



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MURDER NO. 8 OF 2011

REPUBLIC PROSECUTOR

VERSUS

PHILIP OSINGO ALIAS CHURCHIL ACCUSED

RULING

1. By a Notice of Motion filed on 5th August 2014 the applicant PHILIP OSINGO alias CHURCHIL applied for orders:-

- *That this honourable court be pleased to admit the case to start afresh.*

1. The application was supported by the affidavit of the applicant wherein he deponed that the case was tried and heard without the same being accorded vital facilities like prosecution witness statements and that the judge who heard the case went on transfer and would therefore wish that the case start afresh.

BACKGROUND

2. The accused person herein took his plea before justice M.A. Makhandia on 18th January 2011 when a plea of not guilty was entered for the same and his trial commenced before justice R-Lagat Korir on 6th June 2012 who took the evidence of ten prosecution witnesses and on 7th day of January 2013 put the accused on his defence before proceeding on a transfer.
3. The matter was subsequently listed before justice R.N. Sitati for defence hearing but from the court records, it seems that directions under **Section 200** was never taken.
4. On 17th November 2014 this matter was listed before me when the same was fixed for direction on 20th January 2015 in view of the application herein stated when it was submitted by Mr. Ondari that since the accused had filed an application to have the matter start afresh he left it to the court to make a decision thereon.
5. Mr. Majale for the state submitted that since the matter had reached the defence stage securing the witnesses by the prosecution would not be possible. He further submitted that **Section 22** of the **Security Act** and amended **Section 200** so that when the case has reached the defence stage, **Section 200** does not apply.
6. I have looked at **Section 22** of **Security Law** which I hereby produce as follows:-

“22. The Criminal Procedure Code is amended in Section 200 by:-

a) Inserting the following new subsection (1) -

1A. A recommencement of trial under (1) (b) shall not affect the court's finding that the accused person has a case to answer.”

7. As the law now stands the applicant's right to recall witnesses can now not be exercised since he had been put on his defence. The accused's right to recall witnesses must be balanced against the provisions of **Article 50(1)(e)** which requires that the trial must begin and concluded without unreasonable delay.
8. I would in the final analysis dismiss the application filed on 5th August 2014 and order that this matter proceed for defence hearing forthwith.

Signed and dated on this 17th day of March, 2015.

J. WAKIAGA

JUDGE.

In the presence of:

Miss Boyon for the State

Mr. Sagwe for Mr. Ondari for Accused