

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 9 OF 2013

HILLOW ABDULLAHI KORiyowACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

On the 1/12/2014, this case came to me for mention. The court decided that directions should be taken under section 200 of the Criminal Procedure Code. When the provisions of section 200 of the CPC were explained to the accused person he stated that he wanted the case to start a fresh and that all witnesses be recalled. Mr. Nyasani learned counsel for the accused also supported that decision.

Mr. Okemwa Learned Prosecuting counsel opposed the demand of the accused to have the case to start a fresh and the recall of four witnesses. Counsel submitted that the case should proceed from where it had reached. Counsel submitted also that some witnesses had already testified in Nairobi and that the court in Nairobi had given directions that the case be transferred to Garissa and also that it starts a fresh, but this court vacated those orders and ordered that the case should proceed from where it had reached. Counsel also opposed the request for a fresh trial on the ground that the witnesses who had testified in Nairobi were from Somalia and could not now be traced. The case was also an old case. The accused was ably represented by an advocate in Nairobi who cross examined those witnesses. In counsel's view recalling those witnesses will be an exercise of infertility. Counsel asked that the prosecution be allowed to call the remaining witnesses including the doctor to testify before closing their case.

Learned counsel for the accused Mr. Nyasani opposed the request by the prosecuting counsel. Counsel submitted that allowing the request of the prosecuting counsel would amount to infringement of the constitutional rights of the accused. Counsel emphasized that there was a purpose for enacting section 200 of the Criminal Procedure Code which was to safeguard the accused's rights. Counsel submitted that though the accused was ably represented in Nairobi, the case was now before another judge and the accused was also represented by another advocate. There was therefore justification for the witnesses to be recalled. Counsel argued that though they have no issue with proceeding with the case, there was need for recall of the witnesses. Counsel also pointed out that the accused has been in custody for more than 4 years and had not complained.

Section 200 of the Criminal procedure Code confers a right on an accused person to demand the recalling of witnesses who have already testified, in cases where the previous Judge/Magistrate has been replaced by another Magistrate after taking evidence from witnesses. Courts have held that it was the obligation of the succeeding Judge/Magistrate to inform an accused of his right to demand the recall of witnesses who have already testified. The accused herein has demanded the recall of witnesses who have testified. Obviously, the Judge is a new judge and his counsel is a new counsel. The state has opposed the request on the main ground that this is an old matter and that the witnesses who testified having come from Somalia cannot be availed at this time.

In my view though section 200 of the Criminal Procedure Code confers a right on an accused person to demand the recall of witnesses who have already testified, it does impose a mandatory obligation on the court to allow that demand. The law is silent on what the court should do. As such in my view the court has to consider all the circumstances of a case and determine whether it serves the best interests of justice to grant a demand of an accused person.

This case commenced in Nairobi as criminal case No. 99 of 2010. It was partly heard. On request, the court in Nairobi gave directions that the case be transferred to Garissa and that it should start afresh. When the matter initially came before me, it was for application by the state to retransfer the case to Nairobi so that the orders of fresh trial be vacated by the court which made those orders. That request was declined by this court in a ruling since this court has jurisdiction to hear and determine the matter. In that ruling also this court stated that the order of the Nairobi court for a fresh trial was merely a direction and not a ruling. In that event it was not necessary for the file to be taken to the same judge to review or confirm those directions. This court decided that any succeeding judge could look or consider the situation and determine whether those directions for a new trial should stand or be reviewed based on the circumstances of the case.

It was at that point that this court decided to comply with the provisions of section 200 and the accused demanded for recalling of the witnesses. I still maintain that a judge cannot bind another judge to start a trial denovo. That order only applies to that sitting judge. Any succeeding judge in my view has to comply with the provisions of section 200 of the Criminal Procedure Code, if the trial was partly heard by another judge. I also note that the judge who ordered a denovo trial did not hear any witness. If that Judge had heard at least one witness the order of denovo trial would have crystalized and a succeeding judge would have to proceed from there.

In the present case since the judge who ordered denove trial did not hear any evidence, that order lapsed when the case was placed before another Judge in Garissa for hearing.

I appreciate that the accused has constitutional as well as statutory rights for a fair hearing. The recalling of witnesses, when so demanded by an accused is an element of fair hearing. The court has however, an obligation to do a balancing act. If the witnesses are not available, is it fair to ask for them to be recalled? If the witnesses cannot be brought to court without undue expense, is it right to recall them? If the witnesses have already died, is it fair to order that they be recalled? The state has opposed the request for recalling the witnesses because they come from Somali and are not currently available. The accused or defence has not said that those witnesses are available. In my view the objection by the state is justified. I find and hold that the tenets of justice will require that I exercise my discretion and decline to grant the request of the accused. A new Judge and a new counsel can read and understand the evidence already tendered by the witnesses and on record. I have not been told that there is any part of the recorded evidence that cannot be understood. As such I decline the request of the accused. I order that the trial do proceed to hearing from where it has reached.

SIGNED, AND DELIVERED AT GARISSA THIS 16TH OF FEBRUARY, 2015.

GEORGE DULU