



**Republic v Jore (Criminal Revision E082 of 2024)
[2025] KEHC 2679 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL REVISION E082 OF 2024**

DK KEMEL, J

MARCH 7, 2025

BETWEEN

REPUBLIC PROSECUTION

AND

BRIAN BARAZA JORE ACCUSED

RULING

1. The Applicant herein vide a letter dated 6/5/2024 has sought for revision of orders made by the trial court on 19/5/2022 in Siaya Chief Magistrate’s Sexual Offence Case No. 51 of 2020 wherein the trial court declined the Prosecution’s request to proceed with the matter from where it had reached and ordered the case to proceed afresh (Denovo).
2. The Applicant’s gravamen further is inter alia; that the prosecution’s case against the Respondent had taken off with three witnesses who testified; that before the case could be concluded, the trial magistrate was transferred and that the matter was to be started by the succeeding magistrate; that the prosecution made an application before the succeeding magistrate to have the matter proceed from where it had reached but that the said magistrate ordered the case to start afresh(denovo); that the investigations officers was then contacted with a view to getting back the witnesses but unfortunately they could not be traced; that the application to proceed from where the matter had reached was not taken into consideration by the trial magistrate; that it is in the best interest of justice and the parties that the matter proceeds from where it had reached as the witnesses who had testified cannot be traced; that this court is clothed with powers under Article 165(6) of the *constitution* and section 362 of the *Criminal Procedure Code* to issue orders as it may deem fit to meet the demands of fair administrative justice; that the decision by the trial magistrate dated 19/5/2022 was irregular and contrary to the spirit of a fair trial and ought to be reviewed as appropriate so as to accord the parties a fair administration of justice. The Applicant now urges this court to intervene and call for the record of the lower court and proceed to revise, vary and set aside the orders of the learned trial magistrate dated 19/5/2022 so as to accord fair administration of justice in the matter.



3. The Respondent herein filed a response in the form of a letter dated 30/12/2024 wherein he stated *inter alia*; that this court should associate itself with the decision of the trial court and order the case to start denovo; that the trial court exercised its mandate under section 200(3) of the [Criminal Procedure Code](#) as the trial magistrate did not have the benefit of observing the demeanour of the witnesses who had so far testified and hence the need to start the case afresh; that the prosecution has not demonstrated that the said three witnesses cannot be traced; that this court should invoke the provisions of section 364(2) of the [Criminal Procedure Code](#) and uphold the contents of section 200(3) of the [Criminal Procedure Code](#); that this court should uphold the directions of the learned trial magistrate to the letter.
4. The Respondent filed some undated submissions while learned counsel for the Prosecution made oral submissions.
5. The Respondent's submissions are inter alia; that the matter proceeded with three witnesses who included the complainant, her mother and grandfather; that the matter was fixed for hearing several times but witnesses never turned up and that the prosecution has not given evidence or a report to the effect that the witnesses cannot be traced; that the prosecution managed to call a doctor whom he did not cross-examine after his attempts to have the complainant called first were rejected by the trial court.
6. Miss Mumu for the prosecution reiterated the contents of her letter dated 6/5/2024. She submitted that the prosecution had called three witnesses who testified before the trial magistrate was transferred. It was submitted that the investigating officer was unable to trace the witnesses from 2022 to date. It was also submitted that the Respondent duly cross-examined the three witnesses at length. Learned counsel urged the court to grant the request so that the matter can be concluded in the interest of justice
7. The Respondent reiterated his written submissions and sought help from this court over the matter.
8. I have considered the application by the prosecution as well as the oral submissions. I have also perused the record of the lower court and more particularly the ruling dated 19/5/2022. In the said ruling, the learned trial magistrate held as follows:

“Turning to the circumstances of this case, I find that three prosecution witnesses have already testified. There is no evidence from the prosecution that its witnesses are not likely to recall events relating to this incident. In the circumstances of this case, weighing all the factors, I find that this is one case that the accused person's right to have the matter start denovo should be protected. I therefore decline the state's opposition and direct that this matter starts anew.”

