



Director of Public Prosecutions v Makokha & another (Criminal Case E125 of 2021) [2024] KEHC 1354 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E125 OF 2021
SC CHIRCHIR, J
FEBRUARY 8, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

KEFA ANJERE MAKOKHA 1ST ACCUSED

DENNIS MAKOKHA 2ND ACCUSED

RULING

1. The hearing of this matter commenced with Justice Musyoka presiding. After having taken Evidence from six (6) witnesses, the Judge went on transfer, and I took over the matter. When the case came up for directions pursuant to the provisions of section 200(3) of the *Criminal Procedure Code*, the accused persons opted to have the hearing start denovo.
2. This was objected to by the prosecution and the parties were directed to file substantive submissions in that respect

Accused Persons' Submissions.

3. While relying on the decision in the case of *Joseph Athuku Wangai vs. R* (2005) eKLR, counsel for the accused Ms. Imbosa made a strong case for strict compliance with section 200(3). She argued that the accused persons have been represented by two counsels so far, and as the counsel presently on record, she took over the matter at the tail end of the hearing. And as such, she further contends, she did not have the opportunity to examine crucial witnesses.
4. The counsel further submits that in as much as the accused persons were represented, it would be difficult for the current Advocate to follow the plot of prosecution witnesses, cross examine some of them, and follow the consistencies or inconsistencies in their testimonies.



5. It is further submitted that the current counsel never recorded previous proceedings, did not have the chance to observe the demeanor of witnesses and their conduct, and cannot therefore ascertain the credibility of the said witnesses.

Prosecution's Submissions

6. It is the prosecution's submissions that the recalling of witnesses is not mandatory, but rather what is mandatory is the obligation on the part of the court to inform the accused person(s) of his rights under section 200 (3) of the *criminal procedure Code*.
7. While relying on Article 27(1) of *the constitution*, the prosecution further submits that the complainant too, like the Accused, is entitled to equal protection of the law.
8. It is further argued that Article 159(2) (a) and (b) of *the constitution* requires that Justice should be dispensed without any undue delay and without undue regard to technicalities.
9. The prosecution further argues that section 200 (3) of the *Criminal procedure Code* does not give due regard to the rights of the complainant, and as such the section should be applied sparingly.
10. It is further submitted that all the prosecution witnesses, except one, have since testified; that the case has been pending in court since 2021; that the accused persons were represented at all times and the defence had the opportunity to cross examine the witnesses.
11. The prosecution further submits that the accused persons have not demonstrated what prejudice they will suffer if the case does not start *denovo*.
12. Finally, the prosecution has relied on the case of *Stephen Mburu Kinyua vs. Republic* (2016) e KLR to buttress their submissions.

Determination

13. I have considered the rival submissions. On the requirements of section 200(3) of the *Criminal Procedure code*, I am in agreement with the prosecution that the only mandatory requirement under the section is that of the duty of the court to bring to the attention of the accused persons their rights under the said section. The accused persons in this case were duly informed of their rights under the section and to that extent this court was discharged its duty.
14. Thereafter the decision as to whether the case should start *denovo* is at the discretion of the court.
15. In the case of *Stephen Mburu* (supra) cited by the prosecution, in determining whether the hearing should start *denovo*, the court must put into consideration the following :-
 - a. Whether it is convenient to commence the trial *denovo*, that is, the difficulty in mounting a new trial
 - b. How far the trial had proceeded.
 - c. The availability of the witnesses who had already testified
 - d. Possible loss of memory by the witnesses, given the passage of time
 - e. The time that has lapsed since the commencement of the trial taking into consideration the constitutional requirement that criminal trial should commence and be concluded without undue delay



- f. The prejudice likely to be suffered by either the prosecution or the accused if a new trial is ordered, and
- g. The interest of the victims of crime and witnesses including the impact a new trial will have on there balanced against the benefits of a new trial.
16. I have considered the reasons given by the accused persons, the gist of which is that they have a new advocate, who did not have the benefit of following the previous proceedings and assessing the demeanor of witnesses , and hence they argue, will deny them the benefits derived from of cross examination.
17. However, change of counsels is never consideration when arriving at a determination on whether the hearing of a case should start denovo. In any event, the Accused persons are always at liberty to change counsels in the course of proceedings and it cannot be, and has never been, that a hearing need to start denovo when a new Advocate comes on record. Section 200(3) addresses itself to change of presiding Judge or magistrate, not change of counsels.
18. However, where an accused was not previously represented, then the question of whether fair trial was achieved comes into play and this becomes a consideration on whether or not the case should start denovo. This was the scenario in the case of *James Richard Mbugua vs. Republic* (2022) KEHC 3037(KLR) cited by the Accused persons. In that case the accused had no counsel previously ,and had just appointed an Advocate when the new Magistrate was taking over the hearing, he had not examined the 4 witnesses that had so far testified. The court held that the new Advocate should have been granted a chance to cross examine the witnesses.
19. In the present case, the scenario is different. The accused persons were represented all through by Mr. Indimuli Advocate. Indeed, the present Advocate, Ms Imbosa held brief for Mr Indimuli a number of times and cross- examined witnesses. Ms . Imbosa cross- examined the pathologist (PW3) . She also examined PW4, PW5 and PW6 on 16.2.2023. Thus, out of the 6 witnesses that have so far testified, 4 were cross- examined by current Advocate on record for the Accused persons. In short, contrary to the assertion by the Accused, their Advocate is well acquainted with the case. There is no prejudice therefore that they will suffer by the entry of Ms. Imbosa as the defence counsel in place of Mr. Indimuli.
20. I have also considered the time this matter has taken in court. The accused persons took plea in 2021. The case has been on, for the last 3 years . Starting the case afresh violates the Accused persons' s right to speedy trial and negates the the public policy requirement for expeditious disposal of cases.
21. I have further considered the circumstances of this case. On perusing the record, I note that at some stage in his testimony, PW2 had to be declared a hostile witness. what chances are that such a witness would return to court, save on the basis of a warrant of arrest? Added to that would be the possibility of the prosecution having to deal, again, with the hostility of the same witness. Subjecting the prosecution to such an ordeal will in my view prejudice their case. On the other hand, in view of what I have stated earlier, no prejudice will be suffered by the Accused persons if the case does not start afresh.
22. Taking all the foregoing into consideration, it is my finding that the interest of justice demands that this case proceeds from where it has reached. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF FEBRUARY, 2024

S. CHIRCHIR

JUDGE



In the presence of:

Godwin- Court Assistant

Ms Chala for DPP

