



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 22 OF 2011**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**FRANCIS GITHUTHE NJOROGE.....ACCUSED**

**RULING**

By an oral application made on 11<sup>th</sup> December, 2013 **MR. TARUS** counsel for the accused applied to have this case start *de novo*. The history of this case was that the hearing commenced before me on 28<sup>th</sup> September, 2011. At that time the accused was represented by **MR. MBURU KARIUKI** Advocate. The prosecution led by **MR. ONSERIO** learned state counsel called nine (9) witnesses before closing their case on 25<sup>th</sup> April, 2012. On 25<sup>th</sup> April, 2012 the court ruled that the accused had a case to answer and he was placed on his defence. On 11<sup>th</sup> October, 2012 the accused still being represented by Mr. Kariuki made a sworn statement in his defence. The matter was then reserved for final submissions. At this point the original file went missing in the registry. In the mean time a skeleton file was opened and a different lawyer **MR. TARUS** successfully applied for bond on behalf of the accused. Eventually on 19<sup>th</sup> September, 2013 the original file was traced. At this point Mr. Tarus who had taken over conduct of the case from Mr. Kariuki applied to have the case begin *de novo*. He submitted that as a new lawyer coming on record, he was not in a position to make the final submissions in the case.

The law by section 200(1) of the Criminal Procedure of the Criminal Procedure Code provides that where a magistrate has partly-heard a case and a different magistrate is to take over the hearing of that case, the accused has a right to demand a *de novo* hearing. Although this provision refers to trial by magistrates I have no doubt that the same would apply to trials in the High Court where one Judge takes over a case from another Judge. However, this is **not** the case here. The trial was fully conducted before the same Judge (being myself) throughout. All the nine (9) witnesses testified before me and I took the defence of the accused. Similarly, the same advocate **Mr. Mburu Kariuki** was on record for the accused throughout the trial upto and including the time of making his defence. It is only **after** the defence and before final submissions when the file went missing that accused decided to change advocates. This does not in my view merit a *de novo* trial. There has been no allegation that previous counsel mishandled the case and/or behaved in an inappropriate way at all. In fact Mr. Kariuki appeared on all the hearing dates and robustly cross-examined all the prosecution witnesses. He was to my mind an effective and efficient defence counsel. Accused himself was present at all times during the trial. There has been no claim of prejudice against the accused in the manner in which the trial was conducted nor has any allegation been made that he was denied any of his constitutional trial rights.

Mr. Tanui for the state opposes this application for a *de novo* hearing submitting that to order a re-trial at

this stage would prejudice the state as they will have to re-resource for all their witnesses again. Time has passed and memories may have faded. I am inclined to agree with the state. The trial is all but concluded. No convincing and/or persuasive reason has been advanced for a new trial. The record is intact and trial was wholly conducted before one Judge. Any lawyer with sound legal education is fully capable of perusing the record and making final submissions. This is a task which cannot be beyond a well trained lawyer.

Based on the foregoing I find no merit in this application and I deny the prayer for a *de novo* trial. I direct that dates be taken for final submissions.

**Dated and delivered in Mombasa this 28<sup>th</sup> day of February, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Ms. Obura h/b Mr. Tarus for Accused

Ms. Fundi for State

Court Clerk Mutisya

**Court:**

Hearing to proceed on 22<sup>nd</sup> April, 2014 for final submissions.

**M. ODERO**

**JUDGE**

**28<sup>TH</sup> FEBRUARY, 2014**