REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO. 86 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KELVIN MWANGI MAINA.....RESPONDENT

RULING ON THE REASONS FOR ORDERS MADE ON 23RD JUNE 2021

1. On 23rd June, 2021 this Court, in compliance with Section 200 of the **Criminal Procedure Code (CPC)** sought the accused, ***KELVIN MWANGI MAINA,*** to elect on how his trial should proceed. This is because four witnesses testified on behalf of the prosecution before *Justice C. Meoli* before I took over the trial after the said learned Judge was transferred from Kiambu High Court.

2. **Section 200** of the **Criminal Procedure Code** provides *inter alia* thus:-

> ***"(1) Subject to sub-section(3), where a magistrate, after having heard and recorded the whole or part of the evidence (emphasis ours) 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) ...***
>
> ***(b) ...***
>
> ***(2) ...***
>
> ***(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 re-heard and the succeeding magistrate shall inform the accused person of that right.***

3. **Section 200** of the Criminal Procedure Code applies *mutatis mutandis* to the High Court.

4. When the provisions of **Section 200** of the Criminal Procedure Code were put to the accused, he chose to start the trial *de novo*. On 23rd June, 2021, this Court ruled that this case would start from where it stopped and this Ruling is intended to give reasons for the order.

5. The accused was charged with the offence of murder. That offence is alleged in the information to have occurred on 12th November, 2016. The accused first appeared before this Court on 29th November, 2016.

6. Prosecution called its first three witnesses on 5th December, 2018. Prosecution's first witness was 11 year old boy, the son of the deceased. The other two witnesses who testified on that day were adult daughters of the deceased. The four witnesses testified on 5th December, 2019. She was the sister to the deceased.

7. The accused in requesting the trial do start de novo stated through his learned counsel Mr. Kamuiru thus:-

> ***"It is prudent to start de novo. He was not content (sic) with his representation."***

8. The accused in this case and upto 10th March, 2021 was represented by the advocate *Ms. Sabastian*. That learned counsel sought, and was granted leave to cease acting for the accused because she was not getting instructions from the accused.

9. The jurisprudence of section 200 of the CPC is that the recalling or re-summoning of witnesses who have already testified is sparingly done. Other considerations must be born in mind to ensure justice is indeed served. The prosecution in responding to the accused's application for *de novo* hearing stated that, accused had legal representation all along in this case and since it's been three years since the witnesses testified, the investigating officer may not know their whereabouts and that those witnesses may be reluctant to re-live the events that led to the commission of this offence.

ANALYSIS

10. The courts have recognized that there can be circumstances where an accused's demand for *de novo* hearing may be impossible. This is what was stated in the case of ***REPUBLIC VS. ANTHONY SHABAN MURAGE (2020) eKLR*** as follows:-

> ***"6. But the Court of Appeal stated in the case ABDI ADAN MOHAMED (supra) that the re-summoning of witness in certain circumstances can be impossible. This is what the court stated in Abdi (supra):***
>
> > ***'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.'"***

11. This line of discussion was further the subject of a court decision in the case of ***DIRECTOR OF PUBLIC PROSECUTIONS VS. PETER ONYANGO ODONGO & 2 OTHERS (2015) eKLR*** thus:-

> ***"18. Section 200 (3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.***
>
> ***19. In the case of NDEGWA V. REPUBLIC [1985] KLR at 534 the Court of Appeal stated:-***
>
> ***'Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial.' ...***
>
> ***27. In NDEGWA V. R (Supra) it was held that Section 200 (3) CPC should sparingly be applied. The application of Section 200 (3) C.P.C. in my view is commonly abused especially where the application is made with a view to defeat the ends of justices and specially where the accused knows the witnesses cannot be traced or are dead or the complainant cannot be traced or cannot get the witnesses without enormous expense or the application is made to cause witness have no faith with the court syst-em and fail to turn up or where the case has been pending for long period without being determined, such applications for witnesses to be recalled in my view should not be granted specially where the accused has had the opportunity to cross-examine witnesses and specifically where the matter had been pending for a long time. This is because granting such an application, court may be acting contrary to article 47, 50 (2) (e) and 159 (2) (d) of the Constitution which demands that justice shall not be delayed, and trial should be concluded without unreasonable delay and lastly every-one has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

12. I concur with the submissions of the prosecution that the witnesses, that is, the children of the deceased, having testified in October, 2018 may be difficult to trace and may fail to testify because of having to re-live painful memories of their mother's death. In view of that difficulty and because this matter has been pending far too long since the year 2016, any further delay the conclusion of this case may be contrary to the Constitution's dictates that, justice shall not be delayed.

13. My finding is that the accused will suffer no injustice since he has had legal representation throughout.

14. The above are therefore the reasons for the order made by this Court on 23rd June, 2021, that this trial do proceed from where it had stopped.

RULING DATED and DELIVERED at KIAMBU this 1st day of JULY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant……Ndege

Accused: Present

For Accused Kamuiru

For DPP: Kasyoka

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE