

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 2 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ZACHARIA OMARA HIRIBAE.....ACCUSED

RULING

This is a ruling as to whether this case should commence *de novo* or should proceed from where the last witness testified. Mr. Nyasani, counsel currently on record for the accused briefly submitted that he has explained the reasons behind the application to start the case *de novo* to the accused and that this will impact on his constitutional rights.

Learned state counsel on the other hand has asked this court to allow this case to continue from the last witness because to start the case *de novo* would present challenges to the prosecution in respect to securing attendance of witnesses. Learned counsel cited **Criminal Appeal No 418 of 2013 [2013] eKLR** on the issue touching on compliance with section 200 of the Criminal Procedure Code (CPC).

The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. Briefly, hearing of this case commenced on 12th March 2013 when six witnesses testified for the prosecution. The matter was adjourned to 27th August 2013 when one witness for the prosecution testified. After this date, no more witnesses testified. The reasons are that either the witnesses failed to turn up or the defence counsel was absent. During the entire trial when the seven prosecution witnesses testified, the accused person was represented by Mr. Kullow who had been instructed by the court. As far as the court record stands, there is no reason given what happened to Mr. Kullow that he failed to turn up in court to take up the defence. However, on my own knowledge from other files where Mr. Kullow was on record, counsel has left legal practice to pursue other employment opportunities. He however did it in a very unprofessional manner. He left the matters he was handling without informing the court and or seeking to be discharged from representing the accused. He also left without informing the accused and the case was left in limbo, if I may use that word.

This court intervened and directed that the Deputy Registrar instructs another counsel to take up the defence of the accused. Mr. Nyasani was instructed and when he attended court, he made this application.

In the intervening period before Mr. Nyasani came on record, the accused person had been making numerous applications every time the matter came up for mention, citing delay in concluding the matter and the suffering he had been undergoing while in custody.

The Criminal Procedure Code does not have a provision where there is change of legal counsel. Section 200 (3) CPC obligates the succeeding magistrate to inform an accused person of his right to resummons and rehear any witness who had already testified before the preceding magistrate. I take it that this applies to a judge in similar circumstances. The reason for this is that a judicial officer taking evidence from witnesses also observes the demeanour of the witnesses. In this case, the pertaining circumstances are different. It is the defence counsel who has changed not the judge. All the evidence of the seven prosecution witnesses was taken by the same judge who is still in conduct of this case. The accused person has been ably represented by a defence counsel who cross examined all the witnesses at length.

With due respect to Mr. Nyasani, he did not indicate what constitutional rights of the accused will be

infringed if this case proceeds from the last witness. On the contrary, the Constitution obligates courts to ensure a speedy trial and this is one of the fundamental rights to a fair trial.

This court has had an opportunity to observe the demeanour of the witnesses who have already testified and I have noted that their evidence is clear and understandable and is without ambiguities. I have also noted the complaints raised by the accused all through when his former defence counsel was absent. I am convinced that he is desirous that this matter comes to a conclusion. In my considered view, there is no prejudice to his case if this case were to proceed from where it stopped. The record of this court is intact and I find nothing on record to convince me why this case ought to start *de novo* (**see Criminal Case No 22 of 2011, Republic v. Francis Githu the Njoroge [2014] eKLR**).

I take the view that the rights of the accused to a fair trial that includes expeditious conclusion of his case are better served if this case were to proceed from where it stopped. In the circumstances, I decline to allow the case to start *de novo*. Let the prosecutor summon the remaining witnesses to enable the conclusion of this trial. The accused is reminded that he retains the right to apply to resubmit any witnesses for further cross examination but in such event, care should be taken to avoid repetition of what is already on record. It is so ordered.

Dated, signed and delivered on 7th April 2014.

S.N.MUTUKU

JUDGE