



**Silima alias 'Kajim' v Republic (Criminal Case E026 of 2021)
[2025] KEHC 2246 (KLR) (Crim) (11 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E026 OF 2021
AM MUTETI, J
FEBRUARY 11, 2025**

BETWEEN

JAMES KINUTHIA SILIMA ALIAS 'KAJIM' APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The accused person through Mr. Main Advocate when the matter came up for directions under Section 200 of the *Criminal Procedure Code* indicated to the court that it was his wish that the matter be heard de novo. The reason advanced by the accused through his counsel was that when the hearing was going on before the Honorable Lady Justice Githua the accused person did not participate fully because he did not have the whole set of witness statements.
2. The application for the hearing of the matter de novo was opposed by Ms. Njoroge for the state who submitted that whenever a Judge ceases to exercise jurisdiction and another Judge takes over the hearing of a matter, an accused person does not have an automatic right to demand that a matter starts de novo but that it is the succeeding judge who in exercise of his judicial discretion who determines whether such an action is desirable in the interests of justice.
3. The prosecution counsel further argued that during the hearing before the learned Honorable Justice Lady C. Githua, the accused person was represented by competent counsel and the matter of witness statements not having been supplied was never raised.
4. Counsel for the prosecution went on to submit that the accused person had been denied bond because of the fear of interference with witnesses and that fact had not changed.



5. According to Ms. Njoroge, if this court was to order that the trial begins de novo the state would have insurmountable difficulties in securing the attendance of the witnesses who have already testified and in particular it would be near impossible to secure the attendance of the eye witness who happened to have been a passerby at the scene of the crime when she witnessed the incident.
6. Counsel for the prosecution further argued that one of the witnesses who testified is an elderly aunt to the deceased who lives away from Nairobi and it would be a great inconvenience to recall her.
7. Finally, counsel for the prosecution submitted that the application to have the matter start de novo was a calculated move by the accused person to delay the trial and that this court should see through the accused's person scheme and reject the application in toto.
8. Mr. Maina for the accused person, in his rejoinder submitted that the accused person faces a very serious charge and that the inconvenience to the prosecution should not be an excuse to deny him his right to have the witnesses recalled.
9. Counsel for the defense argued that the defense did not intend to delay the trial because any delay in the hearing would be prejudicial to the accused. It was further argued that by recalling the prosecution witnesses this court would have the opportunity to observe the demeanor of the witnesses.
10. Mr. Maina further argued that the learned Honorable Justice Kimondo gave directions in this matter and acceded to the request by the defense to have the matter start de novo.

Analysis And Determination

11. It is important to indicate from the outset that on 19th September 2024 this matter went before the Honorable Justice Kimondo and the learned Judge issued the following directions:
 - i. "This trial shall now be heard by the Honorable Justice A. Muteti.
 - ii. Directions Under Section 200 of the [Criminal Procedure Code](#) shall be taken on 5th November 2024 virtually
 - iii. Accused be produced on the platform."
12. It is therefore clear from the record that the Honorable Justice Kimondo did not issue directions under Section 200 of the [Criminal Procedure Code](#) contrary to the submission by the defense counsel.
13. The matter was committed to this court by the Honorable Justice Kimondo for hearing and directions under Section 200 of the [Criminal Procedure Code](#) which I am now called upon to give.
14. The power to decide whether a matter is to start de novo or proceed from where the previous court left, is a power that is exclusively reserved for the court that takes over a matter. It is a matter of discretion and the court in considering such an application is enjoined to ensure that in issuing directions under Section 200 of the [Criminal Procedure Code](#) the interests the administration of justice are safeguarded to ensure that the prosecution and the defense enjoy equality of arms in the course of trial.
15. It should never be left to the accused person to dictate how the matter is to be handled because a court must strike a delicate balance between the rights of the accused on the one hand and the fight against crime on the other hand in a fair and just manner.
16. The court in making the decision must bear in mind that the wording of Section 200 of the [Criminal Procedure Code](#) is not mandatory but simply directional. The duty of the succeeding court is first to inform the accused person of his rights under Section 200 of the [Criminal Procedure Code](#) and allow the accused person to elect.



17. It is important that where an accused persons insists on a matter beginning de novo, that the accused person be called upon to give reasons why such a course should be taken more so where the accused person was represented by counsel at the hearing when the witnesses sought to be recalled gave evidence.
18. The Court of Appeal in Kisumu Criminal Appeal No.140 of 2017 Samuel Omondi Gombe alias Agok & another v Republic (unreported) while interpreting the application of section 200(3) of the Criminal Procedure Code agreed with the submissions of the State to the effect that section 200(3) gives the trial judge a discretion to choose how to proceed;whether to start de novo or continue from where his predecessor stopped, and that it is only after the court makes that election that the accused person's right accrues, specifically, the right to re-summon a witness.

The Appellate Court held as follows;

“A plain reading of the provision lends itself to the interpretation suggested by the prosecuting counsel, that is, upon the learned judge commencing the hearing afresh, the appellants would have been entitled to have any of the witnesses that had already testified resummoned.

19. Section 200 of the Criminal Procedure Code should never be used as a tool by accused persons to delay trials or vex the court and the prosecution by demanding the recall of witnesses on flimsy grounds whenever a judge ceases to exercise jurisdiction. It is precisely that for that reason that the discretion is left to the court taking over a matter to determine whether the hearing should start a fresh or to continue from where the previous judge left.
20. The courts must remain alive to the present realities where murder cases take some times unreasonably long periods to conclude before our courts not because of the courts unwillingness to hear them but the practicalities of the moment which include the limited capacity of the High Court in terms of the number of judges available to hear the cases countrywide. The current capacity of the High Court is below the optimal capacity by more than half the statutory number. That is a matter one cannot ignore in deciding on whether to start the hearing of a case de novo.
21. In the case of Joseph Kamau Gichuki v Republic NRB [2013] eKLR the Court of Appeal held that;

“This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused”
22. The court taking over a matter must be persuaded that indeed the accused is unlikely to receive a fair trial if the trial proceeds from where the previous judge left without recalling the witnesses who had already testified.
23. The prosecution in this matter has clearly indicate the difficulties that they experienced in securing the attendance of the eye witness to give evidence and also made it clear to this court that if the court were to order that if the matter starts a fresh there is no guarantee that the four witnesses who had already given evidence would be found to come and give evidence in the trial.



24. This court has considered the plea by the defence against the position taken by the prosecution. The court has not found anywhere in the record where the accused person or his counsel had expressed difficulty in proceeding with the matter before the previous court on account of witness statements.
25. It is the considered view of this court that the position taken by the accused person is an afterthought and is purely calculated at ensuring that the prosecution of the matter is delayed and exploit the possibility of the unavailability of the prosecution witnesses which would eventually lead to the collapse of the matter.
26. It is the view of this court that thus is not one of those cases where an order for a trial de novo should issue. The accused was heavily represented by counsel and therefore there would be no reason to order the recalling of the four witnesses or any of them.
27. Consequently, the application by the accused person fails and this court directs that the trial should proceed from where the Honourable Lady Justice left in the interest of justice.
28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Ms Njoroge for the state

Kirugu holding brief Maina for the Accused

