REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

REVISION NO. 2 OF 2016

REPUBLIC

VERSUS

SAMUEL WAHOME.....ACCUSED/APPLICANT

RULING

The applicant has been charged in **Nyeri Chief Magistrates' Court Criminal Case No. 33 of 2014** with the offence of rape contrary to **section 3(1) (a) (b)** and **(3)** of the **Sexual Offences Act, No. 3 of 2006;** his trial is underway in the magistrates' court.

By a letter dated 23rd November, 2015 the applicant wrote to me asking for a review of his case on the ground that although the current magistrate hearing his case took it over from the previous magistrate he has declined to recall the four witnesses who testified before her and begin the case *de novo*. The current magistrate has also heard two witnesses without the applicant cross-examining them. In this review the applicant is seeking for an order for a retrial of his case and he has in that regard invoked **article 50(a)** and **25(c)** of the **Constitution**.

I have had occasion to peruse the court record which shows that the trial was initially conducted before Hon. S.Ngungi (PM) who took the evidence of four witnesses but was transferred before the prosecution's last witness testified. According to the prosecutor, the remaining witness who was set to testify before the magistrate was transferred was a doctor.

On 19th August, 2015 when the case came up for hearing, the applicant applied to have his case commence afresh before the current presiding magistrate. In response to this application, the prosecutor sought for a mention date to conduct the investigations officer. The matter was set for mention on 2nd September, 2015 and on that date, the prosecutor informed the court that the investigations officer who had been conducting the case had been transferred and he was therefore to conduct any other officer who may have taken over the case from the previous investigations officer. The case was then set for hearing on 28th September, 2015.

When the case came up for hearing as scheduled, the prosecutor responded substantively to the accused person's application to recall the witnesses; he informed the court that when he conducted the investigations officer on the possibility of recalling the witnesses, the officer told him that it was going to be difficult to find all the witnesses who had testified. The prosecutor opposed the accused person's application on this ground and also added that since this was a rape case the complainant may not be willing to come back to testify. Further the prosecutor submitted that the accused person had participated

in the trial by cross-examining the witnesses whom he wanted to be recalled.

The court rejected the accused person's application and in its ruling, it noted that five witnesses had testified. The court also made reference to **section 200(3)** of the **Criminal Procedure Code** upon which the accused person's application was obviously made and held that it is not mandatory that witnesses who have testified will always be recalled to testify afresh whenever a new magistrate takes over a case from his predecessor.

The court also held that the matter was old and ought to be disposed of; the complainant was also waiting for justice. It was the court's opinion that the hearing and determination of this case was going to be delayed further if this matter was going to be opened afresh. With that the court directed that the trial proceeds from where it had reached; the court proceeded and took the evidence of two witnesses and thereafter ruled that a prima facie case had been established against the accused person as to require him to be put on his defence. The record shows that the accused person opted to give unsworn statement and was going to call two witnesses; however, before he testified he applied for this review.

Section 200 of the **Criminal Procedure Code** provides clear guidelines for conducting and determination of trials in which part of the evidence has been taken before a magistrate who for one reason or another cannot conclude the hearing and make a determination of the case or who has taken has taken the entire evidence but cannot write the judgment or deliver it. The section provides as follows:-

> ***200. Conviction on evidence partly recorded by one magistrate and partly by another***
>
> ***(1) Subject to subsection (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—***
>
> ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
>
> ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***
>
> ***(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.***
>
> ***(4) 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 the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.***

Of particular relevance to the applicant's application is section 200(3) which deals with cases where a succeeding magistrate commences the hearing of a case in which part of the evidence has been taken before his predecessor. This particular provision stipulates that whenever such a case arises the accused person may demand that the evidence of those witnesses who have testified be taken afresh and it is incumbent upon the succeeding magistrate to inform the accused person of that right.

Although the applicant states that he is entitled to the right to have witnesses recalled, **section 200(3)** does not give that suggestion; the only right bestowed upon him is the right to be informed that he may demand for recalling of the witnesses. The decision whether or not to recall those witnesses lies with the succeeding magistrate and obviously such decision will be made depending on the circumstances of each

case.

In **Ndegwa versus Republic (1985) KLR 534** the Court of Appeal said of this particular provision in the following terms:

> ***Section 200 is a provision of law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice, if a succeeding magistrate 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.***
>
> ***Section 200 is not to be invoked where, as seemingly in the instant case, such a half-hearted trial is a short one, it could be conveniently started denovo 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.***

The point is, it is not in every case that the court will recall witnesses; it may be that such witnesses may not be available, or some considerable time has lapsed since they testified or that there may not be any prejudice caused either to the accused or the prosecution if the witnesses are not called or for any other reason that in the opinion of the trial court justifies the decision not to recall the witnesses. I would in this regard adopt the opinion of the Court of Appeal in **Malindi Criminal Appeal No. 57 of 2014, Joseph Kamora Maro versus Republic** where the court held that:-

> ***The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left jurisdiction of the court as was the case here or some may have even died. To this extent we are in agreement with the learned judges of the High Court that "this provision does not oblige the succeeding magistrate to start denovo" but what is mandatory is to inform an accused person of his right under section 200(3) of the Criminal Procedure Code.***

The applicant seems to have proceeded on the wrong premise that that he has a right, not under **section 200(3)** but under article **"50(a)"** and **25(c)** of the **Constitution** for a retrial. **Article 25(c)** provides for a right to a fair trial; article **"50(a)"** does not exist in the Constitution but if the applicant meant **article 50(2) (a),** it provides that an accused person is to be presumed innocent until the contrary is proved.

I cannot see how relevant **article 50(2) (a)** is to the applicant's application because there is nothing to suggest in the decision by the learned magistrate that the applicant is guilty of the offence with which he has been charged. I have not also found any suggestion of violation of **article 25(c)** of the **Constitution** because the whole purpose of **section 200** of the **Criminal Procedure Code** is to ensure a fair trial and if a decision is taken upon a correct interpretation of that particular provision but which may not be popular with the applicant, it does not thereby follow that the applicant has been denied the right to a fair trial.

In the ultimate I do not find any merit in the applicant's application and I hereby dismiss it. I direct that the original file be returned to the magistrates' court for the trial to proceed from where it had reached.

It is so ordered.

Dated and signed this 24th day of February, 2016

Ngaah Jairus

JUDGE