9. It is the foregoing decision that has generated this revision. The revisionary power of the High Court in Article 165 (6) & (7) of the [constitution](#) provides as follows:

- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Being guided by the above provision, this court has had the advantage of going through the record of the lower court. It is not in dispute that the case involved a complainant who is a minor aged thirteen (13) years and the Respondent herein as the accused and that the matter had proceeded with three witnesses before the trial magistrate was transferred. That being the position, both the prosecution and the defence were to conduct the trial with utmost diligence



and care so as to ensure that both the prosecution and defence were given adequate time and facilities in order to ensure that each party has their day in court. It is noted that upon the transfer of the learned trial magistrate, the incoming trial magistrate was obligated to ensure compliance of the provisions of section 200(3) of the *Criminal Procedure Code* and that the Respondent opted to have the matter start afresh (denovo). It seems the Prosecution attempted to comply with the order but their efforts seemed to have come a cropper as it only managed to avail one witness (a doctor) while the complainant and the other two witnesses who had testified earlier could not be reached. The provisions of section 200 of the *Criminal Procedure Code* provides as follows:

“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.
- (2) where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.
- (3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been re-ordered 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.
- (4) where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

10. The conventional practice is that a trial court is obliged to inform the accused of his right under section 200 of the *Criminal Procedure Code*. In *John Bell Kenengeni v Republic* [2015] eKLR, the Court of Appeal addressed the import of Section 200 (3) at length and concluded that “the duty is reposed on the court and that there is no requirement that an application be made by the accused for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200 (3) requires in a mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate.

11. The Court of Appeal succinctly summarized the guiding principles surrounding the application of Section 200 of the *Criminal Procedure Code* in *Lenyesio Lekipe & Another Nyeri* CRA No. 294 of 2010 where it was held that:

“In all these pronouncements, this court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale, and philosophy behind Section 200 of the *Criminal Procedure Code* more than thirty years ago. In *Ndegwa v Republic* [1995] KLR 534 where it held that;



1. The provisions of Section 200 of the *Criminal Procedure Code* (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.
2. The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started de novo. Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.
3. No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.
4. A magistrate who did not observe the evidence is not in position to assess the position, credibility and personal demeanor of all the witnesses.”

It is noted that upon the prosecution failing to secure the witnesses in compliance with the order by the learned trial magistrate, they made the present application. It is clear that in the absence of the three witnesses they stand to suffer great prejudice as the said witnesses cannot be traced. The prejudice suffered if the order of the trial magistrate is upheld will be far much higher on the part of the prosecution as compared to the accused (Respondent) if the order is varied and or set aside. The accused herein had the opportunity to cross-examine the witnesses at length and thus is not prejudiced if the said evidence is adopted and the prosecution directed to call the remaining witnesses. Indeed, both the accused and prosecution have expressed their frustration regarding the delay in the conclusion of the matter. I find an order that the matter proceeds from where it had reached to be reasonable in the circumstances. The guidelines enumerated in the case of *Ndegwa v R* (supra) are applicable in the present circumstances so as to ensure that the rights of the Applicant are protected and that the same will serve the public interest. I find the decision arrived at by the learned trial magistrate dated 19/5/2022 was arrived at in error. The same was irregular, and contrary to the prosecution’s right to fair trial and due process under Article 50(2) of the *constitution*. There is therefore merit in the prosecution’s request for revision of those orders so as to ensure that justice is not only done but is seen to be done.

9. In view of the foregoing observations, the revision has merit. The same is allowed. The following orders are hereby issued:
 - a. The ruling by the learned trial magistrate dated 19/5/2022 is hereby varied and/or set aside and substituted with an order allowing the prosecution’s request to have the case proceed from where it had reached.
 - b. The parties herein to set down the matter before the trial court for further hearing on priority basis.

DATED AND DELIVERED AT SIAYA THIS 7TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE



In the presence of:

Brian Baraza Jore.....Accused/ respondent

Mocha.....for Prosecution/Applicant

Ogendo.....Court Assistant

