Republic v Nyakina & another (Criminal Case 19 of 2019)
[2023] KEHC 1842 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL CASE 19 OF 2019

WA OKWANY, J

MARCH 9, 2023

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JAMES OGWAGWA NYAKINA ..... 1ST ACCUSED

JACKSON KIRUI KIPNGENO ..... 2ND ACCUSED

RULING

1. This matter was previously heard by Maina, J and Ochieng', J (as he then was) when at least 12 witnesses testified.

2. When the matter came up for hearing before me on October 4, 2022, Mr Majale, Learned Counsel for the State sought directions, pursuant to Section 200 of the *Criminal Procedure Code* (CPC) that the matter proceeds from where it had reached while arguing that he was left with only 2 more witnesses to call. It was Mr Majale's submission that securing the court attendance of all the 12 witnesses all over again will not be practically possible.

3. Mr Kaba, Learned Counsel for the accused persons, opposed the application by the prosecution on the basis that the charge of Murder that the accused persons are facing is serious and carries a heavy sentence such that this court should start the hearing *de novo* in order to have the benefit of observing the demeanor of the witnesses. It was submitted that the issue of the availability of the witnesses cannot override the rights of the accused persons as prescribed by the law.

4. After considering the submissions by Counsel, this court directed that the proceedings so far taken in the case be typed before a determination can be made on whether or not the case should proceed *de novo*.

5. I have carefully considered the submissions by learned Counsel together with the typed proceedings on the court record.

6. The issue before me concerns the exercise of discretion under Section 200 (3) of the *Criminal Procedure Code* which stipulates 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 the right".

7. Both the High Court and the Court of Appeal have pronounced themselves on the import of the above provision. In *Ndegwa vs Republic* [1985] eKLR, the Court of Appeal held:-

> " 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."

8. In *Abdi Adan Mohamed vs Republic* [2017] eKLR, the Court of Appeal held:-

> " As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanor of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJA said that:-
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> 'It could also be argued that the statutory and time honored formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanor and credibility of witnesses. It has been and will be so in other cases that will follow. ...'
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> In other words Section 200, as was emphasized in Ndegwa (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates.
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> ...
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> It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial *de novo*, how far has the trial reached, 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. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;
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> "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 very 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 a predecessor owing to the latter becoming unavailable to complete the trial. See *Ndegwa v. R.* (1985) KLR 535".

9. In *Joseph Kamau Gichuki vs Republic* NRB [2013] eKLR, it was held: -

> " 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".

10. In the present case, the trial commenced on September 17, 2019 when plea was taken and thereafter, the prosecution availed the testimony of a total of 12 witnesses. As I have already noted in this ruling, the case has been heard by 2 judges and I am therefore the third judge handling it. It is also instructive to note that the prosecution indicated that they only have 2 witnesses to go before they can close their case.

11. Having regard to the totality of the circumstance surrounding this case, I am of the view that while it is desirable that a criminal trial be started and concluded by the same judge, the reality before our courts is that the same may not be achievable as a trial judge may be transferred, retire, be promoted to a higher court or leave service for one reason or the other. In the instant case, this court is aware that Maina J who initially heard the case was transferred while Ochieng' J (as he then was) who subsequently took it over was promoted to the Court of Appeal. Section 200 of the *CPC* was enacted to take care of the reality of the possibility of such changes occurring in the course of a trial.

12. As I have already noted in this ruling, the trial has advanced with a total of 12 witnesses and can be said to be at the tail end having taken well over 3 years. It is reported that only 2 witnesses are remaining.

13. Guided by the dictum in the above cited cases, I find that the provisions of Section 200 of the *CPC* 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.

14. Considering all the factors of this case and especially the age of the case, I find that it will not serve the interest of justice to start the case *de novo* as there is the likelihood of the unavailability of witnesses or their fatigue owing to the lapse of time. My further finding is that while it is desirable for a court to observe the demeanor of witness, such observation cannot over shadow 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.

15. In sum, I am not persuaded that this is a proper case for the granting of an order that the case starts *de novo*. Consequently, I direct that the trial proceeds from where it had reached.

16. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA ON THIS 9TH DAY OF MARCH 2023.

W. A. OKWANY

JUDGE