



REPUBLIC OF KENYA



**Republic v Ndwiki (Criminal Case 2 of 2020) [2025] KEHC 4632 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL CASE 2 OF 2020**

**LW GITARI, J**

**APRIL 8, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**MUSYOKI NDWIKI ..... ACCUSED**

**RULING**

1. The accused is charged with murder contrary to Section 203 as read with Section 204 of the *Penal Code*. He denied the charge and the matter proceeded before Justice Limo who heard the evidence of Seven (7) witnesses. The prosecution closed its case and the accused was put on his defence. Unfortunately, Justice Limo was transferred from this court station and could not hear the defence case.
2. The matter is to proceed in this court under the provisions of Section 200 of the *Criminal Procedure Code* Cap 75 of the Laws of Kenya. The accused thro' his learned counsel has applied to recall PW1 and the Investigating Officer. The provisions of Section 200 *Civil Procedure Code* applies 'Mutatis Mutandis' to the proceedings in the High Court. Section 20(2) of the *Criminal Procedure Code* provides:

“The provisions of Section 200 of this Act shall apply 'Mutatis Mutandis' to trials held in the High Court.”

3. It follows that Section 200 of the *Criminal Procedure Code* is applicable to the proceedings in the High Court. Section 200(3) of the *Criminal Procedure Code* provides that:

“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.”



4. The provision gives the accused the right to recall the witnesses for the purpose of cross-examination only. The Section entrenches the accused persons' rights to a fair trial as provided for under Article 50(1) of the Constitution which provides as follows:

“ 50.

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

5. It follows when a Judge takes over a matter that has proceeded before another, he/she must ensure that the accused is not prejudiced. In the case of *Ndegwa -vs- R* (1985) KLR535, Court of Appeal it was held that:

“...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...”

6. The court is supposed to ensure that the right of the accused person to a fair trial is not violated. The court of Appeal in the case of *Abdi Adan Mohamed -vs- Republic* 2017 eKLR it was held:

“Where in the language of Section 200(3) the accused demands that any witness be resummoned and re-heard, the demand must be subject to availability of witnesses sought to be resummoned and re-heard, the demand must be subject to availability of witnesses sought to be re-summoned. It of course will be impractical where it is demonstrated the witness sought be re-summoned is deceased, to insist on calling such a witness.

Similarly, if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the Magistrate or Judge may adopt and rely on evidence on record previously recorded by the out-going Magistrate or Judge. That is why in demanding the re-summoning of any witness must be done in good faith.”

7. The court further went on to state that some of the considerations under Section 200 of the Criminal Procedure Code include whether it is convenient to commence the trial de novo how far has the trial reached, availability of witnesses, the time that had lapsed since the commencement of the trial and prejudice likely to be suffered by either the prosecution or the accused. See *Joseph Kamau Gichuki -vs- R. C.* Appeal No. 523 Polo cited in *Nyabutu -vs- R* (2009) KLR 409 where the court stressed that:

“By dint of Section 200(1)(b) of the Criminal Procedure Code a succeeding Judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the Law which is to be used sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding Judge does not, or is not allowed to adopt and continue a criminal trial started by predecessor owing to the latter becoming unavailable to complete trial. See *Ndegwa -vs- R* 1985 KLR 535. In this case the trial Judge passed on after having fully recorded evidence from seven (7) witnesses and from the two appellants and hand in fact summed up to the assors. The trial moreover, was not short one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though the prosecution witnesses



might have been available locally, re-hearing might have prejudiced the prosecution and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga J in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded.”

8. It follows that the right of the accused to fair trial should be promoted and where the trial is to proceed before another Magistrate or Judge, the consideration is whether the attendance of the witness may be secured without an amount of delay or expense which would in all fairness be un reasonable. The court has to consider whether it will be possible to recall the witness by reason of unavailability, due to death or simply that he cannot be found or is incapable of giving evidence. The burden is on the prosecution to prove that it will not be possible to procure the attendance of the witness.
9. In this case, there are seven witnesses who testified before Justice Limo. Though the accused had applied to have the case start de novo so that the judge can see them and assess their demeanor, he softened that stance when the prosecution stated that there is no guarantee that the witnesses will be traced. He now wants two witnesses to be recalled, that is PW1 and the investigating officer. The record shows that PW1 testified on 26/06/2023. The Investigating Officer PW7 testified on 23/7/2024. I find that the lapse of time since they testified is not too long. The Investigating Officer is a Police Officer who can be easily traced while Pw1 can be traced as her particulars are well known.
10. The prosecution has not proved that the witnesses cannot be traced. In line with Court of Appeal decisions which I have cited, I should give the accused the right to have the two witnesses recalled for the purpose of further cross-examination by the defence. I allow the application to recall PW1 & PW7. Summons shall issue to the two witnesses and the matter shall be given a date for hearing.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 8<sup>TH</sup> DAY OF APRIL 2025**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

