



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

HCCRA NO. 36 OF 2016

DAVID NGABA KIRAMBA.....PLAINTIFF

VERSUS

REPUBLIC.....DEFENDANT

(An appeal from directions by R. Odenyo (SPM) in Migori CRC NO. 685 OF 2014 made on 22/07/2016)

JUDGMENT

1. This appeal is strictly related to directions given on **22/07/2016** regarding how the matter before the trial court was to proceed. DAVID NGABA KIRAMBA (the appellant) was charged with six counts of the offence of robbery with violence Contrary to Section 295 as read with Section 296(2) of the Penal Code.

2. The matter proceeded for hearing on 20th November 2014 before D.K. Kemei (CM) at Migori Law Courts and as at **8th April 2016** he had taken the evidence of 13 prosecution witnesses and the prosecution closed its case.

3. On 05/05/2016 Hon. Kemei (CM) ruled that the appellant had a case to answer and placed him on his defence and a date was set for defence hearing on 13/05/2016.

4. However by the time the matter was set for defence hearing, Hon. Kemei (CM) had been transferred from Migori Law Courts, to Nakuru Law Courts and replaced by Hon. R. Odenyo (SPM).

5. The court then explained to the appellant his rights under section 200 (3) of the Criminal Procedure Code and his counsel, Mr. Kamiro informed the court of the appellant's desire to recall PW5 PW10, PW11, PW12 and PW13; all whom he said were important witnesses and it was crucial that the new trial magistrate appreciated what was contested.

6. Mr. Kimando on behalf of the prosecution had no objection to his request except for PW13 who was described as an expert witness, and it had taken almost a year to obtain his attendance to court.

7. Mr. Kamiro then responded thus:-

“ The last time PW13 was here he indicate he is normally around. But I can dispense with him.”

8. Upon considering the submissions, the trial magistrate pointed out that a ruling had been made under

Section 211 Criminal Procedure Code and defence indicated that they were ready to proceed with their case, so the application was disallowed.”

9. The appellant was dissatisfied with this ruling on grounds that the trial magistrate misinterpreted the provisions of Section 200 (3) Criminal Procedure Code, and failed to comprehend that the accused had a right to demand a rehearing of the witnesses whose evidence had been recorded by his predecessor.

10. At the hearing of this appeal Mr. Kimiro submitted that the State had no objection to the recall of witnesses, and argued that the law does not restrain recall of witnesses just because prosecution has closed its case. Further that the section does not limit the right to recall to any stage where the case has reached whatsoever.

11. Mr. Kimiro explained that the recall was important as PW11 and PW12 had testified in his absence on 12th June 2016, despite the fact that he had written to the court explaining his inability to attend. He emphasized that the appellant faces serious capital offence and should be allowed to exhaust the avenues available.

12. Mr. Kimando in opposing the application submitted that once prosecution had closed its case, then the next stage was for defence to present its case as the appellant had even been informed of his rights under Section 211 Criminal Procedure Code.

Counsel contends that Section 200 Criminal Procedure Code is for purposes of credibility of proceedings and in this instance the proceedings were well typed and it would be a waste of time to recall the witnesses who had testified. He argued that counsel herein never applied to recall the witness before prosecution closed its case.

Section 200 (3) of the Criminal Procedure Code provision as follows:-

“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.”

13. The argument by Mr. Kimando is off tangent , and would only fit if the matter was being heard by the same magistrate who had started it. A new magistrate had taken over, Section 200 (3) does not limit the right to recall to a particular stage of the trial. In fact if the appellant wished he could have elected for recall of **ALL** the witnesses or even De Novo hearing.

The prosecution had not expressed any difficulty in getting the preferred witnesses and in fact the defence had conceded the recall of PW13 due to challenges prosecution had in attaining his attendance.

15. I agree with the appellant that the trial court misinterpreted the provisions of Section 200 (3) Criminal Procedure code.

Consequently the directions given are quashed and I direct that he witnesses requested for be recalled to testify.

DATED and SIGNED at MIGORI this 24th day of November, 2016.

H. A.OMONDI

JUDGE