Ng'ethe v Republic (Criminal Appeal E017 of 2024)
[2024] KEHC 7483 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E017 OF 2024

RC RUTTO, J

JUNE 14, 2024

BETWEEN

NEWTON KAMAU NG'ETHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the ruling of Hon. P. O Ooko (Senior Principal Magistrate) delivered on 20th February 2024 in Kiambu Criminal Case No. 1168 of 2017 Republic vs Kamau Mucuna & 4 others)

JUDGMENT

1. This is an appeal against the ruling of Hon. P. O Ooko (Senior Principal Magistrate) delivered on 20th February 2024 in Kiambu Criminal Case No. 1168 of 2017 *Republic v Kamau Mucuna & 4 others*. In that Ruling the trial court declined the application by the accused persons to have the matter start *de novo* and directed that the matter proceeds from where it had reached without any prosecution witness being re-summoned for purposes of cross-examination in terms of section 200(3) of the *Criminal Procedure Code*.

2. Aggrieved by this decision, the appellant filed a petition of appeal dated 29th February, 2024 seeking an order that Kiambu Magistrate Criminal Case No. 1168 of 2017 *Republic v Kamau Mucuna & 4 others* be allowed to start *de novo* on the following grounds;

    a. That the trial magistrate erred in law and facts by failing to consider the appellants and his co-accused application made on 7th December 2023 to have the lower court matter start *de novo*.

    b. That the trial magistrate erred in law and facts by failing to consider the reasons outlined by the appellant and his co-accused through their counsel and their sworn replying affidavit dated 29th January 2024 on why the matter should start *de novo*. The court gave no consideration to

the evidence tendered by the appellant while giving undue and disproportionate weight and significance to evidence tendered by the prosecution.

c. That the trial magistrate erred in law and facts by considering and entertaining and relying on an Affidavit sworn on 18th January 2024 by Inspector Rosemary Thuranira on behalf of the prosecution yet she is not the current investigating officer in the matter.

d. That the trial magistrate erred in law and facts by relying on the prosecution flimsy, not proved grounds and allegations that some witness was deceased and could not be produced if the matter was to start *de novo*.

e. That the trial magistrate erred in law and facts by concluding and basing his reason to decline to allow the matter to start *de novo* on the fact that the accused person through their counsel and themselves cross-examined the witness that had already testified.

f. That the trial magistrate erred in law and facts by concluding that there were no discrepancies in the earlier recorded statements vis-a vis the oral evidence tendered before court.

g. That the trial magistrate erred in law and facts by failing to appreciate that re-hearing of a case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanor and credibility of the particular witness or witnesses and to weigh their evidence accordingly.

h. That the trial magistrate erred in law and facts in concluding that the use of the word "may" in accordance with section 200(3) of the *Criminal Procedure Code* gives the court discretion as to whether or not to order for resummons of the witnesses who had previously testified for the purpose of being reheard before the succeeding magistrate.

i. That the trial magistrate erred in law and facts by disregarding his predecessor's Hon. Kibet Sambu (SPM) orders and advice of starting the case *de novo* and resummoning all the witness.

j. That the trial magistrate erred in law and facts by failing to note that there was no change of circumstances necessitating the prosecution to oppose the request to start the matter *de novo* between the period when his predecessor's Hon. Kibet Sambu (SPM) issued an order on 7th June 2022 and when the same application was made before him on 7th December 2023.

k. That the trial magistrate erred in law and facts by denying the appellant his right to be heard a fresh which extends to his constitutional right to liberty and ignoring the fact that the accused person is the most sacrosanct individual in the system of our legal administration.

l. That the trial magistrate erred in law and facts in failing to acknowledge that the appellant constitutional and fundamental right to be afforded a fair trial in an adversarial court system would be grossly violated if the lower court matter is not allowed to start *de novo*.

