REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO 19 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

TITITI OLE POTOT.....1ST ACCUSED

LEKISHON MOUNO.....2ND ACCUSED

(FORMERLY NAIVASHA HIGH COURT CRIMINAL CASE NO. 1 OF 2016, R. V 1. TITITI OLE POTOT & LEKISHON MOUNO)

RULING

1. The issue before me is whether or not I should order the trial of the accused to start afresh (or de novo) and proceed from where it had reached. The accused want their trial to start afresh, while the prosecution want the trial to proceed from where it had reached**.**

2. The issue arose in the following circumstances**.** Five prosecution witnesses had testified before my predecessor, Hon. Lady Justice Meoli. After I took over the trial Mr. Kamwaro, applied to have the trial of the accused to start afresh pursuant to the provisions of section 200 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

3. In support of his submission Mr. Kamwaro cited section 200 of the Criminal Procedure Code [Cap 75] Laws of Kenya. The provisions of that section state as follows.

> *"200 (1) subject to subsection (3), where a magistrate, after having heard and recorded the whole 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-*
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> *(a)……*
>
> *(b)……*
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> *(2)……*
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> *(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."*

4. Additionally, Mr. Kamwaro also cited article 50 (2) (a to q) of the 2010 Constitution in respect of the fair trial rights of the accused. Those rights include the right to advance disclose of the evidence the prosecution intends to rely upon, right to counsel, right to cross examination, right to language interpretation, right to refuse to give self-incriminating evidence and right to remain silent, and not testify during proceedings, among other rights. Furthermore, he also cited a number of authorities *including* ***Joseph Gituku Wangai & 5 others v. Republic [2005] eKLR***, in which the court stated that the provisions of section 200 (3) of the Criminal Procedure Code are meant for the protection of accused persons and must be complied with and failure to do so is fatal to the prosecution case. He also cited the case of ***Ndengwa V R [1985] eKLR 535***, in which the Court of Appeal held that a trial magistrate must himself see, hear, assess and gauge the demeanour and credibility of witnesses. He finally cited section 199 of the Criminal Procedure Code, which requires a trial court to record the remarks respecting the demeanour of a witness while such witness is testified.

5. Mr. Omwega for the prosecution cited the case *of* ***James Nyanchoka Ojwang & Another v R, Criminal Appeal No. 194 of 2008,*** Court of Appeal (Kisumu), in which that court upheld the conviction of the appellants on a charge of murder based on the evidence recorded by a deceased trial judge (Kaburu Bauni, J) and a judgement written and delivered by his successor (Musinga,J). In that case the court observed that section 200 (1) (b) of the Criminal Procedure Code allows a succeeding judge to act on the evidence recorded wholly by his predecessor. It then went on to state that: *"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 Ndengwa V R [1985] KLR 535****."* That court went further and observed that the trial had taken five years to conclude, which the court said militated against the trial being started de novo due to loss of memory on the part of the prosecution witnesses or the appellants.

6. It is clear from the provisions of section 200 (3) of the Criminal Procedure Code that an accused is given a discretionary power to demand for the recall of all witnesses, who have testified, to testify before the second magistrate. Once he makes the demand the court has discretion in the matter to accept or refuse the request. As pointed out in ***Joseph Gituku Wangai & 5 others v. Republic [2005] eKLR,*** the recall provisions are for the protection of the accused. The expansion of and constitutionalisation of the rights of an accused in the 2010 Constitution points to a liberal interpretation of the provisions of section 200 (3) of the Criminal Procedure Code. Furthermore, the case of ***James Nyanchoka Ojwang & Another v R, supra,*** explicitly requires that the usage of the recorded evidence by the succeeding magistrate should be used sparingly.

7. I find from the record of the proceedings that five witnesses have testified orally. These witnesses are mostly civilian witnesses. The recorded testimony shows that the bulky of the evidence is oral evidence. Unlike the English common law based system documentary evidence is commonly used in systems that follow the civilian system of law, which is common in countries that follow the French legal system. The provisions of section 200 (3) of the Criminal Procedure Code should only be used sparingly.

8. The upshot of the foregoing is that I find that ordering a *de novo* trial is in the interests of justice and I hereby so order.

9. The application of the accused persons succeeds with the result that their trial will start *de novo.*

Ruling signed, dated and delivered in open court at Narok this 11th November 2019 in the presence of Mr. Kamwaro for the accused and Ms. Nyaroita for the state.

J. M. Bwonwong'a

Judge

11/11/2019