REPUBLIC OF KENYA

IN THE HIGH COURT

AT KITALE

Criminal Revision 5 of 2012

RICHARD KISSA MATAYO :: APPLICANT.

VERSUS

REPUBLIC :: REPUBLIC.

COURT RULING.

In a letter/request dated 29th May, 2012, the firm of Katama Ngeiywa & Co. Advocates who represent an accused person **Richard Kissa Matayo** in CMCR case No. 1405 of 2008, asked the Deputy Registrar of this court to call for the record respecting the aforementioned criminal case and place the same before this court for purposes of revision and setting aside of the orders made on the 16th May, 2012 by the learned trial magistrate. The request was made pursuant to the provisions of sections 362, 364 and 365 of the Criminal Procedure Code.

Indeed, the Deputy Registrar called for the trial court record and placed the same before this court for necessary orders.

A perusal of the record indicates that the accused initially appeared before the Senior Principal Magistrate at Nairobi on 25th June, 2007 charged with two counts viz making a false document contrary to section 347 (a) of the penal code and obtaining registration by false pretences contrary to section 310 of the penal code. A third count was included later i.e. forcible detainer contrary to section 91 read with section 36 of the penal code.

The accused pleaded not guilty to all the counts and a date was set for the hearing of the case in Nairobi. However, the case was transferred to Kitale vide a High Court order provoked by the accused. Hearing commenced in Kitale on the 2nd March, 2009 before the learned Senior Principal Magistrate **M.C. Chepseba**. One year down the line only three (3) witnesses had testified on behalf of the prosecution. The third witness testified on 19th March, 2010 after which the prosecution was granted an

adjournment to call three (3) more witnesses.

On 18th June, 2010 when the hearing of the case resumed, the prosecution did not have all its remaining witnesses. A further adjournment to the 16th May, 2010 was granted to the prosecution despite objection from the defence. A final and last adjournment to the 17thAugust, 2010 was granted on that 16th August, 2010. But on the 17th August, 2010, the trial magistrate was indisposed. The matter was therefore pushed to the 4th October, 2010 when the prosecution again failed to avail its remaining three (3) witnesses and applied for an adjournment. The application was disallowed by the court and the prosecution was ordered to close its case if it had no further evidence to offer. Having no further evidence to offer, the prosecution closed its case. The matter was fixed for mention on 1st November, 2010 for submissions. On that date, the prosecution applied for witnesses summonsfor three witnesses but was reminded by the court that it had already closed its case.

On 15th November, 2010, the matter came up for submissions. The defence had no submissions to make. The prosecution asked for time to submit and was given upto 3.00 p.m. when it was indicated that the prosecution was not ready to tender submissions. Instead, the prosecution applied to have its case re-opened but the application was vehemently opposed by the defence. In a ruling delivered on 7th January, 2011, the application was allowed by the court. The case was thereafter fixed for further hearing on 22nd/23rd March, 2011. On 22nd March, 2011, the prosecution applied for adjournment. The defence did not oppose. The matter was fixed for mention on 19th April, 2011 to fix a suitable date for further hearing. On 19thApril, 2011 the mention date was extended to 17th May, 2011 on which date the prosecution presented a **"Nolle prosequi".** The defence raised objection thereto and in a ruling delivered on 23rdAugust, 2011, the objection was upheld by the court which ordered that the case proceeds without further delay.

On 12th September, 2011, the case was fixed for further hearing on 7th to 9th November, 2011.

On 8th November, 2011, the prosecution called its fourth witness whose evidence was not completed on that date due to emerging legal issues raised by the prosecution and replied to by the defence in objection. The court upheld the objection in a ruling delivered on 20th January, 2012. Thereafter, the case was slated for further hearing on 26th march, 2012 on which date it was placed for mention for directions before a different magistrate due to the transfer of the trial magistrate to another duty station. The defence proposed that the matter proceeds from where it had reached but although the prosecution had one witness present, it proposed that the hearing of the case starts afresh. The defence objected to the start of the case afresh on grounds that section 200 (3) of the CPC gave the accused the right to decide and that the case was old. The accused would thus be prejudiced if the case was to start **"de novo".**

On 16th May, 2012, the court gave directions to the effect that the hearing of the case should start afresh. In so doing, the court stated as follows:-

"This case has a rather complex history with the Attorney General having attempted to enter "Nolle prosequi". The prosecution had had to re-open their case after initially closing it. The current prosecutor is not also very conversant with the case having taken over late.

