



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**(CONSTITUTIONAL & JUDICIAL REVIEW DIVISION)**

**PETITION NO. 2 OF 2015**

**IN THE MATTER OF:                   ARTICLES 2(6), 22, 23 (1) & (3), 53(D), 53(2) & 165  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF:                   ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 27(1) & (2), 28, 47 AND 50  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF:           THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF:           SENIOR PRINCIPAL MAGISTRATE'S COURT  
AT SIAYA CRIMINAL CASE NO. 1601 OF 2010**

**BETWEEN**

**OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS .....PETITIONER**

**VERSUS**

**PETER ONYANGO ODONGO ..... 1ST RESPONDENT**

**THE S.P.M. SIAYA ..... 2ND RESPONDENT**

**THE A.G. .... 3RD RESPONDENT**

**JUDGMENT:**

1. The Petitioner, **The Office Of The Director of Public Prosecution** through a Petition pursuant to

Articles 2(6), 22, 23(1) 2(3), 53(d), 53(2) and 169 of the constitution of Kenya 2010 prayed for the following:-

**1 A declaration that Section 200 (3) of the Criminal Procedure Code Cap 75 Laws of Kenya is unconstitutional and invalid.**

**2.The ruling made on the 19th November 2014 be declared illegal and quashed by this Honorable Court.**

**3. The matter to proceed for submissions and judgment as per the order of Ag. Senior Principal Magistrate Hon. B. M. Ochoi, dated 16th day of August 2013.**

**4. Costs and incidental to these proceedings.**

2. The genesis of the petition as per the Petitioner is that the 1st Respondent was charged with an offence of defilement contrary to **Section 8(1) of The Sexual Offences Act No. 3 of 2006 on 9th November 2010** before Hon. W.K. Chepseba, Principal Magistrate at Siaya. That the case against the 1st Respondent commenced on 25th June 2012 and the petitioner called five (5) witnesses before the Senior Principal Magistrate Siaya, who was transferred in April 2013 having handled the matter lastly on 19th March 2013.

3. That the matter was taken over by his predecessor **Hon. B.M. Ochoi, Ag. Senior Principal Magistrate on 7th May 2013**, who complied with the provisions of **Section 200 (3)** and defence intimated they wished the case to continue from where it had reached. That on 30.7.2013 the petitioner closed its case and on the same day the 1st Respondent's Counsel sought a date for submissions. That before submission were made and ruling delivered the trial Magistrate was transferred and the matter taken over by **Hon. J.N. Sani, Ag. Senior Principal Magistrate** and he also complied with **Section 200 (3), of the Criminal Procedure Code**. That later the file was allocated to **Hon. M. S. Kimani, Resident Magistrate** ruled that the case should start *de novo*

4. It is petitioner's contention that the ruling made by the 2nd Respondent at Siaya on 19th November 2014 is detrimental to the petitioner and the Public at large being the Public Prosecutor and borders on constitutionalism in that **Section 200 (3) violates Article 159** of the constitution which requires trial not to be defeated because of technicalities urging further that in criminal case **No. 1601 of 2010** the court had already complied with **Section 200(3)** before and for the matter to start *de novo* once more flies in the face of rules of natural justice. The petitioner further contended that one of the witness called was a minor and a child of tender age and to make her repeat the events in Court session is not only cruel but also inhuman. That the 1st Respondent was represented by a competent Counsel who had an opportunity to cross-examine the witnesses and Court recorded the response.

5. The Petitioner's contention is further that the 1st Respondent was charged with an offence of **Defilement contrary to Section 8(1) of The Sexual Offences Act** and the ruling by the 2nd Respondent infringes on the rights of the victim as protected under **Article 27, 53(d) and 53(2) of the Constitution**.

6. The petitioner has further contended the ruling based on **Section 200 (3) of the Criminal Procedure Code** was unconstitutional, as it not only amounts to delay but also to procedural technicality and that the decision was against the spirit and letter of the constitution as envisaged in **Article 159 (2) (b) and (d) of the constitution of Kenya 2010**. That under **Article 27 of the constitution**, the petitioner urged provides equality and freedom from discrimination as every person is equal before the law and has the right to equal protection and equal benefit of the law. under **Article 28 of the constitution** it was contended by the petitioner that it protects the dignity of every citizen thus, the victim's dignity was violated by the 1st Respondent and the use of **Section 200 (3) of the Criminal Procedure Code**, to start the matter *de novo* infringes on the constitutional right. **On Article 47 of the Constitution** the petitioner averred of the need for administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair, therefore, it was urged **Section 200 (3) of the Criminal Procedure Code** leads to unreasonable delays urging **Article 47** not only protects the accused persons but also the complainant in

any criminal proceedings.

