Republic v Waweru (Criminal Case 24 of 2019)
[2023] KEHC 27412 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 27412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL CASE 24 OF 2019

DO CHEPKWONY, J

JULY 19, 2023

BETWEEN

REPUBLIC ..... STATE

AND

TABITHA NJERI WAWERU ..... ACCUSED

RULING

1. The Accused was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the *Penal Code*.

   The Particulars of offence are that:-

   > "On the 12th May, 2019 at Makongeni Trading Centre, Thika West Sub County within Kiambu County the accused murdered Peter Njiini Muthii".

2. The matter has proceeded for hearing before different Judges and on 13th June, 2023, when the matter came up was coming up for Directions, the case being a part-heard, the court informed the accused of her rights under Section 200 of the *Criminal Procedure Code*. In response, the accused informed court that she wished to have the case start de novo claiming that she did not hear the evidence of PW1 well.

3. The prosecution objected to the accused's request and the court directedBthe prosecution to file a Replying Affidavit on its position on this request by the accused and the Accused was equally granted leave to also file her Affidavit, if need be.

4. The Prosecution filed the Replying Affidavit sworn by Hellen Ngessa on 29th June, 2023 opposing the accused's prayer to have the case start de novo since it would cause delay of justice. According to the prosecution, the matter has been pending before court since 2019 and that they have always availed witnesses to testify before court while the accused has always sought for adjournments.

5. The Prosecution avers that the matter has proceeded for hearing with several witnesses having already testified. That during the hearing the accused was in court and she had the opportunity to cross examine these witness. It is therefore the prosecution's contention that there is no need to subject the witnesses to another court process again. The Prosecution also contends that although the accused has a right to have a matter start afresh it is not an absolute right as it depends on the circumstances of a case.

6. The Prosecution holds that the accused ought to have informed the court that she was unable to follow the proceedings so that the court could intervene. The prosecution holds that the matter should proceed from where it had reached so that litigation could finally come to an end as the accused would not suffer any prejudice.

7. The defence counsel, Mr. Munene orally informed court that he explained everything to the accused person who was present in court. That the hearing was conducted in Kiswahili language and he put across 18 questions to the prosecution witness.

Analysis and Determination

8. For determination before this court is whether or not the case should start de novo.

9. When this case was listed for hearing on 6th December, 2021, the accused sought adjournment on grounds that she was unwell but the prosecution had their witnesses present in court and but did not oppose the adjournment based on humanitarian grounds. For the hearing of 5th October, 2022 the prosecution sought adjournment on the grounds that witnesses had not been bonded.

10. The hearing of the prosecution's case commenced on 6th October, 2022, when the court heard the evidence of Stephen Njine Muthii (PW1), Timothy Mumbi Kimotho, (PW2), Charles Murimi Njine, (PW3) and the prosecution sought for adjournment to call other witnesses. When the matter was fixed for hearing on 7th February, 2023 the court was informed that the accused was admitted at Kiambu Hospital and the matter was then adjourned to 4th April, 2023 when the matter was fixed for mention on 6th June, 2023 for parties to take directions on whether to proceed with the matter from where it has reached or start the same de novo. The accused opted for the matter to start de novo.

11. These Directions are made pursuant to the provisions of Section 200 of the *CPC* which provides as follows;

> "Section 200(1) Subject to subsection (3), where a Magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and exercises that jurisdiction, the succeeding magistrate may-
>
> a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.
>
> (2) Where a Magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding Magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(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.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting Magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

12. On 6th June, 2023, the court complied with the provisions of Section 200 (3) of the *CPC* and informed the accused of his right. This was the position of the Court of Appeal in the case of *John Bell Kinengeni v Republic* [2015] eKLR, where it held that:-

> " the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200(3) requires in a mandatory tone that the succeeding Magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding Magistrate".

13. Although the Accused has a right to elect for a case to start de novo. This court agrees with the prosecution that this right is not an absolute right as the court is required to take into consideration other factors based on the circumstances of a case. The Court of Appeal in the case of *Joseph Kamau Gichuki v Republic* [2013] eKLR held that the court should consider how far the trial had proceeded, availability of witnesses who had already testified, time that had lapsed since commencement of trial and the prejudice likely to be suffered by either parties. In its precise words, the Court of Appeal stated 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."

14. It is note-worthy that this provision of the law is not couched in mandatory terms that the case must start de novo. What is mandatory is that the accused be informed of his right to either elect for the case to start de novo or to have a witness recalled. In the case of *Joseph Kamara Maro v Republic* [2014] eKLR, the Court of Appeal held that:

> " ...To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under Section 200(3) of the Criminal Procedure Code." emphasis added.

15. In this case, it is evident that although the accused with the present offence was charged in the year 2019, it was not until 6th October, 2022, when the trial commenced. The court has granted several adjournments on account of both the accused and the prosecution.

16. On the 6th October, 2022, all the three witnesses testified and the Accused's Counsel had a chance to cross examine each one of them. Since the evidence was taken on the same day and less than one year ago, it cannot be said that the accused has forgotten the evidence that was presented to court. It is this court's view, that starting the case afresh would be prejudicial to all parties as it will only cause a further delay in the determination of this case owing to the fact that it has been pending since 2019 which is contrary to the provisions of Article 50 (2) of the *Constitution* on the right to a fair hearing, as provided for in the following terms:-

    (e) "to have the trial begin and conclude without unreasonable delay."

17. In view of the fact that three witnesses have already testified and only four are remaining, and coupled with the fact that the accused has not given cogent reasons to warrant the matter to start de novo, this court directs that the matter proceeds from where it had reached.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF JULY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Ngesa counsel for the State

Mr. Munene counsel for the accused

Court Assistant - Martin