



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.3 OF 2016

EZEKIEL OCHIENG

OGOMA.....APPLICANT

VERSUS

REPUBLIC.....

.....RESPONDENT

RULING

The Applicant, Ezekiel Ochieng Ogoma is facing several charges before the magistrate’s court on allegations that he conspired to defraud an insurance company. The Applicant pleaded not guilty to the charges. Hearing substantially proceeded before L. Mbugua – Chief Magistrate before she was transferred. The proceedings were taken over by J. Gandani – Senior Principal Magistrate. When the matter was mentioned before the said learned magistrate and the Applicant’s rights were explained to him in accordance with **Section 200(3)** of the **Criminal Procedure Code**, the Applicant indicated that he wanted the case to start *de novo* because he had been intimidated by the court that initially heard the case. The prosecution objected to the application for the case to be heard *de novo* on the grounds that the case had substantially been heard and the majority of witnesses had testified. The prosecution further stated that the majority of witnesses who had testified had been procured from Siaya County at a considerable expense. The prosecution was of the view that it would be difficult for it to procure the said witnesses if the court were to order the case to start *de novo*. After considering the rival argument made, the learned magistrate ruled in favour of the prosecution. She held that the Applicant had not advanced sufficient reason for the court to have the matter start *de novo*. She ordered the case to proceed from where it had reached.

It was apparent that the Applicant was aggrieved by this decision. He filed an application before this court seeking to have the decision of the trial court in declining to order that the case start *de novo* revised and set aside. The Applicant argued that his right to fair trial would be infringed if the case before the trial court does not start *de novo*. On his part, the State through Ms. Kule submitted that the Applicant had not placed before the trial court or this court sufficient grounds upon which the court can exercise its discretion and order the trial to start *de novo*. **Section 200(3)** of the **Criminal Procedure Code** provides that:

***“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”***

In the present application, the Applicant, in apparent exercise of his right under **Section 200(3)** of the **Criminal Procedure Code** has demanded that the case starts *de novo*. The Applicant’s co-accused in the trial requested for a retrial because she claimed that she was under stress when the case was heard by the preceding magistrate. The Applicant in this case told the court that he was intimidated by the previous magistrate.

*Are these sufficient reasons that can justify the court to order the trial to start de novo?* It is trite that the reason why an accused person is granted the right to recall a witness when a succeeding magistrate takes over the proceedings from the previous magistrate is so as to have such witness recalled for the purpose

of re-examination to enable the succeeding magistrate assess the demeanour of such witness to determine whether he or she is telling the truth. **Section 200(3)** of the **Criminal Procedure Code** is not a blanket licence for an accused person to demand for a case, where many witnesses have testified to start *de novo*. The accused person is only granted the right to have a specific witness or witnesses to be recalled so that he can put questions to such witness or witnesses to enable the succeeding court form the impression of the demeanour of such witness or witnesses. The accused person is required to lay foundation why he wishes for that particular witness to be recalled to testify before the succeeding magistrate.

In the present application it was clear that the Applicant did not lay any sufficient basis for the succeeding magistrate to make an order that the case starts *de novo*. The fact that the accused person was under stress or felt intimidated by the previous magistrate is not sufficient ground for the succeeding magistrate to make an order that the case starts *de novo*. This court has perused the proceedings before the previous magistrate. It was apparent to this court that the Applicant robustly cross-examined the prosecution witnesses who testified. There is no indication to suggest that he was intimidated by the previous magistrate as he alleged when he sought the case to be heard *de novo*. At no time did the Applicant indicate that he had any problems with the previous magistrate or questioned the impartiality or conduct of the said magistrate.

**Section 200(3)** of the **Criminal Procedure Code** cannot be invoked at the whim of an accused person who advances no reasons for the witnesses who had previously testified in the case to be recalled. **Section 200(3)** of the **Criminal Procedure Code** does not confer an automatic right (without reasons) for an accused person to demand that the case starts *de novo*.

Taking into consideration the entire circumstances of the case, it is clear to this court that the Applicant will not be prejudiced if the case proceeds from where it has reached. If the Applicant shall be aggrieved by the finding that will ultimately be reached by the court, he will have the constitutional right to exercise his right of appeal. The application herein lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY 2016**

**L. KIMARU**

**JUDGE**