**Republic (ODPP) v Rajab (Criminal Case 30 of 2016)**
**[2023] KEHC 20001 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20001 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CRIMINAL CASE 30 OF 2016**

**PJO OTIENO, J**

**JULY 14, 2023**

**BETWEEN**

**REPUBLIC (ODPP) ..... PROSECUTOR**

**AND**

**SALIM ABDUL RAJAB ..... ACCUSED**

**RULING**

1. The information having been registered in court on the 27.3.2016, trial commenced on 27.11.2018 before J. N. Njagi, J when evidence was recorded from four witnesses including two sibling of the deceased, who were eye witnesses, and the two parents who were informed by the two minors of what had transpired.

2. Not much appear to have happened thereafter till the 22.3.2013 when the matter landed before this court and the defence sought directions under Section 200 Criminal Procedure Code, that the trial begins denovo. In making such request, Counsel stressed that it was the right of the accused to so insist.

3. From the prosecution, the proposal was that the matter proceeds from where it had reached because no prejudice would be visited upon the accused who was at all times represented by the same Counsel and who had not demonstrated any prejudice to be suffered if the matter proceeds from where it had reached.

4. To the contrary, the Counsel highlighted the age of the matter and the lack of guarantee that all witnesses were still available to give evidence. The Prosecutor cited to court the decision in *Abdi Mohamed v Republic* [2017] eKLR for the proposition of the law that section 200 *CPC* implies to the High Court as it does to the Subordinate Courts and that it need not be applied mechanically lest it defeat justice.

5. The court is thus called upon to determine and give directions on how and from where the matter proceeds after the initial trial Judge left the Station.

6. As enacted section 200 gives the accused the right to demand that the matter starts de novo and the court is obligated to inform him of that right, every time there occurs an opportunity for taking over of trial. The provision is a clear envisionment of the right to fair trial now enshrined under article 50 of *the Constitution*.

7. However, the right to a fair hearing is designed to achieve justice and not to defeat it. When applied mechanically the provision portends grave injustice where the rights and obligations of an accused person may be overly protected at the peril of justice being perverted.

8. Consequently, the courts while reminding itself of the paramount importance of the liberty of a subject have equally taken into account the need that in doing so, no rule of natural justices, statutory protection, evidence and the rule of common sense needs to be sacrificed, abandoned or violated[1].

9. The right of the accused must be balance by the public of policy that where one can be proved to the required standards, to have committed an offence, then the accused needs to answer to the law in that respect and earn what is due from the law by way of a conviction and sentence.

10. Courts have thus developed balancing tools to meet the ends of justice while protecting the inderogable right of the accused to a fair hearing. The Court of Appeal has given an in-depth decision on the subject in *Abdi Adan Mohamed v Republic* [2017] eKLR where it held:-

> " 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...
>
> Where, in the language of Section 200(3) the accused demands that any witness be "re-summoned and re-heard," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. Similarly, if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith...
>
> As we conclude we think this appeal demonstrates quite clearly how Section 200 has been applied mechanically in disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate. For example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates. We do not understand why Hon. T. Nzioki who had heard virtually all the witnesses, except one could not return to complete the trial. Starting one hearing afresh three times can cause witness fatigue and apathy. Trial courts ought to comply with the guidance given in the case of Ndegwa v. R [supra] that Section 200 should be used

[1] *Ndegwa v Republic* [1985] eKLR 535

sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered."

11. When that binding decision is applied to the facts and circumstances of this case, the court notes that the incident founding the charge took place way back on 13/9/2015, now about 8 years ago. The only eye witnesses were PW1 and PW2, sibling to the deceased, who were then minors attending Madrasa teachings.

12. Taking into account the passage of time and the ages of the witnesses then, it is the opinion of the Court that it would not serve the interests of justice to restart the matter all over again by calling all the witnesses. To this court to accede to the demand by the accused would be to apply the stipulations of Section 200 CPC in a mechanical manner to the detriment of overall implications on the administration of criminal justice.

13. The Court chooses not to sacrifice the rule of good common sense and while reminded on the sacrosanct right of the accused, directs that the matter shall proceed from where it had reached without the need to recall and rehear the four witnesses whose testimonies were recorded before J. N. Njagi, J.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF JULY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:-**

**Ms. Awora for the Prosecution**

**Mr. Mulama for Ondieki for the Accused**

**Court Assistant: Polycap**