REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 23 OF 2014

DANIEL WAINAINA NJUGUNA.....APPLICANT

VERSUS

1. CHRISTINE MBAIKA MUSEE.....1ST RESPONDENT

2. BERNARD OTOLO ONYANGO.....2ND RESPONDENT

3. GOEFFREY WESIONGA.....3RD RESPONDENT

4. REPUBLIC.....4TH RESPONDENT

RULING

DANIEL WAINAINA NJUGUNA is the complainant in Kibera Chief Magistrate's Court Criminal Case No. 3895 of 2011. The accused persons are Christine Mbaika Musee, Bernard Otolo Onyango and Geoffrey Wesonga Wandera. They are the 1st,2nd and 3rd Respondents respectively. They face four counts of robbery with violence contrary to Section 296(2) of the Penal Code. The 2nd and 3rd accused persons were separately charged with handling stolen property contrary to Section 322(2) of the Penal Code.

On the 10th January, 2014, Honorable Ochoi, SPM recorded an order that the trial be heard *de novo*. This order aggrieved the complainant who laments that, as at the time the order was entered, only two witnesses namely the complainant and the investigating officer had not testified. As at the date, a total of five witnesses had testified and the order was therefore prejudicial not only to the complainant but to the entire trial as it had taken three years to secure the five witnesses. Moreover, according to the complainant two of the witnesses who had already testified could not be secured to adduce evidence afresh. One of the witnesses, Mr. Robert Kiprop was a resident of Busia and had recently moved to Uganda and the complainant no longer has his contact. The other witness, Judy Sandra, is a pastor who had since relocated to the United States of America. The complainant further laments that some of the exhibits which had been recovered from the suspects continued to degrade at the police station and the court's exhibit store. For that reason, it may prove difficult to salvage the items which comprise household goods. Furthermore, the counsel who represent the accused persons have not changed; so no prejudice would be occasioned to the accused persons if the matter proceeded from where it had reached. The complainant adds that the prosecutor then prosecuting the matter failed to consult him or the investigating officer before the order was made .On the whole, the order to have the matter heard *de novo* was prejudicial to

the complainant and it defeated the ends of justice.

The request for revision was made on behalf of the complainant by her lawyers Njuguna and Partners vide a letter dated 24th March, 2014 . On behalf of the 1st Respondent, the application was opposed. A Replying Affidavit was sworn by her on the 24th June,2014. The gist of the affidavit is that the complainant has no locus standi to make the complaint as, in a criminal trial a complainant is represented by the state. It is also trite that under Section 200(3) of the Criminal Procedure Code the right to elect whether or not the matter should be heard *de novo* lies with an accused person. The provision does not accord the magistrate the discretion to deny an accused person his or her right to have the matter heard *de novo*. This court is urged to take cognizance of the fact that the accused persons are charged with offences that attract death penalty. They elected to have the matter heard *de novo* because they wanted the prosecution witnesses to be retested on their demeanor. Again, it is not the accused persons' counsel who are on trial and that it is in the interest of justice that the order of the learned magistrate be upheld. Finally, the 1st Respondent deponed that the prosecutor did in fact consult the investigating officer before the order was made.

Learned counsel Mr. Moses Odawa further filed written submissions on the 6th August,2014 on behalf of the 1st Respondent. He reiterated the averments in the 1st Respondent's Replying Affidavit and emphasized that the learned trial magistrate broke no law in making the order that the trial be heard *de novo*. The court was referred to the case of **R.V Catherine Mueni Makau Criminal Revision No. 2 OF 2012** which emphasized that the provisions under Section 200 of the Criminal Procedure Code are couched in mandatory terms and a succeeding magistrate cannot bend them at the whilm of pressure from the complainant.

In opposing the application, the 2nd Respondent filed Grounds of Opposition date 25 July,2014. Under the grounds he states that the complainant is not a party to the trial and he therefore had no locus standi to file the application, that he is usurping the powers of the Director of Public Prosecutions and that the application is intended to deny the 2nd Respondent his right to a fair trial under the Constitution.

The 2nd Respondent's counsel, Mr. Mukele Ngacho and Co. Advocates filed written submissions on 6th August, 2014. In summary, it is argued that an accused has a right under Section 200(3) of the Criminal Procedure Code to elect that the trial be heard afresh. Again, under the Constitution, the power to elect on how prosecution of a case should proceed is exclusively conferred on the Director of Public Prosecutions. The complainant is therefore out of order in demanding that the order of the learned trial magistrate ordering that the trial be heard *de novo* be reviewed. It is further submitted that there was no irregularity, illegality, impropriety or incorrectness in the order of the learned trial magistrate deserving a revision.

Suffice it to note, the 3rd Respondent did not file any opposition to the application.

Learned state counsel, Ms. Aluda on behalf of the 4th Respondent in her oral address to the court on 12 November,2015, submitted that this matter being a revision, the court could proceed to adjudge on it based on the record of proceedings in the lower court file.

