



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION NO. 72 OF 2016

TOM NDOMBI ALIAS SHIHUNDU.....1ST APPLICANT

PHILIP AMAYO ALIAS PHILO.....2ND APPLICANT

VERSUS

REPUBLIC.....:RESPONDENT

(An application brought under articles 22(1), 25(1) and 27(1)(2) of the constitution)

RULING

The 2 applicants Tom Ndombi alias Shihundu and Philip Amayo alias Philo have been jointly charged in Eldoret Chief Magistrate's Court with various offences in Criminal Case No. 4908 of 2012. Specifically, the offences are 2 counts of the offence of robbery with violence Contrary to Section 296(2) of the Penal Code. 1st appellant faces an alternative charge of handling stolen goods Contrary to Section 322 (1)(2) of the Penal Code. They also independently have been charged with the offence of gang rape Contrary to Section 10 of the Sexual Offences Act, No. 3 of 2006. The case before the chief magistrate court is still undermined, with 3 witnesses having testified.

On 1st July, 2016, both applicants filed their own application by way of Notice of Motion, dated 1st July, 2016. The said motions are similar and seeks the same prayers word for word. It is for this reason that when the applications came up for hearing on 16th March, 2017, Learned Counsel for the Prosecution (state) applied that the 2 applications be consolidated and be heard as one. Both applicants had no objection to the application for consolidation. The court accordingly made an order that the 2 applications (CRA 71 of 2016 and CRA 72 of 2016) be consolidated and heard as one.

The application of the applicants seek orders to be summarized as follows: -

- (a) THAT, your Honour, I make this application because I was denied the opportunity to restart a fresh my case as guaranteed under Section 200 of the Penal Code.**
- (b) THAT, your Honour, I was surprised to find out that what I (Tom Ndombi) challenged during Cross-examination were not appearing within the proceedings.**
- (c) THAT, the trial court is forcing and pushing the case to proceed thus violating the law and justice.**

The applicants made oral submissions in court and also presented written submissions. In his oral submissions, 1st applicant, (Tom Ndombi) submitted that he had applied for recall of 2 witnesses and the

court had allowed the application on 10.11.2014. and upon transfer of the trial magistrate (Hon. D. Alego), he made a similar application before the incoming magistrate (Hon. C. Obulutsa) who again allowed same. That after summoning the investigating officer(s) several times, the court ruled that the witnesses could not be traced and that the case should proceed on. His plea was that the witnesses be recalled.

For the 2nd applicant (Philip Amayo), his submissions were that the witnesses be recalled and that the case do start afresh. And that he was aggrieved when the court ordered the case to proceed on before the witnesses could be recalled. Also, that the court had not recorded the questions he had asked.

The state opposed these application first on ground that this is a gimmick to delay Justice. She relied on **Joseph Kamau Gichuki -vs- Republic, quoted in Michael Waweru Ndegwa -vs- Republic CR Appeal 290 of 2010, Nyeri** on what the court ought to consider on whether to invoke Section 200 of the Criminal Procedure Code, being: -

- **Whether it is convenient to start de novo.**
- **How far the trial had gone.**
- **Availability of witnesses who had already testified.**
- **Possible loss of memory by the witnesses.**
- **Time that has lapsed since commencement of the trial**
- **Prejudice likely to be suffered either by the prosecution or the accused.**

Counsel summed up that based on the above standards, the application of the 2 applicants must fail.

I have considered the oral submissions of both sides. I have also perused the written submissions presented by the 2 applicants. As I understand it the applicants have brought these applications Under Section 200 of the Criminal Procedure Code that their Criminal Trial do start afresh and that the witnesses who had testified be recalled. This is first, after the trial magistrate (Hon. Alego) was transferred and there is a new presiding magistrate (Hon. Obulutsa) S. 200 (3) of the Criminal Procedure Code reads;

“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 succeeding magistrate shall inform the accused person of that right”.

The question that begs for answer is whether upon an accused person making an application for recall or rehearing (trial de novo) under the above provision, then automatically the court must allow the application and order for the recall or re-hearing of the witnesses who had already testified. I note that whereas the provision makes it mandatory for the incoming magistrate to inform the accused of his right to ask for recall or rehearing of such witnesses, this provision (S. 200(3)) does not go on to state that the court must make that order of recall or rehearing if such an application is made.

So, what is the position? I am guided on this fact by the court of appeal decision of **Joseph Kamau Gichuki –vs- Republic, quoted by Matiso J; in Michael Waweru Ndegwa –vs- Republic (Nyeri) HCRA No. 290 of 2010**, that:

“this court has previously held that Section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of Justice will be defeated if a succeeding magistrate does not continue a trial commenced by this predecessor. Some of the considerations to be borne in mind before invoking Section 200 include whether it is convenient to commence the trail de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.”

The interpretation I get from the above, is that the order for recall or rehearing under Section 200(3) of

the Criminal Procedure Code is not mandatory upon the application being made by the accused. But rather, that the order would be made depending on the circumstances of each case. So would the circumstances of this case demand that the 3 (or 2) witnesses who had testified be recalled or that they be reheard? First, from the proceedings, it is clear that the trial court has summoned the investigating officer several times on the recalling of these witnesses (27th July, 2015, 29th July, 2015, 10th September, 2015, 17th September, 2015). Reasons have been given by the prosecution side on why the witnesses cannot attend again. First that they are reluctant and have declined to attend (PW3) and secondly that they cannot be found. Also sickness and allegations of threats. Case was filed in court on 16th November, 2012 and the last of the 3 witnesses gave evidence on 12th March, 2014. All this time, the applicants have been in custody. I am convinced that if the witnesses were available or were willing to re-appear in court, they would surely have come back to court. That does not seem feasible. To this extent, I agree with the finding of the trial court (Hon. Obulutsa) on 17th September, 2015, that the case do proceed on with the remaining witnesses. This is because one way or the other litigation must come to an end and a decision must ultimately be made by the court. In this present case, it is on record that the applicants have applied for recall or re-hearing and it has been confirmed by the prosecution that that is not possible. This trial may proceed with the remaining witnesses and it would be a matter of Judicial notice on the part of the trial court that such witnesses were not recalled or reheard as applied for by the applicants.

As to the 2nd ground raised that the proceedings do not contain the whole evidence as it came out during trial, I get the answer in Section 200 (4) of the Criminal Procedure Code, thus;

“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 accused was materially prejudiced thereby, set aside the conviction and may order a new trial”.

To me, this presupposes that this is an issue that can only be raised on appeal and only in case of a conviction. Had the witnesses been available, a recall of the witnesses could have been ordered. That is not possible in this case.

Considering all the circumstances of this case, it is my firm position that it is not possible to have the witnesses who have already testified in the criminal case recalled or reheard. The applications of the 2 applicants accordingly fail. I dismiss the 2 applications as consolidated and order that their joint Criminal Case No. Chief Magistrate’s Criminal Case No. 4908 of 2012 do proceed on with the remaining witnesses to its logical conclusion.

Orders accordingly.

DATED, SIGNED and DELIVERED at ELDORET, this 30th Day of March, 2017.

D.O. OGEMBO

JUDGE

Ruling read out in open court in presence of: -

1. Ms. Ms. Kegehi for the State and
2. Both Applicants

D.O. OGEMBO

JUDGE