



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 38 of 2005

REPUBLIC PROSECUTOR

VERSUS

PAUL OTIENO NDEJWE

PAUL OUMA OTIENO..... ACCUSED

RULING

1. The evidence for the prosecution in this case was taken by my brother Makhandia, J. who also made a ruling that the two accused persons had a case to answer. Directions under **section 200** as read with **section 201 (2)** of the **Criminal Procedure Code** were taken and all the parties concerned were in agreement that the case was fixed for defence hearing on 17th November 2011. However on 17th November 2011, Mr. Omwega, counsel for the 2nd accused informed the court that the 1st accused had instructed his advocate Mr. Ombachi that he wished to have the matter start afresh. Mr. Gitonga learned counsel for the state did not object to this request save for the fact he informed the court that this was an old matter and therefore prayed for an early hearing date. The case was then set for fresh hearing on 23rd January 2012.

2. However on the day the trial was set to start afresh, counsel for the State Mr. Gitonga submitted to court that given the unique circumstances of this case being a 2005 matter, the predecessor judge having heard the prosecution's case to its entirety, culminating to the accused being put to their defence they did not find it in the interest of justice for the matter to proceed afresh. He further submitted that although the prosecution had agreed that the case be heard denovo, they had later re-evaluated their decision relying on provisions of **section 200** as read with **section 201 (2)** of the **Criminal Procedure Code**, and the accused's Constitutional right to be heard that that right must be balanced against the scales of justice.

3. He further submitted that the witnesses who gave very weighty evidence against the accused persons may not be found, their memories may have lapsed and in the circumstances, justice will not be served if the case were to start all over again.

4. Mr. Ombachi in reply to Mr. Gitonga's submission identified three issues for determination by this court which were:

- 1) *Is the prosecution right in making this application?*
- 2) *Can the court validly take away a right earlier granted to accused?*
- 3) *Can there be reasonable/valid grounds upon which the application was based?*

5. On issue number 1 Mr. Ombachi referred to **section 200** as read with **section 201** of the **Criminal Procedure Code** and submitted that the prosecution's application was an afterthought and it is an infringement of the accused's right under **section 200** of the **Criminal Procedure Code**. That the prosecution having consented to accused's application to be heard afresh were estopped in law to take away that right and if the prosecution had been aggrieved by the order they should have appealed.

6. With regard to the 2nd issue he submitted that the accused have a right to a fair hearing under **Article 50** of the **Constitution**, that **section 200** stipulates the rights of accused are to take precedence over discretion of court and that this court had no option but to concede to accused's request.

7. Lastly he submitted that with reference to **section 200** of **Criminal Procedure Code** that the accused do not have to comply with what the prosecution demanded of them and that the case should start without conditions. He therefore urged the court to find that the prosecution's application is unconstitutional, bad in law, incompetent and ought to be dismissed.

8. I have carefully listened to the oral and written submissions by both counsel and this court needs to re-examine the provisions of **section 200 (3)** as read with **section 201** of the **Criminal Procedure Code** which state:-

“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.”

9. The accused persons want the trial to begin afresh though it had reached the stage of defence hearing. Such an order is not in my view illegal, incorrect or irregular despite the fact that the prosecution had already agreed for the trial to start denovo only to back track on the same.

10. In the case of **Catherine Mueni Makau –vs- Republic [2012] e KLR**, it was held:

“The provision in section 200(3) has been given a liberal interpretation to mean

that it is entirely up to the accused to chart the way forward for his case

where it is taken over by another magistrate. He may elect to have the case

commence de novo or proceed from where the previous magistrate left.

Therefore the decision whether to proceed from where the previous

magistrate left does not lie with the magistrate. It is with the accused. The

incoming magistrate has no discretion or choice in the matter. The

provisions are couched in mandatory terms. They are some of the so called

fair trial provisions of the law. They cannot be sacrificed at the altar of the

complainant's convenience. Again the complainant may say that the accused

has all along been represented by counsel and therefore the order for a re-

run of the case is most unfortunate. However it must be appreciated that it is

the accused who is on trial here and the duty of the court is to the accused

*and not her counsel. The duty by the incoming magistrate to explain to the accused the provisions of **section 200** is mandatory.”*

11. The prosecution in this case has not presented any evidence to show that it will be difficult to get the witnesses who testified in the above case. In any case, the main witness in this case happens to be the son to the deceased who I doubt would ever forget the events that took place before his father was brutally murdered.

12. In the circumstances, the application sought by the prosecution to deny the accused his right for a fresh trial is denied. The case shall therefore start afresh as earlier ordered by this court on 17th November 2011.

Dated and delivered at Kisii this 07th day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Omwega for Ombachi for the 1st Accused

Mr. Omwega for the 2nd Accused

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.