



**Wangare v Republic (Miscellaneous Application E024 of 2023)
[2023] KEHC 23206 (KLR) (Crim) (13 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS APPLICATION E024 OF 2023
LN MUTENDE, J
SEPTEMBER 13, 2023**

BETWEEN

ANTONY KIMANI WANGARE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Antony Kimani Wangare, the Applicant, approached the court through an application dated January 23, 2023 seeking stay of the proceedings in Makadara Criminal case No. 5033 of 2022 pending hearing and determination of the application; and, setting aside of the proceedings of 19th October, 2022 and the ruling delivered on 19th October, 2022 so that the trial can start de novo hence the prosecution recalling all witnesses who had testified.
2. The application is based on the grounds that Hon. N. Kivuti was ordered to recuse herself from presiding over the case on 19th October, 2022, in Criminal Revision No. E236 of 2022 on the basis that she was biased. The High Court ordered that the matter be transferred to another magistrate. A total of six (6) prosecution witnesses testified and the prosecution closed its case the same day and the court promptly ruled that the accused had a case to answer and the defence hearing was set for 1st November, 2022.
3. That Counsel holding brief for the Complainant misled the trial court by indicating that the Court of Appeal had stayed proceedings pending the appeal of the ruling; that there are certain aspects of evidence which the accused required to cross examine the witnesses given the gravity of the offence; no prejudice would be occasioned on the prosecution, and, it is in the best interest of the Law to accord justice to the accused that the application be allowed.



4. The application is supported by an affidavit sworn by the applicant who basically reiterates what is stated on the grounds of the application.
5. The ruling alluded to was delivered by Bwonwong'a J. The instant application was placed before the same Judge who granted prayer 2 of the application hence by the order dated 30th January 2023, proceedings in Makadara Criminal Case No. 5033 of 2022 were stayed.
6. Subsequently following retirement of Bwonwong'a J. the application was re-allocated to me on 9th May, 2023. Prior to the initial application being heard, another application dated 22nd June, 2023, was filed by the applicant (Accused) seeking orders that the court varies, lifts the warrant cancelling the applicant's bond on 21st June, 2023 so as to reinstate the earlier bond terms forthwith; and the case be transferred from Makadara Court to any other court of a similar jurisdiction.
7. The application is premised on the grounds that in Criminal Revision No. E236 of 2022, Hon Monica N. Kivuti, SPM, was ordered to recuse herself from presiding over the applicant's case on the basis of being biased; the matter was transferred to Hon. H. Onkwani who refused to start the matter de novo prompting the applicant to file the instant application; the court is to direct whether the case is to start de novo as the accused rights had been infringed;
8. That Kimondo J. directed the matter be mentioned before another judge on 11th July, 2023 and the advocate having conduct of the matter correctly diarized the matter.
9. That on 21st June, 2023 the trial court cancelled the accused's bond and detained him in custody, an act which is utterly malicious and an outright contempt of the High Court Order and her actions should be reversed by an Order of the Court and the case be transferred immediately to another court of the same jurisdiction.
10. That counsel in personal conduct of the case had advised the accused to attend court and inform the same that he had mis diarized the said case and was for mention to inform the court how far the court had so far gone since he had another matter at Mavoko Law Court in Criminal Case No. E427 of 2023 where the two (2) accused persons were released on cash bail of KShs. 100,000/-. That the reason for cancellation of bond was because the accused asked to be given a date after 11th July, 2023, when the High Court matter would be coming up but the Magistrate said that the accused was lying.
11. The initial application was brought pursuant to the provisions of Article 50 of *the Constitution* and Section (3) of the CPC and all enabling provisions of the law; while the subsequent application was brought pursuant to Section 362 of the CPC.
12. Both applications are unopposed. That would not bar the court from interrogating the record to reach an informed decision.
13. The supervisory jurisdiction of the High Court over Subordinate Courts is derived from *the Constitution* and Statute. Article 165(6)(7) of *the Constitution* enacts:
 - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”



14. Section 362 of the *Criminal Procedure Code* (CPC)provides thus:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

15. The law limits revisional powers of the High Court over Subordinate Courts to orders/findings that are illegal or irregular.

16. This is a case of defilement. In an endeavor to fast track the matter Hon. Kivuti made orders that were not to the expectations of the accused (Applicant) hence seeking revision before Court. The learned Judge delivered himself in the matter ordering the learned Magistrate to recuse herself from the matter. Being a court of concurrent jurisdiction, I cannot comment on that fact.

17. The order of this court is dated 19th October, 2022. Apparently, the learned Magistrate’s order placing the accused on his defence was made on the same date. There having been no stay order, the learned Magistrate could not be faulted for having proceeded with the case. What transpired was not an illegality.

18. Upon the order of the High Court being brought to the attention of the Subordinate Court, presided over by Hon. Kyambi CM, the matter was re-allocated to Hon. Onkwani SPM. Procedurally the Court was expected to comply with Section 200(3) of the *CPC* which provides thus:

“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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

19. The learned trial Magistrate upon taking up the matter was to give directions. But, the record indicates that the Defence Counsel sought hearing of the matter de novo, an application that was vehemently opposed by the Prosecution Counsel. Based on the rival arguments advanced, the trial Court delivered a ruling in that regard. What transpired was hence tantamount to compliance with Section 200(3) of the *CPC*.

