REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 4 OF 2014

REPUBLIC…….APPLICANT

VERSUS

BENSON WANGALWA ……RESPONDENT

From the original Criminal case No. 481 of 2012 of the Chief Magistrate's court at Kibera before Mr. Ochenja, Chief Magistrate)

RULING

The accused/respondent in Criminal Case No. 44 of 2010 pending before the Chief Magistrates' court at Kibera case is facing three counts of stealing by servant contrary to Section 281 of the Penal Code.

It is alleged that he stole some three vehicles from his employer by selling them without the company's authority or knowledge. From the record 16 prosecution witnesses have already testified and the prosecution has three more witnesses left to testify before closing its case. Four magistrates have handled the trial resting with Hon. Ochenja.

Three previous magistrates were either transferred or promoted. After Hon. Ochenja was transferred Hon. Ochoi was seized of the matter. When it came up for hearing on 17th September, 2013 the learned counsel for the accused made an application under Section 200 of the Criminal Procedure Code for the hearing to start de novo because the trial magistrate had been transferred.

It was the position of the learned counsel for the accused that they wished to rely on the demeanour of the witnesses, and as the court which was due to make judgement had not heard all the witnesses the case should start afresh. The application was opposed by the prosecution. The magistrate made an order acceding to the request of the defence counsel.

On 31st October, 2013 the prosecution applied orally to review the order to start the case *de novo* but in a ruling made on 5th November, 2013 the application for review was dismissed. Following that dismissal the applicant who is the Director of Public Prosecutions moved the court by way of a letter dated 16th January, 2014 challenging the said ruling.

It was submitted in the said letter that there will be great logistical and financial challenge in recalling the witnesses who have already testified, since most of them have left the employment of the complainant company and their whereabouts are unknown, and others are outside the county. The testimonies of the witnesses who had testified was on record which could be relied upon by the succeeding magistrates to

write the judgment, and this is not the first time a magistrate who is seized of a matter has been transferred.

If a case is to start afresh every time a magistrate is transferred, then there would be considerable delay in concluding the matter. All along the accused/respondent never required that the case should start afresh after three magistrates who previously heard the case were transferred. To do so now when only three witnesses are remaining to testify, is an attempt to delay the conclusion of the case.

It will also save judicial time to have the case continue from where it had reached than to start afresh. Finally, the provisions of Section 200 of the Criminal Procedure Code ARE not the preserve of an accused person, as the court as well as the prosecution have a role to play in determining how the case proceeds in order to meet the ends of justice.

Both the applicant and the respondent have filed written submissions. These I have read alongside some authorities that have been cited. Under Section 200 (3) of the Criminal Procedure Code an accused person may demand any witness be re-summoned and reheard where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor. In such a case the succeeding magistrate shall inform the accused person of that right. That provision is couched in mandatory terms.

In the instant case there is no indication that the accused person demanded that the witnesses be recalled or re-summoned. It is his counsel who moved the court to that effect. Both the Court of Appeal and the High Court have observed that this is a right reserved for the accused person. For counsel to address the court would be misplaced.

Be that as it may, whereas the accused may make that demand and the court is entitled to inform him of the right which appears to be mandatory, it is my considered view that it is not mandatory for the court to start the hearing *de novo* when the accused person makes such a demand. This is because had the legisture intended that this should be the case, there is no doubt that it would have said so.

I believe the court has the discretion to order the case to start *de novo* or to continue from where it had stopped. I am reinforced in that holding by the provisions of Section 146 (4) of the Evidence Act Cap 80 Laws of Kenya- Where it is provided,

> ***"The court may in all cases permit a witness to be recalled either for further examination- in-chief or for further cross-examination, and if it does so, the parties have a right of further cross-examination and re-examination respectively."***

From the record the accused /responded herein was represented by counsel all along. On not less than three occasions the trial magistrates were transferred. At no time did the accused/ respondent ask that the hearing start *de novo*. Sixteen witnesses have testified so far with only three remaining. The accused/ respondent had submitted that fair trial would be guaranteed if the hearing starts *de novo*. However this court is alive to the provisions of Article 50 of the Constitution the heading of which is **"Fair Hearing".** It is provided thereunder that every accused person has a right to a fair trial which includes the right to

"(e) to have the trial begin and conclude without unreasonable delay".

Article 159 (2) (b) of the Constitution provides that Justice shall not be delayed.

This hearing commenced with the charging of the accused/ respondent on 10th October, 2010. It is over three and half years now and the accused/respondent wishes to have the trial start afresh. If I were to grant such an order this will be against the tenor, context and spirit of the Constitution. It will also fly on the face of the provisions that justice shall not be delayed.

In view of the foregoing, the order of the trial court dated 17th September, 2013 is hereby set aside. The hearing shall start from where it stopped before a magistrate of competent jurisdiction. It is so ordered.

SIGNED DATED and **DELIVERED** in court this **25th Day** of June **2014**.

A.MBOGHOLI MSAGHA

JUDGE