



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 59 OF 2010

REPUBLIC

VERSUS

ALPHONSE KYALO MUTHOKA..... ACCUSED

RULING

INTRODUCTION

1. This is a ruling on directions on the request by the accused that the case commences *de novo* before the succeeding court following the transfer of the previous trial court. The accused faces the charge of murder contrary to section 204 of the Penal Code. The trial is at the defence hearing stage (the accused having been put on his defence) after the Prosecution closed its case after calling 9 witnesses all of whom were heard by the Honourable Lady Justice Mutende sitting at the High Court at Machakos. Following the transfer of the said Judge, the matter has now come up before this Court for further hearing. Upon being asked of his preference in terms of section 200 of the Criminal Procedure Code, the accused chose to have the trial begun *de novo*. The matter was adjourned to allow the prosecution to confirm the position as regards the availability of the witnesses, should a trial *de novo* be ordered.
2. When the court sought to confirm the question of available of witness, the Divisional Criminal Investigation Officer, Makueni, Inspector Benjamin Katumo, said that –

“When the State Counsel asked whether the witnesses can be traced I went to the home of the deceased and I found that several witnesses were available. 5 are available but at different places. The Investigating Officer who was one of the witnesses had also transferred. We may not get all the witnesses if the matter starts afresh. I request that since the Judge is at Kitui, the matter may be taken there for defence hearing.”

3. Counsel for the accused, Mr. Mutinda, who is provided to the accused by the State, objected to the transfer of the case to Kitui for hearing before the previous court indicating that he would have hardship on account of the low budget provisions of State provided counsel to travel to Kitui where the previous Judge serves as the Resident Judge.
4. While the prosecution did not positively state that the witnesses would be unavailable, the Counsel for the Director of Public Prosecution, Mr. Machogu, submitted that:-

*“Considering that the case is a 2010 matter and all the witnesses have transferred, if the matter starts *de novo*, it will be a challenge to the prosecution to try and trace and avail the witnesses. I request that if the court directs that matter be transferred to Kitui and Counsel for the accused to be paid for his travel expenses to Kitui.”*

ISSUE FOR DETERMINATION

5. The issue for determination is, therefore, whether the court will, in the circumstances of this case, order a trial *de novo* or transfer of the court file to Kitui for hearing and disposal by the previous trial Judge.

PRINCIPLES

6. Section 200 of the Criminal Procedure Code (CPC) provides for the procedure at the taking over of criminal proceedings between the magistrate's courts as follows:

“200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) 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

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

7. The rule in section 200 of the Criminal Procedure Code (CPC) is a commonsensical one designed to afford a fair hearing to an accused whose full trial is not possible before one judicial officer to the end of case at the judgment and has to have his guilt or innocence established by a court which did not hear and see all the witnesses who testified in the case.
8. Although the rule has not been made to apply to High Court proceedings, Judges of the Court have in practice routinely adopted the Magistrate Court's procedure for the hearings before the High Court so that the accused is asked to confirm whether the trial should proceed to further hearings from the position it had reached with the previous court with or without recall of witnesses, or whether the entire trial should commence afresh in a *de novo* trial. The latter is, of course, subject to availability of prosecution witnesses.
9. However, where witnesses are not available by reason of death or cost of procuring their attendance or otherwise and the previous court is available, even if it is a different station and at some cost, an order of the Court would usually be made to permit the trial to continue to hearing and determination before the Court that previously heard the matter.

DETERMINATION

10. As the criminal proceedings has been had before the previous Court which put the accused on his defence in accordance with section 306 (2) of the Criminal Procedure Code after hearing **all** the nine witnesses, the case should proceed to trial before the Court that has so substantially heard the trial. The procedure under section 200 of the Criminal Procedure Code is not an avenue for securing a retrial before a new Court after the Prosecution has closed its case and an accused has

- been placed on his defence by another Court; a retrial should be ordered by an appellate court on appeal or revision and not by a court of concurrent jurisdiction.
11. Where a previous court has heard all the witnesses for the Prosecution to the close of its case and has considered the evidence and found that the evidence establishes a *prima facie* case and put the accused on his defence, the hearing of the defence case should be had before the court that made ruling on case to answer, unless the judge or magistrate is unavailable.
 12. In this case, the previous trial court is readily available in the neighbouring Kitui Law Court, and the expenses of counsel for the accused in attending the remaining proceedings of defence trial, submissions and judgment may properly be paid out the State's *pro bono* fund for unrepresented accused persons in capital charges.

ORDERS

13. Accordingly, for the reasons set out above, the Court gives directions for the hearing of the criminal trial herein in the High Court at Kitui before the Court (Lady Justice Mutende) that heard all the prosecution witnesses and placed the accused on his defence. The Court file will for that purpose be placed before the Resident Judge at Kitui for directions on a date to be fixed by the Deputy Registrar of the Court. Counsel for accused shall be paid, in addition to his *pro bono* fee, such reasonable expenses, to be determined by the Deputy Registrar of the Court, for his travel to attend the proceedings at the Kitui Court.

DATED AND DELIVERED THIS 19TH DAY OF NOVEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Machogu for the Republic

Mr. Mutinda Kimeu is brief held by Mr. Makundi for the Accused

Mr. Moruri - Court Assistant.