20. In the case of *Republic vs David Chepkwony Kibor* [2021] eKLR. Gikonyo J held that:

“Of jurisprudence in respect of section 200(3) of the CPC, enough judicial ink has been spilt, leaving it no longer in doubt that the Section is not a peremptory command that partly heard criminal cases must always start de novo every time a trial court changes. A fundamental reality of Section 200 of the CPC as an existing law is that, it does not imprison the rights and protections which *the Constitution* has vested in and proclaimed of victims of crime. Thus, fair trial serves substantial meal; to all parties in the criminal trial and administration of justice. Accordingly, the long string of judicial precedent states that in giving effect to section 200 of the CPC, courts must consider, inter alia; 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. In my considered view, the test should be whether fair trial would be materially prejudiced”



21. The key contention of the applicant is to have the matter start afresh. When the application was made before the trial Court, the argument raised was that medical examination was not taken into consideration. The contention of the Prosecution was that the defence had been given an opportunity to cross examine the authors of the PRC form and P3. That these witnesses were recalled on 19th October, 2022. This was after the case was re-opened after the close of the prosecution's case.
22. In its considered Ruling, the trial Court opined that the High Court had delivered itself regarding recusal of the Magistrate hence the case was to proceed from whence it had reached.
23. On the 19th October, 2022 all six (6) witnesses who had testified were re-called for further cross examination and they were duly cross examined by Mr. Omwenga, learned counsel for accused.
24. From the point of law and case law, what is mandatory is the Court to inform the accused of the right captured in Section 200 (3) of the CPC. But this was a case where Counsel for the accused took upon himself the duty to seek the order hence pre-empting the Court's directions, therefore, the Court cannot be faulted in that regard. No irregularity was noted.
25. On the question of setting aside the proceedings of 19th October, 2022, Section 210 of the CPC provides thus:

“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

26. After re-call of the witnesses for further cross-examination, the prosecution's case was deemed closed, and, Mr. Omwenga, counsel for the accused stated thus:

“I'll be okay with a ruling date”.

He waived the right to file submissions at that stage hence the Court cannot be faulted for delivering a Ruling instantaneously having heard the case. In the result, no illegality was occasioned.

27. On the question of transfer of the case to another Court, Section 81 of the CPC provides that:
 - (1) Whenever it is made to appear to the High Court—
 - (a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or
 - (b) that some question of law of unusual difficulty is likely to arise; or
 - (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or
 - (d) that an order under this section will tend to the general convenience of the parties or witnesses; or
 - (e) that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order—
 - (i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;



- (ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;
 - (iii) that an accused person be committed for trial to itself.
- (2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.
- 28. The argument herein is that the trial will not be fair. The question the Court has to consider is whether it is in the interest of justice. Will the order meet ends of justice? In a criminal case there is an accused person and a victim of crime. These two (2) individuals must be seen to be equal before the law and must have equal protection. There should be access to justice that includes effective adjudicatory mechanisms which include accessibility in terms of distance, but, of importance is the process of trial being speedy. It has not been suggested that Hon. Onkwani who took over the matter following the order of this Court (High Court) has interest in the matter. The only issue was failure to hear the matter de novo and subsequently cancelling bond in respect of the applicant. The order of the superior court was that the rights of the accused were infringed as four of the witnesses had not been cross examined. At the point of taking over the matter by Hon. Onkwani, six(6) witnesses had been re-called and cross examined by an advocate, therefore, the learned magistrate was not contemptuous of the order of the court.
- 29. On the question of issuance of a warrant of arrest, the defence closed the case on 25th January, 2023 and Mr. Kamau, Counsel representing the accused (Applicant), sought time to file submissions. The case was slated for mention on 22nd February, 2023. Instead of filing submissions, Mr. Kamau notified the Court that an application had been filed in the superior Court and a stay order had been obtained. Due to the information given, the court gave a mention date of the 5th day of April, 2023 when the matter was to come up for directions. On the stated date the trial Magistrate was away and the matter was mentioned before Hon. Kyambi, CM who gave a further mention date, 21st June, 2023.
- 30. Thereafter the defence counsel did not appear before the trial court. On 21st June, 2023, the accused appeared in person and notified the court that his advocate had informed him that the matter in the High Court was to come up on 11th July, 2023. The Prosecution Counsel noted that the stay order had not been served upon the Court following allegations that it had been issued. To this, the Court directed thus:

“No stay order has been filed on record. Prosecution has no stay order and matter was for submissions. No submissions have been filed. I hereby proceed to cancel the bond for the accused person. Accused to be remanded in custody. Stay orders be filed on record. Mention for submissions 13.7.23”
- 31. The accused person was released on bond with a surety. He continued attending court pursuant to the terms of bond. It was not insinuated that he absconded. But, this was a question of the discretion of the court.
- 32. Section 215 of the [CPC](#) provides that:

“The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”



33. There was no affidavit of service to prove service of the order. If indeed the order was not served and submissions were not forthcoming, the court would have been at liberty to proceed with writing of judgment.
34. On the issue of the matter being transferred to Milimani Chief Magistrate's Court, this court supervises Makadara Chief Magistrate's Court which has nine (9) magistrates. This court has not been persuaded as to how seven (7) other magistrates can be overlooked. The practice of a party choosing the court that may be favourable to its cause must be discouraged.
35. From the foregoing, I find the applicant having failed to demonstrate why the matter should be heard de novo and why the case should be transferred to Milimani Chief Magistrate's court.
36. The upshot of the matter is that by order of this court, the applicant shall be produced before the Head of Station, Makadara Chief Magistrate's Court, who should be seized of the matter, and proceed to receive submissions of the defence and Prosecution; and /or write the Judgment as provided by the law. Any question arising regarding cancellation of bond may also be considered by the court upon an application being made.
37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY
THROUGH MICROSOFT TEAMS AT NAIROBI,
THIS 13TH DAY OF SEPTEMBER, 2023.**

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Kimani for Applicant

N/A for ODPP

