REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MURDER NO. 4 OF 2013

REPUBLIC.....PROSECUTOR

V E R S U S

SAMUEL MUGO KIMOTHO.....1ST ACCUSED

DUNCAN KARIMI NGOTHO.....2ND ACCUSED

CYRUS MWANIKI MACHIRA.....3RD ACCUSED

RULING

1. The accused persons were charged with murder of Kevin Matiru Njuki on the night of 14 and 15th July 2013 contrary to **Section 203** as read with **Section 204 of the Penal Code.**

2. The hearing of the prosecution's case commenced on 03/03/2015 and the prosecution had called a total of 12 witnesses before the trial judge was transferred. The accused persons are now seeking that the matter to start de novo which application the prosecution has opposed on grounds of unavailability of witnesses.

Section 200(3) of the Criminal Procedure Code 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 re-heard and the succeeding magistrate shall inform the accused person of that right.

Section 201 (2) provides: The provisions of Section 200 of this Act shall apply Mutatis Mutandis to trial held in the High Court.

3. Whereas Section 200(3) C.P.C mandatorily provides for the succeeding Magistrate or Judge to inform the accused of his right to request for the case to start de novo, the court may not be bound by the decision made by the accused person.

There are circumstances which will make the court to overrule the choice.

4. Section 200 (3) of C.P.C gives court discretion even where the accused wishes to have the case start de novo. In so doing the court will consider whether to allow the case to start 'de novo' depending on the circumstances of the case. The court has to consider the implications which may result in the administration of justice by allowing the accused to have his way. Such circumstances include the availability of witnesses who may be fatigued and unwilling to testify all over again. The court will also consider the number of witnesses who have given evidence and depending on the nature of the charge the trauma that the witnesses have to undergo by repeating their testimony all over again.

Stephen Mburu Kinyua v Republic [2016] eKLR

Justice Ngugi stated:

Our case law has now made it clear that while section 200(3) makes it mandatory for the succeeding magistrate (or judge) to inform the Accused Person of his or her rights to request for a *de novo* trial, the succeeding magistrate or judge is not bound by the position taken by the Accused Person on whether to request for a *de novo* trial or not. The succeeding magistrate or judge must exercise his or her judicial mind to the issue and decide if, in the totality of circumstances, the case is an appropriate one for an order that it starts afresh.

We can cull some of the considerations that a Court considering the issue should have in mind from our case law

(principally the Court of Appeal guidelines in the *Ndegwa v R* case as well as in *Joseph Kamau Gichuki v R* case) as well as our emerging jurisprudence based on the Constitution of Kenya, 2010 as well as new legislative enactments governing criminal trials aimed at animating the Constitution. Some of these considerations that a Court considering the issue should have in mind include:

a. Whether it is convenient to commence the trial *de novo*, that is, the difficulty in mounting a new trial;

b. How far the trial had proceeded;

c. The availability of witnesses who had already testified;

d. Possible loss of memory by the witnesses given the passage of time;

e. The time that has lapsed since the commencement of the trial taking into consideration the constitutional requirement that criminal trials should commence and be concluded without undue delay;

f. The prejudice likely to be suffered by either the Prosecution or the Accused if a new trial is ordered; and

g. The interests of the victims of the crime and witnesses – including the impact a new trial will have on them balanced against the benefits of a new trial.

5. This case is a 2013 matter whereby 12 witnesses had already testified and the prosecution was only remaining with about 4 witnesses. It is 4 years down the line and to order the matter to start a fresh will result in unreasonable delay and there might be a challenge in obtaining the witnesses owing to lapse of time. Even at the time Justice Limo heard the case it was difficult to trace some of the witnesses who were students and have left the school.

As stated by Justice Ngugi one of the considerations is whether it is convenient to start de novo. It took three years to hear the twelve witnesses. The case is in its 6th year in the corridors of Justice. **Article 50(2) (e) of the Constitution** provides that :- Every a accused person has a right to a fair trial, which includes the right -

"(e) to have the trial begin and conclude without unreasonable delay"

6. It would not be in the spirit of the Constitution to start the case de novo. The court has to consider whether it is practical to start the case de novo. This is what the Court of Appeal stated in the case of

Abdi Adan Mohamed v Republic [2017] eKLR

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

Finally we must point out that, by the proviso to Section 201(2) of the Criminal Procedure Code Section 200 what we have said in this judgment applies *mutatis mutandis* to trials held in the High Court.

7. Considering the number of witnesses who have testified, the lapse of time and that witnesses may not be traced or availed to testify, this is not an appropriate case for the case to start de novo. I decline to allow the application and order that the case shall proceed from where it has reached.

Dated at Kerugoya this 12th Day of February, 2019.

L. W. GITARI

JUDGE