



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 34 OF 2006

REPUBLIC PROSECUTOR

VERSUS

RICHARD MWATHI NYAMBURA.....1ST ACCUSED

MICHAEL MWANGI2ND ACCUSED

RULING

1. **Richard Mwathi Nyambura** and **Michael Mwangi** (1st & 2nd accused respectively) are on trial for the murder of one **Elizabeth Wanja**. The particulars of the charge are that on 14th day of February 2006 at Ting'ang'a village in Kiambu District within Central Province they murdered one Elizabeth Wanja. The on-going trial is a retrial as the first trial was declared a mistrial.

2. At the close of the prosecution case, the court found that the prosecution had established a *prima facie* case against both accused. Each accused elected to give sworn evidence in defence. On 9th November 2015 the scheduled date for the defence hearing, **Mr. Mutitu** defence counsel for the 1st accused sought an adjournment and made an application to peruse the proceedings in the trial before Hon. Justice Ochieng who presided over the initial trial sometimes in 2010. He intimated to the court that the said proceedings were necessary for the preparation of the defence of the 1st accused. The court allowed the adjournment and granted parties the liberty to apply for the said proceedings.

3. On the 4th February 2016 the 1st accused began his sworn testimony in his defence. In the course of his testimony he sought to impugn the testimony of one prosecution witness(PW3) saying that he was not truthful in his testimony. He referred to his testimony in the 1st trial and sought to produce the relevant proceedings before Ochieng J. Prosecution counsel objected to the production of the exhibit. The court directed both parties to make substantive submissions on the objection.

4. In raising the objection, **Mr. Okeyo** gave the background to the case. He submitted that the two accused persons were charged in 2006 and that the initial trial proceeded with the aid of assessors. Sometimes in the course of the trial, the trial Judge noted that the law had been amended to do away with assessors. The Judge therefore declared a mistrial and ordered a fresh trial. Counsel adverted to Black's Law dictionary which defines a mistrial as '*a trial that a judge brings to an end....because of a procedural error.....in the proceedings.*' He stated that the effect of declaring a mistrial is to nullify the trial and the entire proceedings cease to have any effect at all. **Mr. Okeyo** further submitted that since the matter started *de novo*, the case proceeded as if no case had been heard. He urged the court not to allow introduction of proceedings already declared null and void as the same lacked any legal basis.

5. **Mr. Mutitu** opposed the objection. He submitted that all the accused had done was to refresh his mind with the earlier proceedings and that the State was at liberty to cross-examine him. Secondly counsel submitted that the accused has a right to raise and rely on anything during defence. He submitted that the accused had raised the same issue during the earlier trial.

6. There are 2 issues in this objection. The first one is whether proceedings of a mistrial can be brought before and considered by a court where the case starts *de novo*. The second is whether an accused can be pre-empted from using such proceedings to bolster his defence.

7. This trial started before this court on 24th February 2015. **Mr. Okeyo** made an opening statement in which he outlined the prosecution case. **Mr. Chege** for 1st accused opted not to say anything while **Mr. Wamwayi** for the 2nd accused only stated that his client maintained his innocence and was ready to rebut the prosecution evidence. With that the court proceeded to take the evidence of the 1st prosecution witness. At that point no issue was made of the fact that the case was a retrial. The prosecution counsel only informed the court that a mistrial had been declared necessitating a retrial.

8. In Black's Law Dictionary 9th Edition, a mistrial is defined as "*a trial*" that the judge brings to an end, without determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings". In this particular case the trial had been brought to an end by **Ochieng J.** on 20th December 2010 on account of the fact that the trial had commenced before **Ojwang J.** (as he then was) with the aid of assessors. Subsequently **Ochieng J** heard PW2 without assessors. On noting this procedural error, Ochieng J. declared the proceedings before him invalid and gave directions that the matter starts *de novo* without assessors.

9. The legal consequence of declaring a mistrial was a termination of the proceedings. The same were nullified and ceased to have any legal effect. The trial that commenced before me was in a legal sense a *de novo* trial. Black's Law dictionary, 9th Edition defines a trial *de novo* as "*a new trial or retrial in which the whole case is gone into as if no trial whatsoever had been heard in the court below.*" In **Kenya Anti-Corruption Commission Vs. Michael K. Gituto [2015] eKLR** cited to me by the prosecution counsel, my brother Mativo J. stated: "*The Latin Maxim "De Novo" connotes a 'New', Fresh", a 'beginning', a 'start' etc. In the words of the authors of Black's Law Dictionary, De Novo trial or hearing means trying a matter a new, the same as if it had not been heard before and as if no decision had been previously rendered... The consequence of a retrial order or a de novo (a Venire De Novo), is an order that the whole case should be retried or tried a new as if no trial whatsoever has been had in the first instance.*"

10. In this trial I consider that in starting the trial *de novo*, the parties committed themselves to a new start and the court did proceed as if no other trial had been held in the matter. Strictly speaking, the record of the earlier trial is preserved only because the court is one of record. It is not kept to aid in the new trial where a case starts *de novo*. There would have to be exceptional and justifiable circumstances for reference to be made to the past record for example where exhibits were produced and remained in the file. In this case, the defence wishes to produce the recorded evidence of Owen Gitau Wahu taken before **Ochieng J** in the 1st trial. Owen Gitau has testified in the present trial as PW3. It is my considered view that the trial having started *de novo*, the proceedings before **Ochieng J.** ceased to be of any legal effect and cannot be adopted as part of the record of the present proceedings.

11. The second issue which arises is whether or not the defence can be precluded from relying on any evidence. As a rule of thumb, an accused person has the right to present his defence without hindrance. This is a constitutional right under **Article 50 of the Constitution**. However, the right does not presuppose that an accused can seek to circumvent the sound principles of substantive and procedural law in order to bolster his defence. Secondly, it is to be remembered that the role of the court in any trial is to balance the scales of justice. To allow the defence in this case to introduce proceedings that have been declared a nullity would cause substantial prejudice to the prosecution.

12. For the above reasons, I uphold the objection raised by the prosecution and order the proceedings

before **Ochieng J.** being the testimony of one Owen Gitau Wahu expunged from the record of the present trial. I direct that the witness DW1 Richard Mwathi Nyambura proceeds to conclude his sworn statement.

Ruling delivered, dated and signed at Nairobi this 31st day of March, 2016.

R. LAGAT-KORIR

JUDGE

In the presence of:-

.....: Court clerk

.....: 1st accused

.....: 2nd accused

.....: For accused

.....: For State