their case. They chose PW1 and hence the defence cannot dictate to them that any other witness would testify in his place.

From the chronology of the proceedings it is clear that at no time was the Respondent coerced to proceed without being availed the prosecution witness statements. The record clearly shows that he ably cross examined all the witnesses. He has not told the court what gaps he hopes to fill if the witnesses are recalled. I emphasize that Section 200 of the Criminal Procedure is not couched in mandatory terms such that the wish of the accused must carry the day. The court must take into account the circumstances prevailing in each case. For avoidance of doubt I restate sub section (3) of the provision which is the relevant part. The same reads as follows;

**(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.**

The section grants the accused person a right to demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused of this right. The learned trial magistrate duly complied with it by informing the Respondent of his right. She however did not properly take into account the prevailing circumstances that would have limited the compliance with the Respondents request. It is trite that the trial is old having began way back in the year 2012. The main complainant, PW1 who is terminally ailing is eagerly awaiting the conclusion of the trial. Justice should never be one sided but must be balanced both for the complainant and the accused. The accused has been availed all the necessary facilities and opportunities to present his defence. He ably cross examined all the witnesses and no new material fact or evidence has arisen since they testified. There is also nothing new that the Respondent wants to bring out if the witnesses returned to court. A further delay in the trial will just but serve injustice. In my view, his request for the recalling of witnesses is aimed at dragging the trial. I find it not meritorious.

In the result, I rule that the Applicant has advanced a good case justifying why the trial should not be heard *de novo*. I accordingly allow the application. I set aside the learned trial magistrate's order dated 30<sup>TH</sup> September, 2015 directing that the trial begins afresh. I substitute it with an order that the trial shall proceed from where it had reached. The trial court file shall be remitted back to the trial magistrate for mention on 7<sup>th</sup> March, 2017 to take a hearing date. It is so ordered.

**DATED and DELIVERED this 28<sup>TH</sup> DAY OF FEBRUARY, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

1. Miss Kimiri for the Applicant.
2. Respondent in person.