



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CRIMINAL CASE NO. 28 OF 2012.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RICHARD ASILWA HUMPHREY.....ACCUSED**

**R U L I N G.**

1. The accused person, Richard Asilwa was charged with the offence of murder contrary to section 203 as read with 204 of the Penal code. The particulars being that on the 16<sup>th</sup> day of July, 2012 in Cherovani village in Kakamega forest of Kakamega East District within Kakamega County, jointly with others not before the court murdered Teresia Wangari Muriu.

**Chronology of events**

2. The plea herein was taken on 3/12/2012 where the accused pleaded Not guilty.

3. On 30/9/2014, Mr. Oroni for the prosecution applied for an adjournment as the Investigating Officer had been transferred. Mr. Oroni requested for time to liaise with the investigating officer to have witnesses bonded. He applied for an adjournment.

4. Mr. Ondieki, learned counsel who was holding brief for Mr. Monchere for the accused person, in opposing the application submitted that the fact that the accused is out on bond is not an open cheque that the matter can take forever to be finalized. He further submitted that constitutionally the case ought to be prosecuted expeditiously. He submitted then that the matter was fixed for hearing on 7/4/2014 and five (5) months down the line not a single witness had testified. He further said that the accused lives in Mombasa and has to travel every time the matter is coming up (sic) in court. He prayed for the case to proceed. Hon. Justice Mrima granted an adjournment.

5. On 18/3/2015, the prosecution counsel, Miss Omondi applied for an adjournment as witnesses had been bonded for 19/3/2015 instead of 18/3/2015. She explained that was an error on the part of the police officers who were to bond witnesses.

Mr. Monchere, learned counsel for the accused, opposed the application. The judge adjourned the matter to 19/3/2015. On the said date the prosecution still had no witnesses available in court. Ms. Omondi for the prosecution informed the court that witnesses in the case reside outside the Kakamega region and most of them are employees in the private sector. The investigation officer had followed up on the bonding of witnesses by calling them and most of them had indicated that they would not attend court as they had not been bonded. Police officers who were witnesses and who had been signaled to attend court had not confirmed by return signal that they would attend court.

Ms. Omondi further explained that Dr. Muchana who was a witness had indicated that he was not available on that day due to prior commitments. Ms. Omondi informed the court that the prosecution had really tried to bring witnesses (to court) and the investigating officer had been positive that the matter would proceed on that day. Ms. Omondi prayed for an adjournment.

6. Mr. Monchere for the accused opposed the application as no grounds had been adduced on why the matter should be adjourned.

7. Hon. Justice Mrima granted the final adjournment at the behest of the prosecution.

8. On 20/4/2015, the prosecution did a commendable job of availing seven (7) witnesses in court. Three witnesses testified on that day. A perusal of their evidence indicates that the case before this court is a complex one that involves many exhibits some of which were produced in evidence.

9. In their evidence, PW1 indicated that she lives in Machakos town and works at Kathiani, PW2 lives in Kahawa, Nairobi and PW3 lives in Maili Sita, Nakuru. This court notes that the evidence adduced and recorded in court by Hon Justice Mrima was lengthy.

10. The other 4 witnesses who were available in court on 20/4/2015 did not adduce evidence due to time constraints. The matter was adjourned to 15/7/2015 and 16/7/2015. On the said dates, the case did not proceed due to the absence of Mr. Ondieki, who was to hold brief for Mr. Monchere for the accused person. The matter was therefore adjourned.

11. On 19/11/2015 when Mr. Ondieki appeared before me he indicated that Mr. Monchere had consulted the accused person who had indicated that he would like to have the matter start de novo after the transfer of Hon. Justice Mrima, as this would give the court the opportunity to observe the demeanour of witnesses.

12. The prosecution indicated that it needed time to consult the investigating officer. This court gave the prosecution's office time to do so and listed the matter for mention on 2/12/2015. Come that day, the prosecution informed the court that it needed more time to consult the investigating officer. I put off the matter to 9/12/2015.

13. On the said date Mr. Ng'etich, for the prosecution submitted a letter dated 3/12/2015, from the investigating officer which disclosed that he had received many challenges in the case in getting witnesses to attend court. He indicated that the witnesses live as far as Kathiani, Mwingi, Kianyaga, Nairobi and Mombasa. He indicated that the key witnesses were civilian and they had testified. Tracing them would be very difficult. He further indicated that most of the exhibits had been produced in court by the said witnesses. Mr. Ng'etich prayed for the case to proceed from where it had reached.

14. Mr. Ondieki submitted that the letter produced in court did not categorically state what challenges the investigating officer will encounter in tracing witnesses. It was not disclosed that signals were sent to their areas of residence and that they were not traced.

