REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Revision 6 of 2013

EPHRAIM WANJOHI IRUNGU & 7 OTHERS..................APPLICANTS

VERSUS

REPUBLIC ....RESPONDENT

R U L I N G

1. This application has been brought before me for revision pursuant to the provisions of **section 362** of the **Criminal Procedure Code** from the ruling and decision of Kibera Acting Chief Magistrate David Ochenja in **Criminal Case No. 4782 of 2010**, on 13th December 2012.

2. **Section 362** of the **Criminal Procedure Code** provides for the power of the High Court to call for and examine the record of any Criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

3. The undisputed facts of this case are that the prosecution closed its case on 13th September 2012, and thereafter the trial magistrate, Hon. Mwangi, Principal Magistrate was transferred from Kibera law courts. Hon. Wachira Principal Magistrate delivered the ruling on behalf of the Hon. Magistrate placing all the accused persons on their defence except for accused No. 5 Mr. Jackson Kinga Ali, who was acquitted under **Section 210** of the **Criminal Procedure Code.** Hon. Mwangi was succeeded by Hon. Ochenja, Acting Chief Magistrate.

4. Pursuant to **section 200(3)** of the **Criminal Procedure Code**, the learned Counsel Mr. Esmail for the **1st, 2nd, 3rd, 4th** and **7th** accused/applicants made an application for the case to start **de novo**, arguing that his clients had a right to be heard afresh. He submitted that the case was filed in 2010 and eventually heard and concluded within a period of 4 days in 2012. That, therefore it was not a lengthy case, and could well start de novo in the prevailing circumstances.

5. Mr. Ayisi, learned Counsel for the **6th** and **8th** accused/Interested parties argued that the matter should proceed from where the trial Magistrate had reached. He submitted that his clients had suffered and continued to do so in custody since 2010, and starting the matter afresh would severely prejudice them. He further applied to have **PW3** recalled for further cross examination.

6. The learned trial Magistrate dismissed the application for the case to start de novo, making reference to the case of **Ndegwa Versus Republic Criminal Appeal No. 125 of 1985,** butgranted the request by the **6th** and **8th** accused/persons to recall **PW3**.

7. Aggrieved by the order of the court, Mr. Esmail applied to the High Court for revision of the said

order, in an application dated 4th February 2013. He submitted that the succeeding learned Magistrate did not hear any of the witnesses or even see their demeanor which was an integral part in determining the credibility of a witness during trial. That it was therefore incumbent upon him to order a de novo trial, which would afford him this opportunity. He submitted that this was a mandatory requirement under **section 200(3) Criminal Procedure Code** that not only had to be complied with, but also clearly recorded, and the Court had a duty to protect the right of the accused person otherwise the trial would be vitiated.

8. Mr. Esmail contended that the learned magistrate had not read the court record since it was apparent on the face of it that the trial begun in 2012 when the first witness testified and not in 2010, as stated by the learned magistrate. He submitted that the trial magistrate gave undue regard to the rights of the **6th** and **7th** co-accuseds who had been in custody for two years, over the rights of the applicants. He argued that though their inability to post bail was unfortunate, it did not take away the right granted to his clients under **section 200(3)** of the **Criminal Procedure Code**. He urged the court to find that the trial had been conducted within 4 days, and order for it to start de novo since there would be no prejudice occasioned.

9. The learned State Counsel Mr. Kadebe in his oral submissions, confirmed that indeed **section 200(3)** was not complied with, and that the state would not suffer any prejudice if the court either upheld or disagreed with the decision of the learned magistrate.

10. Mr. Ayisi opposed the application and urged that the provisions of **section 200(3)** of the **Criminal Procedure Code** were complied with and that the **6th** and **8th** accused persons elected to recall **PW3** whose evidence they deemed of help to the court. He submitted that it took two years for the prosecution to summon the witnesses to testify violating the rights of the interested parties to a speedy trial under **Article 159(2) (b)** of the **Constitution**. He opined that the status of the 5th accused person who was acquitted would be precarious if the trial were to start de novo, and urged the court to let the matter proceed from where it had reached as ordered by the trial court.