3. To support this appeal the appellant filed submissions dated 5th June 2024 in which they set out two issues for determination namely;

a. Whether the honourable court erred in law and in fact in concluding that the use of the word "may" in accordance with section 200(3) of the *Criminal Procedure Code* gives the court discretion as to whether or not to order for resummons of the witnesses who had previously testified for the purposes of being reheard before the succeeding magistrate.

b. Whether the honourable court erred in law and in fact by denying the appellant his right to be heard a fresh which extends to his constitutional right to liberty ignoring the fact that the accused person is the most sacrosanct individual in the system of our legal administration.

4. Urging his appeal, the appellant submitted that under the *de novo* principle, once a judicial office trying a matter cease to exercise jurisdiction over the matter during pendency of trial, his successor in jurisdiction gives the parties the right to elect how to proceed, that is by proceeding from where the hearing had reached or to starting *de novo*. Further, that the accused should not be prejudiced by having a successor, who never had an opportunity to appreciate the evidence of witness by observing their demeanor, credibility, emotions, since the evidence may not have been recorded in a detailed manner as required under section 199 of the *Criminal Procedure Code*. To support this argument reference was made to the case of *Abdi Adan Mohamed v Republic* [2017] eKLR.

5. The appellant urged the court to find that the considerations as set out in the case of *Joseph Kamau Gichuki v Republic* NRB [2013] eKLR had not been met to warrant denial by the court to start the matter *de novo*. He urged this court to find that the ends of justice will not be defeated if the lower court matter started *de novo* since the trial court in making this determination relied on the prosecution flimsy grounds and/or unsubstantiated allegations.

6. It was their submission that the trial court disregarded the order and advice of his predecessor Hon. Kibet Sambu (SPM) that the case starts *de novo* and all witness be resummoned. Further that there was no change of circumstance necessitating the prosecution to oppose the request to start the matter *de novo*.

7. The appellant also relied upon the case of *Ndegwa v Republic* [1985] eKLR to urge the court to find that the trial court erred in law and in fact by denying the appellant his right to be heard a fresh. In addition, the appellant made reference to the Indian Supreme Court case of *Nitinbhai Saevatilal Shah v Manubhai Manjibhai Panchal* [2011] 9 SCC 638 which held that *de novo* hearing was viewed as one of the cardinal principles of criminal trials guarding the rights of accused person so that his case should be decided by the judicial officer who heard it.

8. Further, the cases of *Abdi Adan Mohamed v Republic* [2017] eKLR; and *Rebublic v Arnorld Ouma Munyekenye* [2018] eKLR were referred to emphasis on accused persons rights to a fair trial as provided for under Article 50(1) of the *Constitution*. The appellant urged the court to find that he has presented compelling arguments and in the interest of averting a miscarriage of justice order that the matter starts *de novo*.

9. Opposing the appeal, the respondent filed their submission dated 6th June 2024 in which they urged this Court to be guided by the guidelines to consider in determining whether to start a matter *de novo* as espoused in the case of *Abdi Adan Mohamed v Republic* [2017]eKLR. They submitted that the six considerations to be bore in deciding whether the trial ought to have started *de novo* fell in favour of an order that the matter proceeds from where it had reached.

10. It was their submission that the convenience tilts in proceeding from where the matter had reached since 10 witnesses had already been heard, cross-examined and their evidence ably recorded hence it will be inconveniencing and expensive to recall the 10 witnesses when only 2 were remaining before the prosecution could close its case.

11. The respondent submitted that an order to have the matter start *de novo* will highly prejudice it since it had been 7 years since the matter commenced, and one of the key witness, Mr. Nyaga, an auditor, had passed on, and the complainant and most witnesses were of advance age hence making their availability

to testify non-guaranteed. Further, that due to the advanced age of the complainant and witnesses there is a high likelihood of loss of memory of the events leading to the commission of the offence herein.

12. The respondent asked the Court to take note that the 4th accused person was discharged at the instance of the prosecution for his advanced age and ailments relating to old age after considering the overall public interest on his continued prosecution.

