REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 20 OF 2010

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTOR

VERSUS

SAMUEL MWANGI WAMBUGU.....ACCUSED

RULING

Brief Facts

1. On 27/7/2021, this matter came up for directions under Section 200 of the Criminal Procedure Code. The provisions of the section of the Criminal Procedure Code were read and explained to the accused. He elected to have the case start afresh and also indicated that he wanted to recall witnesses PW6 and PW12. The defence counsel also supported the accused's decision.

2. The accused stated that the witnesses ought to be recalled because they were led by the investigating officer in giving evidence which had a negative impact on the accused's case.

3. The prosecuting counsel Ms Gicheha opposed the application to have the case start afresh and to recall the said two witnesses. She submitted that the case should proceed from where it had reached. In response to the allegations of leading the witnesses, the counsel submitted that during the prosecution case, both the accused and his counsel were present in court and did not raise any objections or allegations of leading the witnesses. It was also submitted that the counsel did not have the contacts for the said witnesses in order to get in touch with them and that procuring the attendance of PW12 will be difficult since he attended court only after the court issued warrants of arrest against him. Further, that this was an old matter and Article 50(2) of the Constitution requires expeditious disposal of cases. She urged the court to exercise its discretion since section 200 of the Criminal Procedure Code is not couched in mandatory terms.

4. Mr. Ombongi, the defence opposed the submissions of the prosecution stating that as much as Section 200 of the Criminal Procedure code is not couched in mandatory terms, the court ought to consider the accused's contentions since this is a murder trial. As such, counsel urged the court to allow the recalling of the two witnesses.

5. This case was registered in court on 13/07/2010 and plea taken a week later. The trial could not commence due to various reasons including the fact that one of the accused was undergoing treatment and could not attend trial. The two accused persons charges were later separated. The accused in this case took plea afresh and the trial commenced on 02/11/2017.

6. The evidence of PW6 Stephen Kiuri Kanyi tendered on 27/06/2018 was that he was at the scene during the night of the attack. PW12 CPL John Leleina testified on 25/06/2019 and said that he visited the scene after receiving a report of assault at Karatina Police Station. He found the deceased with stab wounds at Kiamabara following a second report by the area Assistant Chief. On arrival, he found the deceased dead and the body was taken to Karatina District Hospital mortuary. PW12 said he recovered several exhibits at the scene.

7. On perusal of the record, PW6 and PW12 were cross-examined by the defence counsel. The prosecution closed its case and the court put the accused on his defence on 09/12/2019 by Justice Ngaah J who conducted the trial up to that stage having already given a date for the hearing of the defence case.

8. I took over the case on 24/02/2021 following transfer of the trial judge to another station. The defence counsel Mr. Ombongi told the court that his client who was present wanted the case to proceed from where it had reached. The accused on being called upon to confirm the instructions said he needed time to discuss the directions with his advocate. The court allowed the defence time and directed that in the meantime, proceedings be typed.

9. During the next mention the accused made an application that the case starts *de novo* for reasons that the prosecution's case did not go well with him. He then said he wanted PW6 and PW12 recalled which in my view was a double speak because the two options cannot be granted or be executed at the same time. It is either the case starts *de novo* or that the two witnesses be recalled. This application was opposed by the prosecution on grounds that it was coming too late in the day; that the witness, having testified several years ago may not be

traced and that the accused intended to delay the case further. The prosecution counsel Ms. Gicheha argued that Section 200(3) of the Criminal Procedure Code is not couched in mandatory terms and the court has discretion to refuse the application.

10. On perusal of the proceedings, it is noted that the defence counsel was present in court when PW6 and PW12 testified. The two witnesses were cross-examined appropriately. At no time did the defence raise any objection that the witnesses should not testify because they were coached. This was only raised during taking of directions for hearing the defence case, the prosecution's case having closed on 25/10/2019. The allegations of the witnesses having been coached came about two (2) years after the prosecution closed its case. This was a bit late in the day because such allegations ought to have been raised at the time the witnesses were testifying. The defence did not lay any material before the court to support their allegations. He who alleges must prove as required by the law. As things stand, there is no iota of evidence on coaching any of the two witnesses and the record does not support the said allegations.

11. Section 200(3) confers a right on the accused persons to apply that his case starts afresh or that witnesses be recalled where a succeeding trial magistrate or judge takes over.

It provides:-

> **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 of that right.**

12. The Court of Appeal in the case of **Lenyesio Lekupe & Another vs Republic [2016] eKLR** laid out the principles to be taken into consideration while applying section 200 of the Criminal Procedure Code and provided:-

> **"In all these pronouncements, this Court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale, and philosophy behind section 200 of the CPC more than thirty years ago in Ndegwa vs Republic [1985] 534 where it held that:-**
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> > **a) The provision of section 200 of the Criminal Procedure Code ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.**
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> > **b) The provisions of section 200 should not be invoked where the part heard trial is a short one and could be conveniently started *de novo.* Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.**
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> > **c) No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.**
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> > **d) The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.**
> >
> > **e) A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses.**

13. Similarly in the persuasive decision in **Joseph Kamau Gichuki vs Republic [2013] eKLR** the court 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 has lapsed since the commencement of the trial and the prejudice likely to be suffered either by the prosecution or the accused."**

14. Having already given a brief history of the case and the facts of the application by the accused under Section 200(3), I hereby make a few observations. Firstly, that the Court of Appeal decision **Lenyesio Lekupe & Another VS Republic[2016] eKLR** laid down very sound principles which are applicable to this case.

15. In my view the accused has failed to demonstrate that any witness was coached by anyone let alone the investigating officer. In that case it would not be in the interests of justice to give directions that this case starts *de novo*. The accused in his demand for such directions must give reasons which will be analysed by the court and found to be sound and be supported by the record which he has failed to do.

16. This trial is a long one with twelve (12) witnesses and due to its history and circumstances, it cannot, in my view be conveniently started afresh. The prosecution has already expressed their concern that these witnesses may not be traced. The passage of time since the witnesses testified may lead to memory loss on their part which is a fundamental consideration in the Court of Appeal case of Lekupe. Furthermore, the evidence of the two witnesses as recorded by the former trial judge is clear, consistent and easy to follow by the succeeding Judge and as such, no prejudice will be caused to the accused in not starting this case afresh.

17. On perusal of the proceedings and upon hearing both parties, I am of the considered view that the accused in this case was accorded a fair trial to the extent of the stage this case has reached. As such article 50(2) of the Constitution or any other rule of natural justice or any fundamental right have not been violated in anyway.

18. The court observed the demeanor of the accused as he made his application with the double speak as I have already pointed out and formed the opinion that the accused was not seriously challenging the evidence of the two witnesses, but may have had his reasons of delaying to give his defence.

19. I have considered all the material before me and find that this case ought not to start afresh for it will not serve the interests of justice to recall the two witnesses.

20. Consequently, I hereby give directions that this case shall proceed from where it had reached.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 23RD DAY OF SEPTEMBER, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 23rd day of September,2021