Considering the circumstances of this case and the principles set out in the above cited judicial authority, it is directed that the case do begin "de-novo." In view of the age of the case, one day will be allocated for it on which the prosecution will be expected to avail all their witnesses and close their case."

It is this direction that has given rise to this application for revision and setting aside thereof.

The High Court under section 362 of the Criminal Procedure Code may 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 regularityof any proceedings of any such subordinate court. And under section 364 (1) (b) of the CPC, the High Court may alter or reverse any order made by a subordinate court other than an order of acquittal.

The present application is premised on five (5) grounds viz:-

(a)That, the orders made on the 16th May, 2012 violate the provisions of section 200 (1) as read with section 200 (3) since the application to have the trial start "de-novo" was made by the prosecution whereas the accused person was opposed to the same.

(b)That, the prosecution has no right to require the trial to start "de-novo" under section 200 of the Criminal Procedure Code.

(c) That, the orders amount to an abuse of the process of the court in view of the orders made on 4th October, 2010, 7th January, 2011 and 28th August, 2011.

(d)That, the accused person's right under Article 50 (1) (e) of the Constitution has been violated and is likely to be violated further.

(e)That, the orders are oppressive and biased against the accused as they subject him to undue and unreasonable expense, prejudice and embarrassment, while giving the prosecution undeserved advantage to repair its already punctured case and the trial having previously taken over five (5) years and a substantial number of prosecution witnesses having testified.

The view of this court is that section 200 (3) of the CPC does not require either the prosecution or the defence to make an application to have a case commence afresh before a succeeding magistrate. The provision presupposes that a succeeding magistrate would take over and proceed from where his predecessor left. The provision is also meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate. The burden to inform an accused of the right to have the previous witness re-summoned and re-heard is placed on the magistrate in mandatory terms. This is what the provision states:-

> ***"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 re-heard and the succeeding magistrate shall inform the accused person of that right." (See Cyrus Muriithi Kamau & Another vs. Republic Criminal Appeal No. 87 & 88 of 2006 at Nyeri C/A).

In this case, it was upon the succeeding magistrate to take over the case and proceeded from where it stopped while at the same time complying with the provisions of section 200 (3) of the Criminal Procedure Code. The prosecution did not have to make any application to have the case start afresh, neither did the defence have to make any application to have the case proceed from where it reached.

Since section 200 (3) CPC exists for purposes of protecting the accused, it was incumbent upon the succeeding magistrate to ensure that the rights of the accused guaranteed by Article 50 (1) and (2) of constitution are protected. Clearly, the magistrate herein appreciated that the case was an old one and that it had been delayed unnecessarily at the instance of the prosecution by its failure to call all its witnesses and conclude its case, in the circumstances, fairness dictated that the case ought not be delayed any further by starting it afresh. The directions given by the succeeding trial magistrate were prejudicial to the accused and would require revision in the interests of justice.

Although the learned magistrate relied on the case of **Ndegwa vs. Republic (1985) KLR 534**, in giving

the disputed directions, it was apparent that the following pronouncement made therein by the court was over-looked i.e.

"No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration." (see pg 537 of the decision)

For all the foregoing reasons, the grounds in support of the application are hereby upheld to the extent that the direction given by the succeeding trial magistrate on 16th May, 2012 be and is hereby set aside and substituted with a directive that the trial in the subject case proceeds from where it reached under the previous trial magistrate. Ordered accordingly.

[Dated and signed this 15th day of June, 2012.]

J.R. KARANJA.
JUDGE.