



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 4 OF 2008

REPUBLIC.....RESPONDENT

VERSUS

GREGORY MUTUMA MWENDAACCUSED

RULING

This is a part heard case that was heard by J. Emukule who had taken a total of 10 witnesses when he proceeded on transfer in December, 2009. After that, several judges mentioned the case but it never took off. Only one witness was remaining to be heard. On 21/7/2014, when the matter came before J. Makau, he directed that the matter proceeds from where the Judge had stopped and rejected the application to start de novo. Justice Makau never managed to take the evidence of the remaining witness. J. Makau was transferred in 2015 and the matter was placed before me for directions.

Mr. Kaimenyi, Counsel for the accused again made an application pursuant to **Section 200 of CPC** that the matter do start afresh. The application was opposed by the State Counsel for reasons that being an old matter of 2008, most of the witnesses cannot be found; that this matter was almost concluded and it would be prejudicial to the State if the case were to start afresh; that the defence has not demonstrated that any prejudice will be occasioned to them.

Two affidavits have been sworn by the Investigation Officer, CPL Muyeji who deponed that **Joel Muriuki (PW3), Moses Kiogora (PW4) and George Kinoti (PW5) are all deceased**; that **PW2 Isaiah Kiogora relocated to South Sudan** while **PW7 Damaris Karwirwa is in Tanzania**; **PW9 Peter Mukeria Selesio is said to be in Moyale** and that only **PW1 Stella Mwari and Nancy Wangari (PW6) are available**.

Samuel Kirunja Ruchu, Chief of Kiirua Location, where the murder occurred swore another affidavit in which he exhibited the death certificate in respect of **PW1 Joel Muriuki Rutere (P.1)** and burial permit for **PW5 George Kinoti (P.2)**. He confirmed the contents of the Investigation Officer's affidavit.

Mr. Kaimenyi, Counsel for accused urged that it is accused's right to decide on how the matter should proceed.

Section 200 (1) and (3) states:

“S. 200 (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.

(b)

2.

(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.*

Section 200 (1) and (3) are not couched in mandatory terms. The word used is ‘may’. It means that the court is left with the discretion to decide on how a matter should proceed even where Counsel applies to have the matter start de novo or recall witnesses.

By this case’s very age, it is not easy to trace witnesses. There is evidence that some witnesses are deceased. The accused’s submission that it is accused,s right to decide how the case proceeds is not correct. The discretion lies with the court taking into account all the circumstances of each case.

In this case, the accused was represented. He has not told the court exactly how he will be prejudiced if the case does not start de novo. Besides, this same application had been made before J. Makau, who considered and dismissed it and directed that the case proceeds from where Judge Emukule stopped. I do not know why the defence raised the issue that the court has already dealt with. It is a misapprehension to believe that it is accused’s decision that carries the day under **Section 200 (3) of CPC**.

Having considered the application, I find that accused was represented by Counsel and he is still represented. If the court were to start the case de novo, the prosecution would be greatly prejudiced. This court has the duty to balance the rights of all the parties to this case. In exercise of this court’s jurisdiction and in doing my best to balance the rights of all parties herein, this court will allow the two available witnesses PW1 and 5 to be recalled for cross examination if necessary. Otherwise, the case will proceed from where J. Emukule stopped as directed by J. Makau.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF APRIL, 2016.

R.P.V. WENDOH

JUDGE

19/4/2016

PRESENT

Mr. Mulochi for State

Mr. Nyanyire Holding for Mr. Kaimenyi for Accused

Peninah/Ibrahim, Court Assistants

Present, Accused