13. On the issue of the earlier order for the matter to start *de novo*, the respondent submitted that the court, as is practice has power to review any earlier orders when circumstances allow. That the earlier order to have the matter begin *de novo* was consented to without exercising proper diligence of consulting the investigative officer and the complainant to ascertain the availability of witnesses. Further, that circumstances had changed since it was over a year since the earlier order to start the matter *de novo* had been made. They urged this court not to interfere with the orders of the trial court and dismiss the appeal.

Issue for determination

14. The only issue arising for determination is whether the trial court erred in its interpretation and application of section 200(3) of the Criminal Procedure Code in declining to issue an order to have this matter start *de novo*.

15. A perusal of the record reveals that on 7th June 2022, when this matter came up for hearing before Hon Kibet Sambu (SPM), parties agreed to have the matter begin *de novo* after the initial trial court, Hon. Stella Atambo (CM) was transferred. As fate would have it, Hon Kibet Sambu (SPM) was also transferred before he could hear and take any evidence in the matter. Subsequently thereon, on 2nd October 2023, this matter came up for hearing before Hon P. O. Ooko (SPM) and fresh directions were again taken with the prosecution objecting to the matter proceeding *de novo*, a plea that the court acceded to. The appellant is aggrieved with this and alleges that it amounts to a breach of his right.

16. At the core of this matter is the correct interpretation to be given to section 200(3) of the *Criminal Procedure Code*. The Section provides as follows;

> 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 that right.

17. This court is replete with caselaw on the interpretation and application of this section. It is worth noting that this has been taken to mean that this section gives an accused person a 'right' to decide whether a trial should continue from where it has reached or it begins *de novo*, upon a new magistrate/ judge taking over the trial. But is this accurate? Despite this practice, the answer is in the negative. An accused person possesses no such right "to decide whether the matter should proceed or begin *de novo*". Section 200(3) grants the discretion to decide in the hands of the trial magistrate and NOT the accused person. Note the words

> "where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor".

Hence, it is the magistrate who decides whether to proceed with the matter and thereafter the accused person "may demand" for re-summoning of a witness that has already testified.

18. This position was recently clarified by the Court of Appeal in Kisumu Criminal Appeal No.140 of 2017 *Samuel Omondi Gombe alias Agok & another v Republic* (unreported) where while interpreting

the application of section 200(3) of the *CPC* the superior Court of Appeal, 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 resummon 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. This position leads to the inevitable conclusion that the appellant's assertions herein, that section 200(3) grants him (and any other accused person) the right to elect that the matter begins *de novo* to be with no merit. The discretion belongs to the court.

20. Having found that the section grants the court a discretion, then the exercise of that discretion can only be impugned on the basis that it was maliciously or whimsically exercised. Reason wherefore courts have held that section 200(3) should not be invoked to defeat the course of justice. 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".

21. From the proceedings before the trial court, I note that when the matter came up for hearing on 2nd October 2022, directions under section 200(3) of the *CPC* were taken, where the appellants were explained to their rights and all indicated that they wanted the matter to start a fresh. This position was strenuously objected to by the prosecution counsel who sought time to put in a replying affidavit to explain the basis of the objection to the matter starting *de novo*. All parties were then given an opportunity to file their respective replies with the appellant filing a replying affidavit sworn on 29th January 2024 and the respondent filed a replying affidavit dated 18th January 2024. It is this turn of events that led to the court delivering its ruling dated 20th February 2024 which is subject to this appeal.

22. In its Ruling, the trial court held that the use of the word 'may' in section 200(3) of the *CPC* gave the court discretion on whether or not to order for a re-summon of witness who had previously testified for purposes of being reheard before the succeeding magistrate and that whoever invokes the power must always be armed with plausible and sufficient reason as to why the court should exercise its discretion. The trial court also noted that the only mandatory requirement which the succeeding magistrate must do is to inform and explain to the accused of the right to resummon. Based on this finding, the trial court proceeded to evaluate the rival submissions and came to the conclusion that the matter proceeds from where it had reached. Did the trial court err in its direction that the matter begins *de novo*? I find the answer to be in the negative.

23. I have already given the correct interpretation to be accorded to section 200(3) as given by the Court of Appeal above. I reiterate that the Section 200(3) of the *Criminal Procedure Code* does not give an

automatic license to always start a case *de novo* every time a trial court changes as the Court of Appeal has set out circumstances to consider before starting a case afresh. The circumstances include; whether it is convenient to commence the trial *de novo*, how far the trial has reached, the availability of witnesses who have already testified, possible loss of memory by the witnesses, the time that has lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. Further, this discretion is given to the succeeding court to protect the succinct of the courts proceedings as recorded by the presiding court.

24. In the present case, the trial commenced on 19th July 2017 when plea was taken and thereafter, the prosecution availed the testimony of a total of 13 witnesses with two more to go before the prosecution closed it case. The prosecution objected to the matter starting *de novo* on the basis that the witnesses were thoroughly subjected to cross examination by the then defense counsel on record, the accused persons are at an advanced age, the complainant Peter Kaguru who is 78 years is suffering from old age ailments, one of the witness Mr. Nyaga who testified and produced the audit report is now deceased. Thus, the prosecution contended that starting the matter *de novo* will be prejudicial to their case.

25. The appellant urged that similar directions were taken when the prosecution conformed availability of witness, and that they will suffer great prejudice as the court shall be denied an opportunity to observe the demeanor of the witnesses who had testified.

26. With regard to the contention that similar orders had already been taken, I do not find those previous directions to bind the succeeding magistrate. While directions were taken, I find that the same were first taken 'by consent of parties' before a different court. Flowing from the above discussion, the discretion to determine how to proceed lies entirely with the court in which the matter is proceeding. Consequently, parties cannot consent to oust the discretion of the court. Secondly, the evidence availed by way of affidavit evidence was sufficient to warrant the court making a ruling that the matter proceeds from where it had reached.

27. As to the demeanor of the witnesses as submitted by the appellant that the matter starting *de novo* will grant the 'new' magistrate a chance to observe the demeanor of the witnesses pursuant to section 199 of the *CPC* I find no merit in this assertion. Section 199 of the *CPC* requires a magistrate to record such remarks as he thinks are material in respect to the demeanor of the witness whilst under examination. It is not mandatory that the demeanor of each witness be recorded unless such demeanor is "material". I noted that the trial court critically examined the evidence on record and noted that there had been no issue at all taken on the demeanor of the prosecution witness either by the then trial court suo moto and/or at the instance of the defence counsel who had been given an opportunity to cross examine the witness. Hence, this cannot be a basis for one to seek that a matter begins *de novo*.

28. Consequently, considering the peculiar circumstances of this case, in particular: the age of the case; the fact that the prosecution was close to closing its case with only 2 witnesses remaining; that some witness is deceased and other are of advanced age and their memory may be impaired due to advanced age, I find that it will not serve the interest of justice to start the case *de novo*. I find no fault in the trial magistrate's order to have the matter proceed from where it had reached.

29. An order for the matter to proceed from where it had reached also serve to ensure the court's constitutional obligation to dispense justice expeditiously in the face of the apprehension by the prosecution that they may not be able to secure the attendance of all the witnesses should the case begin afresh.

30. The upshot is that I find no merit in the appeal before this Court and the same is dismissed in its entirety. The directions that the matter proceeds from where it had reached are affirmed.

31. It is so ordered.

RHODA RUTTO

JUDGE

DATED THIS 14TH DAY OF JUNE 2024

For Appellants: Ms Kathurima

For Respondent: Ms. Ndenda Holding Brief for Mr. Gacharia

Court Assistant: Peter Wabwire