



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Case 4 of 2008

REPUBLIC PROSECUTOR/RESPONDENT

VERSUS

WESLEY CHEPCHIENG Alias CHAIN GIANT ACCUSED/APPLICANT

RULING

The ruling is on directions taking under S. 200 (3) of the Criminal Procedure Code. In the case, more than one Judge had taken the evidence of the four witnesses who testified. When the provision was explained to the defence (the accused), he opted that the trial proceeds from where it had reached. The State represented by State Counsel, Mr. Munene opposed, submitting that, where more than one Judge/Magistrate has conducted the trial, the mandatory option is to have the trial start De Novo.

This scenario obtains in other criminal cases pending for a similar ruling before me. They are:-

1. Criminal Case No. 37/2010 – Republic -vs- Shadrack Kirobon
2. Criminal Case No. 37/2006 – Republic -vs- Samuel Kimaiyo Cherop
3. Criminal Case NO. 15/2004 – Republic -vs- Bernard Imbiru Misigo
4. Criminal Case No. 99/2005 – Republic -vs- Hillary Kipkoech Chumba
5. Criminal Case No. 18/2006 – Republic -vs- Benson Kuvaka Chumba

Hence this ruling will apply in all these other cases. Suffice it to say however, different State Counsel appeared for the Republic in the various files.

In this file, Mr. Magare appeared for the accused, Mr. Marube Advocate for the accused in Criminal Case No. 37/2010, Mr. Misoi Advocate in Criminal Case Nos. 37/2006 and 15/2004 and Mr. Koros Advocate in Criminal Case Nos. 99 of 2005 and 18/2005.

The State relied on the case of Eustace -Vs- Republic (1970) EA, 393 in which it was held that:-

“One Magistrate may continue and complete a trial began by another Magistrate but a trial cannot be conducted by a succession of Magistrates”

In the cited case, the learned judges of Appeal were of the considered view that their finding was a true interpretation of S. 196 (1) (then) of the Tanzanian Criminal Procedure Code which is the equivalent of

our Section 2003 CPC.

Section 196 (1) of the Tanzanian CPC as cited in the case reads:-

“Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in the whole or part any preliminary inquiry, ceases to exercise jurisdiction therein and is succeeded, whether by virtue of an order of transfer under the provisions of this Code or otherwise, by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence or proceeding recorded by his predecessor, or partly recorded by his predecessor and partly by himself, or he may, in the case of a trial, re-summon the witnesses and recommence the trial or, in the case of an inquiry recommence the inquiry:

Provided that:

(a) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard and shall be informed of such right by the second magistrate when he commences his proceedings;

(b) the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.”

The Judges said that the words **“succeed by a second magistrate”** meant a third one could not take over the trial.

Mr. Magare, while conceding with his client's stand submitted that, to order the case to be heard De Novo would amount to discontinuation of the trial under Article 157 (7) of the Constitution under which the accused should be acquitted. It was also his view that, given the provisions of Article 157 (7) of the Constitution, only an appeal can order the matter to start afresh. And that in any event, the prosecution should have raised the objection at the time the third Judge was taking over the trial. He also submitted that S.200 of the Criminal Procedure Code was amended by an Act of Parliament, Act No. 13 of 1982. That further Article 157 (7) should be read alongside Article 50 (1) and (2) (a) and (e) of the Constitution which provides for right to a fair hearing for an accused person.

Mr. Marube distinguished the Kenyan provision in s. 200 (3) Criminal Procedure Code with the Tanzanian S. 196 (1) Criminal Procedure Code. According to him, whereas the Tanzania Statutes refers to Succession of a case by a second Magistrate, the Kenyan Statute provides for a **“succeeding magistrate”**.

Mr. Misoi concurred with his clients, save to add that court should take into account the age of the cases and the trials would taken long if the same were to be heard De Novo.

As for Mr. Koros, he submitted that to order fresh hearing, would negate an accused's right to a fair hearing as provided by Article 50 (2) (e) of the Constitution. That any further delay would prejudice the accused. He also urged court to take note of Article 1 of the Constitution which provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.

I have carefully considered all the respective submissions made before me as well as the cited case law and the statutes.

Section 200 (3) of the Criminal Procedure Code must be interpreted alongside S. 200 (1) as the latter is subject to the former. It is important that I duplicate them as hereunder:-

“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 resummon the witnesses and recommence the trial.”

“200 (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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

The operative word here is “**succeed**”. In the Concise Oxford English Dictionary, 11th Edition, Revised, the word succeed is defined as follows:-

- take over an office, title, etc from someone, become the new rightful holder of an office, title etc.
- come after and take the place of.

This definition does not put a halt on the number of the persons to succeed something. Likewise a case can be succeeded by as many magistrates and Judges as would be prudent to do so.

This sharply defers with S.196 (1) (a) of the Tanzanian Statute which is categorical that only a second magistrate should succeed a case.

In the cases under reference, it is the wish of the accused persons to have the trials proceed from where they had reached. All the cases are relatively old and accused persons have suffered enough from the delays occasioned, particularly due to the transfers of the trial Judges. No good reason has been advanced by the State that would warrant this court not grant the request made by the accused persons. To find against the accused persons as right submitted by all counsel on record, would be to violate the accused persons' right to a fair hearing as enshrined in Article 50 (1) and (2) (a) and (e) of the Constitution.

I however differ with Mr. Magare that, if the court ordered the matter to be heard De Novo, the same would amount to a withdrawal of the case under Article 157 (7) of the charges. The Article envisages a situation in which the entire charge(s) against the accused are withdrawn. To the contrary, ordering the trial to start afresh would not amount to an accused taking a fresh plea, and so it would not be a fresh charge. An acquittal would not be an option, neither a mandatory provision if the requests by the accused persons are not granted.

In the upshot, I uphold the accused persons' respective decisions to elect to have all the six cases proceed from where the trial had reached. Proceedings will accordingly be typed court will give further directions as and when it is necessary. As I have already stated the ruling will apply to the five (5) files mentioned above.

DATED and DELIVERED at ELDORET this 28th day of March, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

M/s. Karuga holding brief for Magare for the Applicant/Accused

Ms. Ruto and Mr. Wainaina for the Respondent/State