Republic v Ngala (Criminal Case 4 of 2023)
[2024] KEHC 1486 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL CASE 4 OF 2023

DR KAVEDZA, J

FEBRUARY 20, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

STANSILAS BURUDI NGALA ..... ACCUSED

RULING

1. The accused person was charged with the offence of murder, contrary to Section 202 as read with 204 of the *Penal Code*, Cap 63, Laws of Kenya. The hearing of the prosecution's case commenced on March 10, 2022, and since then, the prosecution has called a total of six (6) witnesses before the trial judge was transferred. The accused is now seeking to start the matter de novo. The accused's contention is that, at the start of the case, he was unaware of the unfolding events due to fear.

2. The prosecution opposed the application and contended that the right to start the matter de novo is not absolute. In addition, the accused had not indicated any prejudice that he was likely to suffer if the case continued where it had reached. In addition, six witnesses had already testified and only a few more were left. Learned prosecution counsel, proposed that if the court grants the orders sought, then it should be limited to cross-examination of witnesses.

3. I have carefully considered the averments by the parties on why the case should start de novo or not. I have also considered the record of the trial court. The governing law of such applications is Section 200 (3) of the *Criminal Procedure Code* which provides: -

> "(3) 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 reheard and the succeeding magistrate shall inform the accused person of the right".

4. Regarding the jurisprudence surrounding section 200(3) of the *Criminal Procedure Code*, extensive legal analysis has clarified that this section does not unequivocally mandate the initiation of criminal cases de novo every time there is a change in the trial court. The application of section 200 of the *CPC* requires courts to consider various factors. These include the feasibility of commencing the trial de novo, the progress made in the ongoing trial, the availability of witnesses who have already given testimony, potential memory loss by witnesses, the elapsed time since the trial commenced, and the potential prejudice faced by either the prosecution or the accused. In my considered opinion, the pivotal criterion should be whether a fair trial would be materially prejudiced.

5. In the case of *Lenyesio Lekupe & Another vs Republic* [2016] eKLR the Court of Appeal cited its decision in *David Kimani Njuguna v Republic*, 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 CPC more than thirty years ago. In *Ndegwa vs Republic* [1985] KLR 534 where it held that;
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> 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 circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.
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> 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.
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> 3) No rule of natural justice, statutory protection, and 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.
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> 4) The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.
>
> 5) A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses."

6. Recalling a witness involves a repeat of what had been done and doubtlessly must be justified. It can't be a question of just the accused expressing the wish and the court going by it. The provisions under Article 50 (2) of the *Constitution* of Kenya which I find applicable to our situation are:-

> (2) "Every accused person has the right to a fair trial, which include the right-
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> (e) to have the trial begin and conclude without unreasonable delay;
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> (k) to adduce and challenge evidence.

7. Article 50 of the *Constitution* is about the rights of an accused person. However, fairness in a trial is not all about an accused person as he is not the only party to it. There are other parties who are

equally pursuing justice. The state, the complainant, the victims, and the public whose interests must be weighed in every move the court makes in a trial. The court should not allow a move by whichever party in a trial that would unfairly prejudice the position of a legitimate party in pursuit of justice.

8. Recalling of witnesses' occasions delay in a trial which is against the spirit of Article 50 (2) (e). I note from the court record, that the witnesses the accused wishes to recall gave evidence and were cross-examined fully by his Advocate. He therefore had full opportunity to challenge their evidence, in compliance with Article 50 (2) (k). In any case, there is nothing to show that the accused person was forced to proceed with this matter. He participated fully in the trial.

9. It is also not in dispute that the prosecution case is already at a fairly advanced stage. The need for expeditious disposal of cases and delivery of justice to all parties in a criminal trial is an important consideration of justice. Article 159 (2) of the *Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by principles which include in clause (b) "justice shall not be delayed".

10. The accused in his application did not provide sufficient reason why he wanted the trial to start de novo.The sum total of the foregoing is that the accused person has failed to show what prejudice he will suffer if this case is not heard de novo. Accordingly, the accused's application is without merit and the same is dismissed in its entirety. The case shall proceed from where it reached.

    It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY, 2024

D. KAVEDZA

JUDGE

In the presence of: