REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO. 6 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EDWIN HARRY OBORE.....ACCUSED

RULING

The accused was first presented to court in respect of this matter on 14th February 2013. The plea was taken on 21st February 2013.

On the 4th June 2014, the hearing commenced before Honorable Justice Tuiyott. He heard 9 witnesses and placed the accused on his defence. Before he could hear the defence witnesses, he was transferred. He was succeeded by the honorable justice Weldon Korir who heard one defence witness and at the time of his transfer, six defence witnesses were yet to testify.

On 31st May 2017 when the matter came before me, I was urged to have the matter start de novo. The state was opposed to the proposal hence this ruling.

Section 200 of the C.P.C has been a subject of numerous interpretations and it would appear it has not been dealt with, conclusively. Initially it was taken as absolute in all aspects but recent interpretations has indicated that the explanation of the same by the magistrate taking over a case was mandatory but what followed was not. In the case of **FRANKLINE MWITI Vs. REPUBLIC CRIMINAL APPEAL NO. 20 OF 2016 (MERU)** I made the following observations:

> ***The appellant's case was heard by two magistrates and before the takeover by the second magistrate, the appellant was informed of his right under the provision of section 200 (3) of the CPC. He elected to have his case start de novo. The Concise English Dictionary defines the word*** *"any"* ***as:***
>
> ***used to refer to one or some of a thing or a number of things, no matter how much or how many.***
>
> ***In my understanding of this English word, it does not mean all. In the context of section 200(3) of the CPC it does not therefore mean all witnesses must be recalled. The issue of de novo is a creature of misunderstanding but not of the law. Under the section therefore, an accused person may elect to call some of the witnesses he may deem crucial and indicate whether he wants them recalled for examination in chief or for cross examination. Where one is not represented, the court has a duty to explain and elicit from him the intended purpose for the recalling of the witnesses.***

I supported my finding by a court of appeal decision in the case of **JOSEPH KAMAU GICHUKI vs. REPUBLIC [2013] eKLR** where it was stated:

> ***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 his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial 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 the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.***

The court of appeal in the case of **JAMES OMARI NYABUTO & ANOTHER Vs. REPUBLIC [2009] eKLR** said:

> ***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 5 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.***

In my view, this is the correct interpretation of section 200 C.P.C.

Section 201 (2) of the Criminal Procedure Code provides as follows:

> ***The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.***

This therefore means that section 200 of the Criminal Procedure Code is applicable to trials before the High Court.

In the case of **JAMES OMARI NYABUTO & ANOTHER Vs. REPUBLIC [2009] eKLR** the Court of Appeal (Kisumu) said:

> ***We shall now dispose of the procedural complaint. It is plain that the late Kaburu Bauni J. died after he had heard and recorded the whole of the evidence in the trial. By dint of the provisions of Section 200 (1) (b) of the Criminal Procedure Code a succeeding Judge may act on the evidence recorded wholly by his predecessor.***

In the instant case, guided by the observation made by the Court of Appeal in the case of **JAMES OMARI NYABUTO & ANOTHER Vs. REPUBLIC** (supra), I do not have any reasons to make me order the matter to start afresh. We have to always remember that justice is for both parties in a trial and should not be seen to be leaning in favour of one. We shall therefore proceed from where the matter had reached.

DELIVERED and **SIGNED** at **BUSIA** this **22nd day** of **June, 2017**

KIARIE WAWERU KIARIE

JUDGE