7. The petitioner Under **Article 50 of the constitution** contented that it seeks not only to protect the accused persons but also the complainant from long and emotional trials thus **section 200 (3) of the Criminal Procedure Code** does not achieve the guidelines set up under **Article 50 of the constitution**.

8. The Petitioner's petition is further based on the substantive affidavit by Y. Wakio Mwamburi, a prosecution Counsel in the Office of D.P.P. who briefly stated interalia:- that the 1st Respondent faced a charge of defilement contrary to **Section 8(1) (3) of the Sexual Offences Act**, that on 19th November, 2014 the Court ruled the matter to start *de novo*, that the ruling based on **200 (3) of the Criminal procedure code** was unconstitutional as it prejudiced the victim in the matter, that the matter starting *de novo* the ends of natural justice shall not be met as **section 200 (3) of the Criminal Procedure Code** does not take into account the availability of witnesses, that the accused may suffer no or very little prejudice if the matter continues as the Court records, all the accounts and the accused is always given an opportunity to cross-examine all the witnesses called by the prosecution and that the petitioner shall have difficulty in tracing of and bonding of witnesses which may lead to a miscarriage of justice for the victim.

9. **M/s. V. Wako Mwamburi** filed further affidavit in support of the petition dated 2nd July 2015 starting interalia, that the criminal case **No. 1601 of 2010**, was commenced on 20th June 2012 before Hon. R.B. Ngetich, a Senior Principal Magistrate (*as per attached copy of the proceedings and ruling dated 19.11.2014 marked "VWM1"*) that she was transferred and on 7.5.2013 the matter was taken over by Hon. B.M. Ochoi, Ag. SRM who complied with **Section 200 (3) of Criminal Procedure code**, that the accused through his lawyer intimated that defence wished to continue with the proceedings from the part it had reached before Hon. B.M. Ochoi, who was transferred in September, 2013 and the matter taken over by Hon J.N. Sani Ag. SRM, that Hon. J.W. Sani complied with **Section 200 (3) of the Criminal Procedure Code** and accused elected the to have the matter start *de novo*, that the prosecutor on 24th June, 2015 and October 14, 2014 while seeking for an adjournment expressed the great difficulty to re-availing the witnesses, that he sought the invoking of **Section 34 of the Evidence Act (Cap 80)**, that the Court denied prosecutor's application, and ordered the case to proceed, that the trial Court did not take into consideration the matter had started *de novo* five (5) times and failed to proceed due to lack of witnesses, that the victim herein was a minor and recounting the evidence would be subjecting her to psychological and emotional trauma that the Honourable Court find **Section 200 (3) of Criminal Procedure Code** repugnant to the natural law and rules, that **Section 200 (3) of Criminal Procedure code** is *ultra vires* the constitution and bill of rights that ought to protect the rights of the complainant (victim), that the **Section 200 (3) Criminal Procedure Codes** contains a procedural technical inconsistent with **Article 159 (2) (a) (b) (d) and (e)** of the **Constitution** and it violates the rights under **Article 50 (c) of the constitution of Kenya 2010**.

10. The 1st respondent is opposed to this petition. His advocates M/s. Odhiambo Obonyo & Co. Advocates filed Notice of Appointment on 14th December, 2015, a replying affidavit on the same day on behalf of the 1st Respondent stating interlia:- that he is familiar with the facts of matter, that he initially briefly represented him in this matter, that the 1st Respondent withdrew instructions, that all the witnesses are alive and currently based in the same locality in Siaya according to the 1st respondent, that the complainant will not suffer any prejudice if the case starts *de novo* since she would reproduce the same evidence she earlier on testified, that **Section 200 (3) of the Criminal Procedure Code** protects the right of the accused to a fair trial since trial magistrate gets an opportunity to study the demeanor of all parties giving evidence which aides into currying the just adjudication of the matters indispute, that **Article 50 of the constitution** protects **Section 200(3) of the Criminal Procedure Code**, that the High Court should let the Lower Court decision take its course, because it would be to let High Court hijack the decision and pre-empt the Ruling of the Lower Court and act in appellate capacity which is premature at this stage.