15. He submitted that Section 200 of the Criminal Procedure Code states that at the time of taking directions, the accused person may elect to have a matter start de novo which the accused person had elected to do. The demeanour of the witnesses is material as they give evidence and that the accused wishes that the witnesses testify afresh in another court so that the court can have the opportunity to observe their demeanour.

16. Mr. Ng'etich responded that the prosecution had called three (3) witnesses. It had taken three (3) years for the witnesses to be availed. He submitted that the prosecution intended to call eleven (11) more witnesses. Taking into account the challenge encountered in bonding three (3) witnesses, it would be in the interest of justice if the case continued from where it had reached. Mr. Ng'etich further said that the defence was not being candid with the court in that the defence wanted to take advantage of the challenges the prosecution was facing. The demeanour of the witnesses who testified was a preserve of

the court hearing the matter and not of the accused person. He submitted that the application was made in bad faith and he prayed that the application be dismissed. The witnesses as shown in the letter by the investigating officer lived afar and bringing them to court would be difficult.

17. The court deemed it necessary to trace the chronology of this case due to the rights of an accused person in a criminal case *vis a vis* the rights of the prosecution on behalf of the deceased.

### **Determination of the application**

18. Section 200 (3) of the Criminal Procedure Code provides 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 of that right”***

Section 201 (2) of the Criminal Procedure Code provides that ***“the provisions of section 200 of the Act shall apply Mutatis Mutandis to trials held in the High Court.”***

19. It is not lost to this court that the accused person through his counsel Mr. Ondieki on 30/9/2014 submitted before Hon. Justice Mrima who was seized of the matter then, that the fact that the accused person was out on bond was not an open cheque that the matter can take forever to be finalized. It is incongruous that the accused person has now beat a hasty retreat after the transfer of Hon. Justice Mrima, and would like his case to start de novo. This then means that the accused person no longer believes in the expeditious disposal of his matter as he so strongly believed in, on 30/9/2014.

20. The reason advanced by the counsel for the accused person for the case to start de novo is so that the court can have the opportunity to observe the demeanour of witnesses as they testify afresh. This court notes that had Hon. Justice Mrima observed anything out of the ordinary in the demeanour of PW1, PW2 and PW3, he would have recorded his observation in the proceedings.

21. Although the law makes provision for an accused person to elect to have witnesses resummoned and reheard, the discretion lies with the court before which such a request is made, and such a request must be grounded on sound reasons.

22. In the case of **Ndegwa vs. Republic [1985] KLR Pg. 534 at 537**, Madan, Kneller and Nyarangi JJA observed that section 200 of the Criminal Procedure Code should be used sparingly. They stated as follows:-

***“Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice, if a succeeding magistrate does not, or is not allowed to continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial.”***

23. The need to sparingly apply the said provisions is more pronounced in the instant case to avoid defeating the ends of justice. The accused person is conversant with the difficulties that the prosecution has encountered in bringing witnesses to court. It is very obvious that the accused person is trying to capitalize on the misfortune of the prosecution to defeat the ends of justice.

24. Article 50 of the Constitution sets out what constitutes the right to a fair hearing. Article 50 (2) provides that every accused person has a right to a fair trial, which includes the right:-

(e) ***“to have the trial begin and conclude without unreasonable delay.”***

25. The need of expediency in the dispensation of justice is fortified in article 159 (2) of the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by principles which include in clause (b) ***“justice shall not be delayed”***.

26. The accused person who is out on bail pending trial resides in Mombasa, it beats logic that he would want his case to drag on forever as he continues to travel to and from Mombasa for the hearing of his case. The sword of justice cuts both ways. The accused counsel is on record for having opposed each and every application by the prosecution in seeking adjournments. It was their prerogative to do so. On the other hand, the record is very clear on the difficulties encountered by the prosecution in availing witnesses.

27. This court will be encouraging the same scenario to start all over again if it makes orders for the case to start de novo. Ordering a new trial will be tantamount to encouraging parties herein to play a game of cards with both the prosecution and the defence trying to play a lucky hand. The work of the court is not to be a pawn in a game of chess but to administer justice.

28. The sum total of the foregoing is that the accused person has failed to show what prejudice he will suffer by this case proceeding from where it has reached.

29. I decline to grant orders for the case to start de novo and order that the case proceeds from where it has reached.

**DELIVERED, DATED and SIGNED at KAKAMEGA on this 18<sup>th</sup> day of December, 2015.**

**NJOKI MWANGI.**

**JUDGE.**

**In the presence of:-**

.....**Mr. Oroni** .....**for the Prosecutor**

.....**Mr. Ondieki** ..... **for the Accused.**

.....**Mr. Anunda**..... **Court Assistant.**