Under Section 362 of the Criminal Procedure Code, the High Court;

> " **may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded, and as to the regularity of any proceedings of any such subordinate court."**

I have perused the subordinate court file; it is factual that as at 10th January,2014, five prosecution witnesses had testified. Directions under Section 200(3) of the Criminal Procedure Code had been taken on 8th January,2015, before Honorable Ochoi, SPM. In attendance were all the accused persons' learned counsel. Mr.Swaka advocate for the 1st Respondent was absent. Mr.Mukele was in attendance for the 2nd

Respondent. Also absent was Mr.Etimesi for the 3rd Respondent.

On behalf of the 2nd Respondent, Mr.Mukele submitted that the 2nd Respondent had opted that the matter be heard *de novo* .This applied to the 3rd Respondent who submitted in person. Ruling was reserved for 10th January, 2014 when further directions under Section 200(3) on behalf of the 2nd Respondent would be taken. On this date, Mr.Swaka was present for the 1st Respondent. He informed the court that the investigating officer had been summoned to confirm whether, if the case were to be heard *de novo*, the witnesses would be available. The prosecutor then addressed the court and informed it that he had been informed by the investigating officer that all the witnesses could be found and he therefore had no objection with the matter being heard *de novo*. Accordingly, the court made an order that the trial would be heard *de novo*. Hearing dates were set for 17th and 18th March,2014.

It is important to note that the complaints raised by the Applicant are not frivolous. They are valid in view of the fact that since the plea was taken on 13th December, 2011, until 10th January, 2014, only five witnesses had testified. This implies that it would take another two years and two months for the same number of witnesses to testify if the case started afresh. It is then gainsaid that the trial would take far too long at the cost of justice. And as the adage goes, *justice delayed is justice denied*.

As for the availability of all the witnesses, this court is not in a position to ascertain the concern raised by the Applicant. The same is contrasted by the record of proceedings because the prosecutor informed the learned trial magistrate that all the witnesses who had so far testified would be available to testify afresh.

It is trite that the jurisdiction of this court under section 362 of Criminal Procedure Code is limited to correcting any incorrectness, illegality, irregularity or impropriety of any finding, sentence or order recorded or passed by any subordinate court. The power is confined to its supervisory jurisdiction over the subordinate courts. And of course the High Court must be very carefully while exercising this supervisory jurisdiction not to interfere with the manner in which the trial should be conducted. Having made this observation, it is the candid view of this court that the order of the learned trial magistrate was neither illegal, incorrect nor irregular. That is so because under Section 200(3) a magistrate succeeding another magistrate in the conduct of a trial is enjoined to mandatorily comply with the said provision. For avoidance of doubts the same reads as follows.;

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

The onerous obligation placed on the magistrate under this provision to inform an accused person of its requirements is mandatory. The subordinate court magistrate cannot elect by himself or herself whether or not to inform an accused person of his right to demand that any of the witnesses who had testified be resummoned and reheard. Thus, what Honourable Ochoi did on 10 January,2014, in making the order that is subject of this revision was nothing but complying with the law. For this reason, as observed by the then Asike-Maghandia, J in **Catherine Mueni Makau V Republic (2012)@KLR-High Court at Machakos Criminal Revision 2 of 2012**, the provisions as couched cannot be sacrificed at the altar of the complainant's convenience. I add that being a mandatory provision, the complainant is not at liberty to grief against the right to a fair trial accorded to an accused person under the law.

I am inclined to think as the complainant does, that the request that the trial be heard *de novo* was not made in good faith. This is so because the accused persons have always been represented by the advocates who are also on record in this application. Whilst they are not the persons on trial, they ably cross examined the witnesses and have not clearly demonstrated what prejudice the accused persons would be occasioned if the matter proceeded from where it had reached. It cannot then be far fetched to insinuate a possibility of a concerted attempt to derail the trial. But again, this court's fidelity is to the law which I choose to uphold. Given that the succeeding magistrate's obligation under Section 200 is mandatory, the same cannot be overlooked at the helm of sympathy to the complainant's concerns. In that

case, the accused persons exercised their right to elect to have the matter heard *de novo* and since the learned trial magistrate had no alternative but to adhere to the law, his order was neither illegal, incorrect nor irregular.

In the result, I decline to revise the order sought and the application is dismissed. The lower court file shall be remitted to Kibera Law Courts for mention on 7th December,2015 before the Chief Magistrate for allocation of a hearing date. The trial magistrate should however ensure that the matter is heard on a priority basis on noting that it is a rehearing.

DATED AND DLIVERED AT NAIROBI THIS 30TH NOVEMBER, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. No appearance for M. Odawa for the 1st Respondent.

2. Wandugi holding brief for Mukele for the 2nd Respondent.

3. No appearance for the 3rd Respondent.

4. M/s Wario for the State.

5. Anyoka holding brief for Mr. Njuguna for the Applicant