11. The 3rd Respondent filed grounds of opposition through the Principal Litigation Counsel on 11th November, 2015, averring that the application is misconceived and is an abuse of the Court process and meant to delay the matter further and that the provision of **Section 200 (3) of the Criminal Procedure Code** is mandatory and cannot be sacrificed, wished or abandoned in protecting the liberty on subject

who is the most sacrosanct individual in the legal administration system.

12. That when the matter came up for direction, Mr. Ombati Learned State Counsel appeared for the petitioner and Mr. Obonyo Learned Advocate appeared for the 1st Respondent. That there was no appearance for the 2nd and 3rd Respondents. The Court directed that parties do put in all necessary affidavits and set the matter for directions on 11.11.2015. On 11.11.2015 Court directed the petition be determined by way of written submissions. That by 20.11.2015 the respondent had not filed submissions but sought for more time. He was given 3 days to file submissions and serve. The highlighting on submissions was set for 2.12.2015. By 25.11.2015 the 1st Respondent's submissions were not filed and his Counsel did not attend Court and no explanation was given for his failure, however the Court set this matter down for judgment on 17.12.2015 after allowing the petitioner highlight and gave the 1st Respondent's Counsel 2 more days to file submissions. The Court record show that the 1st Respondent's submissions were filed on 4th December, 2015.

13. I have very carefully perused the petition, the 1st Respondent's Counsel replying affidavit and grounds of opposition filed on behalf of the 3rd Respondent. I have also considered the submissions filed on behalf of the petitioner and the 1st Respondent and authorities relied upon by the parties. The issues for determination in this petition can briefly be summarized as follows:

**(a) Whether Section 200 (3) of the Criminal Procedure Code (Cap 75) Laws of Kenya is unconstitutional?**

**(b) Whether the ruling made on 19th November, 2014 can be declared illegal and whether it can be quashed by the Honourable Court?**

**(c) Whether this Court can order the matter to proceed for submission and judgment as per the order of Ag. Senior Principal Magistrate Hon. B.M. Ochoi, dated 16th August, 2013?**

**(d) Who should bear costs?**

14. In the instant case five prosecution witnesses gave evidence before Hon. R.B. Ngetich and were cross-examined by the 1st Respondent, that when Hon. B.M. Ochoi and Hon. J.N. Sani took over the matter **Section 200 (3) of C.P.C.** was complied with and the 1st Respondent opted to have the case proceed from where it had reached. The prosecution closed their case and the same was pending submissions, when Hon. M.S. Kimani took over and who explained the 1st Respondent his rights under **Section 200 (3) of C.P.C.** and the 1st Respondent's rights to have the witnesses recalled. Hon. M.S. Kimani ordered the case to start *de novo*. It is that order that has provoked this petition.

15. **Section 200(3) of the Criminal Procedure Code** Provides:-

***“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 re-summon the witnesses and recommence the trial.***

***(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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right”***

16. **Section 200 (3) of the Criminal Procedure Code** is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.

17. It should be noted **Section 200(3) of C.P.C.** gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.

18. **Section 200 (3) of C.P.C.** entrenches the accused rights to a fair trial as constituted under **Article 50 (1) of the Constitution of Kenya 2010.**

19. In the case of **Ndegwa V. Republic [1985] KLR at 534** the Court of Appeal stated:-

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

20. In the case of **R V. Wellington Lusiri [2014] eKLR** the Court emphasized the need for succeeding Magistrate to continue with the proceedings under **Section 200** by informing the accused of his rights.

21. In my view **Section 200 (3) of the Criminal Procedure Code** protects the rights of the accused to a fair trial as guaranteed by the constitution under **Article 50. (2)** of the constitution which states every accused person has the right to a fair trial, which includes other rights as set out thereunder. **Section 200 (3) of CPC** as couched or framed do not have any provision to protect the rights of the complainant. It is silent on the rights of the complainant.