11. The issue for determination before me is therefore, whether the interests of justice would best be served by granting the orders sought or by denying them. There is need to balance between the rights of the applicants who are demanding that the trial begins de novo, against the rights of the interested parties who have been in remand for more than two years and are praying for an expedited trial.

12. It is not correct as submitted by the learned State Counsel that **Section 200(3) of the Criminal Procedure Code** was not complied with. That is what is before the court in the instant application.

13. In Criminal appeal No. 115 of 2009 **Joseph Komora Maro -v-Republic** which is of persuasive import, Omondi and Odero JJ sitting in Malindi, observed that some of the witnesses were tourists who had already left the country. They concurred with the trial magistrate's observation that recalling them would occasion further delay to the case and cause much inconvenience.

14. My interpretation is that the **Section 200** of the **Criminal Procedure Code** does not oblige the succeeding magistrate to start the trial de novo. It only obliges the magistrate to bring the provision to the attention of the accused person and consider the accused person's request for the recalling of witnesses. The request was duly considered in this case by Hon. Ochenja who in his ruling dated 13th December 2012 declined to order a de novo hearing. He gave the reasons for this denial as hereunder:

a. The matter had taken over two years from the taking of the plea to the close of the prosecution case.

b. The accused persons had been represented throughout the trial by able counsels.

c. The 6th and 8th accused had been in custody for the entire trial period of 2 years, and to start the matter afresh would prejudice them.

d. The 5th accused person had already been acquitted after the court ruled that he had no case to answer at the close of the prosecution case.

e. The trial was not a short one as submitted by Mr. Esmail, having begun on 1st November 2010 and the prosecution closing it's case on 13th October 2012.

f. Due to the length of time taken, most of the witnesses may have lost memory of the events that took place in 2010 and this in effect would prejudice the prosecution case were it to start afresh.

g. Hearing the case de novo would be in violation of the letter and spirit article 159 of the constitution and would not be in the best interest of both the accused and the complainant.

15. **Section 200 (3)** of the **Criminal Procedure Code** which provides as follows:

"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"

This section gives the accused person the discretion to demand to have any witnesses recalled. It is however, mandatory for the trial magistrate to inform the accused person of this right, to have any of the previous witnesses testify afresh or to be further cross-examined. It is the failure to inform the Accused of this provision which renders the subsequent proceedings a nullity.

16. Criminal Procedure Code in the Court of Appeal decision in the case of **Ndegwa vs. Republic 1985 KLR pg 534 at pg 537,** Madam, Kneller & Nyarangi JJA observed that **Section 200** of the **Criminal Procedure Code** should be used sparingly stating as follows:

"Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial."

17. The need to sparingly apply the said section is more pronounced in the instant case to avoid defeating the ends of justice. It is not contested that starting the case de novo would prejudice the rights of the **6th** and **8th** accused/interested parties and defeat the ends of justice. On the other hand, it has not been sufficiently demonstrated in the circumstances of this case, that the applicants would be prejudiced if I do not grant this order, in view of the fact that they were represented at all times during the trial.

18. **Article 50** of the **Constitution** sets out what constitutes the right to a fair hearing, and it includes **clause (e)** the right of an accused person

"to have the trial begin and conclude

without unreasonable delay".

This is the right that the interested parties seek to enforce by asking me to deny the applicants the orders sought under **Section 200(3)** of the **Criminal Procedure Code.** The need for expedited dispensation of the justice is fortified by **Article 159(2)** of the **Constitution** which provides that in exercising judicial authority, the courts and tribunals shall be guided by principles which include:

"**Clause (2) (b) "Justice shall not be delayed"**

19. In my view the reasons stated above by the learned magistrate were sound. To start the trial afresh would involve much inconvenience and delay of the case, even if Mr. Esmail's clients who are out on bond do not seem to mind. This case has entered its third year and any further delay is undesirable as

justice delayed is justice denied. I am satisfied that Hon. Ochenja exercised his discretion judiciously in declining to order a re-trial and such denial does not nullify the subsequent proceedings.

In the circumstances, the order which does command itself to me is that the case shall proceed for hearing from where it stopped, pursuant to the orders of the learned Acting Chief Magistrate made on 13th December 2012 before a magistrate of competent jurisdiction.

SIGNED DATED and DELIVERED in open court this 16th day of April 2013.

L. A. ACHODE

JUDGE