



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL CASE NO. 20 OF 2009

REPUBLICPROSECUTOR

VERSUS

JOHN KIPYEGON TOO.....ACCUSED

RULING

1. This court is called upon to determine whether this matter should start *de novo* as elected by the accused person under **Section 200** and **201** of the **Criminal Procedure Code**.
2. The accused was first arraigned in Court on **9th April, 2009** though the offence was committed on **3rd April, 2003**.
3. Hearing commenced before **Hon. Justice G.B.M Kariuki** (*as he then was*) on **1st November, 2010**. He heard a total of eight (8) witnesses with the 6th, 7th and 8th witnesses testifying on **31st January, 2011**.
4. On **23rd January, 2012** directions under **Section 200** of the **Criminal Procedure Code** were taken before **Justice Gacheche** to the effect that the case was to proceed from where it had reached. She did not however hear any witness.
5. On **16th July, 2013** when **Justice Sergon** took over the matter, directions were again taken to the effect that the matter proceeds from where it had reached.

The same was repeated on **8th August, 2013** and the evidence of the ninth (9th) witness was taken by Justice Sergon.

6. **Mr. Motanya** had been representing the accused person right from the commencement of the hearing upto this point. Justice Sergon was transferred and reported to his new station on **16th September, 2014**.
7. On **22nd October, 2014** the case came for mention for directions under **Section 200** and **201** of the **Criminal Procedure Code**. Mr. Motanya for the accused was present. The accused then applied for substitution of Mr. Motanya with another advocate. His request was granted but with a warning from the court on the consequences of his decision. Mr. Motanya was then discharged.
8. On **18th December, 2014** **Mr. Siele** advocate came on record for the accused. He made an offer for plea bargaining to the State. The same was on **21st January, 2015** rejected by the State.

9. And upon the rejection of the offer for plea bargaining the court explained the Provisions of **Section 200** and **201** of the **Criminal Procedure Code** to the accused for purposes of taking directions on how to proceed.

10. Its then that the accused indicated that he wished to have the case started *de novo*.

The same was opposed by the prosecution citing the delay in the matter and the fact that witnesses may not be available. **M/S Kivali** for the State also submitted that she only had three (3) witnesses left before she closed her case.

11. Mr. Siele submitted that it was the accused's constitutional right to elect to have the case to start *de novo* as the concerned Provisions were couched in mandatory terms.

12. I have considered all the submissions by both counsels carefully.

13. **Section 200 (1)(b) and (3)** of the **Criminal Procedure Code** which are the relevant provisions here are not couched in mandatory terms. In **Section 200(1)(b)** ... the succeeding magistrate **may** ... where the judgment has not been written and signed by his predecessors, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.

14. What happens when the prosecution is not able to avail witnesses in circumstances that are beyond its control? This is a matter where the offence occurred in 2003. Witnesses recorded statements at that time. The prosecution is not able to avail witnesses for a fresh start of the case.

15. All along the accused has been ready to continue with the case from where it had reached until the other day when he sought to substitute his counsel who had represented him all through the hearing.

16. **Article 50(1) (e)** of the **Constitution** provides:

“ Every accused person has the right to a fair trial, which includes the right to have the trial begin and concluded without unreasonable delay”

17. The delay should not be caused by the court, the prosecution or the accused person.

18. My understanding of **Section 200** of the **Criminal Procedure Code** is to enable the court fully appreciate the evidence it is dealing with. It is not to afford any party an opportunity to delay the determination of the case or do forum shopping.

19. The witnesses remaining are formal witnesses who total **3** in number and there is really no good reason to overlook the challenge raised by the prosecution.

20. Beside claiming this to be a constitutional right, the accused has not shown what prejudice he will suffer if the case proceeds from where it had reached.

21. I therefore decline to order the case to start *de novo*.

22. Justice Sergon had proceeded hearing this case from where it had reached. He had further taken the evidence of PW9. It would therefore be in the interest that Justice Sergon hears the case to its final end. Towards that end there are two options available.

(i) Either Justice Sergon is facilitated by the headquarters to come to Kericho and finalize the matter or

(ii) The accused is taken to Nairobi where the Judge is now based and he will be heard there.

23.I have consulted with the Registrar High Court Nairobi who has advised that option (i) is not possible due to lack of funds at the moment.

24.I therefore direct that this matter be mentioned before Justice Serгон the Milimani Law Courts on **10th March, 2015 at 11a.m** for further orders concerning the hearing date. The officer in charge G.K. Prison Kericho to ensure that the accused is produced before that court on the said date. The Deputy Registrar to ensure this file is transmitted to Nairobi immediately.

Dated, signed and delivered this 18th day of February 2015

H.I. ONG'UDI

JUDGE

In the presence of :

M/s Kivali for State

Mr. Siele for accused

Lagat – Court Assistant