



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 16 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DOYO GALGALO.....1<sup>ST</sup> ACCUSED**

**GALMO GUYO GALGALO alias MAKAYANGU.....2<sup>ND</sup> ACCUSED**

**BOKAYO DIDA BORU alias WARABO .....3<sup>RD</sup> ACCUSED**

**SOMO HUKA KANCHORO.....4<sup>TH</sup> ACCUSED**

**RULING**

1. The accused persons are charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code CAP 63 of the Laws of Kenya**. On 1<sup>st</sup> July 2019 the prosecution closed its case having called ten (10) witnesses. Vide the ruling dated 29<sup>th</sup> October 2019 it was found that the prosecution has established a *prima facie* case, thus the accused persons were placed on their defence.

2. On 2<sup>nd</sup> March 2020, Gikonyo J recused himself from the case and the matter was allocated to this court. The matter was at the defence stage.

3. On 28/09/2020 Mr. Kiget, counsel for the 1<sup>st</sup> accused, stated that having discussed with the other prosecuting counsels they request that the matter starts afresh since the court that heard all the prosecution witnesses recused itself. **Section 200 of the Criminal Procedure Code** gives accused persons leeway to have matter start afresh. That they are several issues they would like the court to look at considering that the charge is a capital offence. Moreover, they would like the court to observe the demeanor of the witnesses and come to its own conclusion that is fair and just. Allegations as to threat to witnesses are not known to him and his client. The witnesses were under protection and they did not know their appearances and names.

4. This application was opposed by the prosecution. Mr. Okeyo stated that the court will not have difficulties going through the evidence to write the judgment and reach its finding. Seven (7) of the witnesses who testified are under witness protection. They have information that issues arose as to revenge on death of persons who were suspected to have testified in the matter. If the matter is stated afresh it will be difficult on their part to have the witnesses availed who are under total protection. If application is allowed ruling by Gikonyo J, on case to answer, has to be set aside before fresh hearing and that can only happen through appeal. However, there are no plausible reasons why the matter should start afresh.

5. **Section 200 of the Criminal Procedure Code** states:

***“(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 resubmon the witnesses and recommence the trial.***

...

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

Mwongo J in the case of Republic v Stephen Kiago Wangari [2018] eKLR held as follows:

*“12. Looking at section 200 CPC, what the Accused actually has under that provision is the right or, more precisely, the discretion to re-summon any witness for re-hearing; (the wording used is “the accused may demand that any witness be re-summoned and reheard...”). It is not a general right to restart the case *de novo*. [Emphasis added] The restarting of a case *de novo* is generally prompted by the necessity to ensure the accused’s rights to a fair trial are protected. This includes the need for the judge – newly seized of a case partly heard by another judge – to hear the evidence and see the demeanor of the witnesses who had already testified, and thus properly appreciate and understand such evidence and do justice in determining the case.”*

6. For a matter to start a fresh it is not an automatic right that an accused person has. Section 200 of the Criminal procedure Code was put in place to ensure that an accused person gets a fair hearing as provided for under Article 50 of the Constitution. Although, several factors have to be taken into regard before this is granted. There must be a balance between the rights of an accused person and the other parties. However, to have a matter start *denovo* it ought to be used sparingly. The Court of Appeal in the case of Abdi Adan Mohamed v Republic [2017] eKLR bearing in mind Section 200 of the Criminal Procedure Code, Section 34 of the Evidence Act and Article 50 of the Constitution of Kenya expressed themselves as follows:

*“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. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R. (2009) KLR 409, where the Court stressed that;*

*“By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started *de novo*. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded.”*

7. After the prosecution witnesses had testified the preceding court established that the accused persons had a case to answer. The defence was ready to proceed with their defence before the judge recused himself. When the matter was transferred here the accused persons now seek that the matter starts afresh. That it will enable this court to look at several issues and observe the demeanor of the witnesses and come to its own conclusion that is fair and just. The issues that the accused say they would like the court to address have not been mention.

8. Secondly, out of the ten (10) witnesses produced by the prosecution seven (7) are under witness protection. This case began last year following the murder of a chief and a majority of the witnesses were put under witness protection. They gave their evidence under witness protection. Thus, no party could observe their demeanor, being their outside behavior, not even the judge who heard them. All that was heard were their voices. Their evidence was well captured by Gikonyo J and there is no doubt that the evidence on record is very clear and legible.

9. The issue of re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding judicial officer is able to assess personally and independently the demeanor and credibility of the particular witnesses and to weigh their evidence accordingly. See Abdi Adan Mohamed v Republic [2017] eKLR. However, in this case it will not be possible for the incoming Trial Judge to observe the witnesses’ demeanour when they are under witness protection. The prosecuting counsel also alluded to the difficulty they will undergo in tracing the said witnesses who have already testified.

10. The Defence Counsel did not indicate that failure to start the matter a fresh would be prejudicial to the rights of the accused persons as compared to the agony and anguish it would occasion the witnesses who have already testified under witness protection.

11. The application to start the trial *de novo* is dismissed and the matter set for defence hearing 23rd, 24<sup>th</sup>, 25 and 26<sup>th</sup> November 2020.

HON ANNE ADWERA ONG’INJO

JUDGE

RULING DATED AND DELIVERED BY EMAIL ON THIS 1<sup>ST</sup> OCTOBER 2020

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

**In the Presence:**

MS Mbithe for state

Mr Kiget for accused persons

MS Onunga Advocate and Mr Okoyo for state.

**HON ANNE ADWERA ONG'INJO**

**JUDGE**