22. The question therefore is do the silence on the rights of the complainant under **Section 200 (3) CPC** mean the complainant's rights are not protected? The succeeding Magistrate before determining the accused demand for retrial or recalling or re-summoning of any of the witnesses, in my view, as **Section 200(3)** is not mandatory for the accused demand to be granted or to be allowed, the succeeding Magistrate is not supposed to deal with **Section 200 (3) of C.P.C.** in isolation of several articles of the constitution dealing with the **Bill of Rights** as **Section 200 (3) of CPC** is not exhaustive in itself. The succeeding Magistrate is supposed to be guided by **Article 27 (1) of the constitution**, which states every person is equal before the law and has rights to equal protection and equal benefit of the law. This means the protection to fair trial is automatically granted to both the complainant and the accused. This means as I understand the said article, before final order is made on the accused demand interms of **section 200 (3) CPC** the complainant should be afforded an opportunity to be heard on the application. A blatant granting of the application without hearing the complainant would in my view not only be against the rules of natural justice but would amount to a violation of the letter and the spirit of our constitution and would not be in the best interest of achieving a fair trial, If the complaint is completely overlooked on the issue.

23. In considering **Section 200 (3) C.P.C.** as regards the information given to the accused, the same information should be extended to the complainant in equal measure, **Article 159 (2) (a) (b) and (d) of the constitution** deals with justice to all irrespective of status, justice not being delayed and being administered without undue regard to procedural technicalities. That the accused and the complainant should get justice without delay and should be administered without undue regard to procedural technicalities. That the accused and the complainant are entitled to justice without procedural

technicalities and discrimination.

24. The Court in determining an application under **Section 200(3) of C.P.C.** should comply with **Article 28 of the constitution** which provides every person has inherent dignity and the right to have that dignity respected and protected. Further under **article 47(1)** of The Constitution every person has the right to administrative actions that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 53 (d) of the constitution** states every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and **Article 53 (2)** provides a child's best interest are of paramount importance in every matter concerning the child.

25. I have quoted at length from our constitution to demonstrate the deficiency that one can be faced with while dealing with **section 200 (3) CPC** in isolation of various relevant articles of the constitution. Further it should be borne in the mind of any judicial officer, that under **Article 2 (1) of the constitution**, the constitution is the supreme law of the Republic of Kenya and it binds all persons and all state organs at both level of government and that under **Article 2(4)** that any law, including customary law, that is inconsistent with that constitution is void to the extent of the inconsistency, and any act or omission in contravention of the constitution is invalid.

26. Having said so much about the purpose of **Section 200 (3) C.P.C.** and noting its purpose is to protect the rights of an accused person to a fair trial. **Section 200(3) CPC** in my view needs to give the complainant the right to have his/her views heard before witnesses are either recalled or re-summoned. I find inspite of the Section having several deficiencies in regard to the rights of the complainant and the same being not automatic for Court to re-summon or recall witnesses, or allow the matter to start *de novo*, after explaining the accused his rights, that **Section 200 (3) of C.P.C.** is not unconstitutional as the Court is obligated to apply several articles of the Constitution to ensure that both the complainant and the accused constitutional rights are not violated or infringed or breached nor does it violate article 50 of the Constitution of Kenya 2010..

27. In **Ndegwa V. R (Supra)** it was held that **Section 200 (3) CPC** should sparingly be applied. The application of **Section 200 (3) C.P.C.** in my view is commonly abused especially where the application is made with a view to defeat the ends of justices and specially where the accused knows the witnesses cannot be traced or are dead or the complainant cannot be traced or cannot get the witnesses without enormous expense or the application is made to cause witness have no faith with the court system and fail to turn up or where the case has been pending for long period without being determined, such applications for witnesses to be recalled in my view should not be granted specially where the accused has had the opportunity to cross-examine witnesses and specifically where the matter had been pending for a long time. This is because granting such an application, court may be acting contrary to **article 47, 50 (2) (e) and 159 (2) (d) of the constitution** which demands that justice shall not be delayed, and trial should be concluded without unreasonable delay and lastly every one has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

28. In my view the ruling of the learned trial Magistrate dated 8.5.2014 ordering the case to start *de novo* was unconstitutional as it was granted against the rights of a child under **Article 53(1) (d) (2)**, and **Article 50(1)** in that it failed to note every person has the right to have a dispute resolved in a fair and public hearing before a Court when the court issued an order without giving the prosecution right of audience., **Article 159 (2), (a) (b) and (d) of the constitution** in that justice was not done to the complainant by failing to give the complainant right of fair hearing, and by failing to note that the matter was pending before Court for 4 years and by ordering the matter to be heard *de novo* without any basis being made, amounted to an abuse of Court's process, delaying justice and by basing the decision on procedural technicalities, **Article 47 (1) of the constitution** by issuing an order that denied the complainant the right to administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair, **Article 25 of constitution** which provides, the fundamental rights and freedoms to the right to a fair trial may not be limited, **Article 27 of the constitution**, which deals with equality and freedom from discrimination. I therefore find and hold that the order for the case to start *de novo* was unconstitutional for the reasons I have given herein above.

29. The learned trial Magistrate made a ruling dated 19th November, 2014 rejecting the petitioner's application for invoking of **Section 34**. The petitioner and the 1st respondent filed affidavits and left the matter to the Court's consideration. The Court considered both affidavits and the provisions of **Section 34 of the Evidence Act**. The trial Court having made an order for the case to start *de novo*, it was wrong for the petitioner to seek the court to readmit the previously recorded evidence without re-summoning and rehearing of the witnesses as demanded by the accused on an account of non-availability of the witnesses. The trial Court correctly set out the conditions which were supposed to be satisfied before the application under **Section 34 of the Evidence Act** could be allowed, and which the petitioner failed to satisfy the Court under **Section 34 of the Evidence Act**. In view of the foregoing, I am satisfied that the trial Court did not in rejecting of the application act illegally. The petitioner in the petition did not state what was illegal about the Court's order of 19th November 2014,

30. In view of the foregoing I find no merits in the petitioner's prayer for the ruling of 19th November, 2014 to be declared illegal and for the order to be quashed. The prayer is without merits and the same is dismissed.

31. **Section 200 (3) of Criminal Procedure code** provides where a succeeding Magistrate commences the hearing of proceedings where part of the evidence has been recorded by his predecessor, the accused person may demand that witnesses be re-summoned and reheard and the succeeding Magistrate shall inform the accused person of his right.

32. In the instant case the succeeding Magistrate Hon. M.S. Kimani, has since been transferred and unfortunately this matter will have to be taken over by another Magistrate. It is mandatory requirement for succeeding Magistrate to comply with **Section 200 (3) of the Criminal Procedure Code**. In view of the provisions of **Section 200(3) of Criminal Procedure Code** it is my finding that the petitioner's prayer No. 3 has been overtaken by the events. The order cannot therefore be granted as it would be an order in vain.

33. **The upshot is that the petitioner's petition partly succeeds and I order as follows:-**

*(a) Section 200 (3) of the Criminal Procedure Code (cap 75) laws of Kenya is constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya 2010, however the same is not exhaustive in that it is silent on the rights of the complainant in cases taken over by the succeeding Magistrate, however that notwithstanding the succeeding Magistrate has an obligation before making final orders to invoke the provisions of the Bill of rights to ensure the complainant's rights to a fair trial is factored in.*

*(b) The Court's order dated 8.5.2014 ordering Siaya Criminal Case No. 1601/2010 to start de novo is against the rules of natural justice and is unconstitutional for violating, or infringing or breaching the complainant's Bill of rights in ordering the matter to start de novo without affording the complainant right of audience and by overlooking the provisions in the Bill of rights.*

*(c) The trial Magistrate order for the case to start de novo is quashed and set aside.*

*(d) The matter to be mentioned before another Magistrate as the trial Magistrate has already been transferred. The succeeding Magistrate to comply with Section 200 (3) of Criminal Procedure Code and invoke the provisions of the Bill of rights as enshrined in the Constitution to ensure fair trial for both the complainant and the accused before making an order on how to proceed with the matter from where it had reached.*

*(e) The ruling of the trial Magistrate of 19th November 2014 was lawful and valid.*

*(f) The Prayers for suit to proceed for submission and judgment is rejected in view of order (d) hereinabove.*

*(h) As this is a matter of public interest each party shall bear its own costs.*

**DATED AT SIAYA THIS 17TH DAY OF DECEMBER, 2015.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 17TH DAY OF DECEMBER, 2015.**

In the presence of:

**M/s. M. Odumba for Respondent.**

**Appellant – Present**

**Court Clerk – Kevin Odhiambo**

**Court Clerk – Mohammed Akideh**

**J. A. MAKAU**

**JUDGE**