



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL CASE NO.18 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN CHERUIYOT KIRUI.....ACCUSED**

**RULING**

1. In this case where the prosecution has closed its case, and is now for defence hearing, the accused person has asked that the trial starts *de-novo*, because another Judge, myself has taken over the case. His reason is that the witnesses who testified before the previous Judge, did not testify properly and were couched. Defence counsel Mr. Mugumya added that the court has to determine the demeanour of witnesses, and it was thus necessary to recall the witnesses.
2. The Prosecuting Counsel for the Director of Public Prosecutions on the other hand has opposed the request for *de-novo* hearing, arguing that the matter had already reached an advanced stage, and was now actually for the defence case and it was easy to type the previous proceedings for consideration by the court.
3. Under section 200 of the Criminal Procedure Code (cap.75) this court has a duty to explain to an accused the three options available, when another judge takes over a part heard case, and to ask the accused to state his or her preferred position.
4. The accused herein has expressed his desire for recalling all witnesses. His counsel Mr. Mugumya supports him. The Assistant Director of Public Prosecution Mr. Muriithi however opposes the request. None of the parties has addressed me on the issue of availability of the said witnesses.
5. This is a 2017 case and both the prosecution and the defence agree that all prosecution witnesses have already testified. Though section 200 of the Criminal Procedure Code (cap.75) provides that the accused person inform the court his preferred option in order to progress the case, it does not say that the court must follow what the accused says. In my view therefore, the court has the ultimate duty and right to make a decision whether to proceed from where the case has reached or to start *de-novo* – or to recall only some witnesses. Each case will have to be considered on its own special circumstances, the overriding consideration being the broader interests of justice for all parties and persons involved.
6. In our present case, I am mindful of the fact that recalling all prosecution witnesses is a process and is also costly. It will cause delay also. In my view, the reason given by the accused for his request, that the witnesses did not testify well or were couched are not sufficient reasons for the recall of all prosecution witnesses, especially in this era where prosecution witness statements are supplied to the defence before tendering such evidence. In murder cases also like the present case, the accused is represented by counsel who can raise any legitimate issue at any time during the trial. The accused has been so represented by counsel, and in my view clarification of unclear witness testimonies, and complainants about couching should have been raised by defence counsel during cross-examination of witness.
7. I find no justifiable reason for the request for recalling all witnesses and *de-novo* trial. I decline to order fresh trial, and direct that the defence will proceed with their defence case in accordance with the law. The case will proceed from where it has reached.

Dated and delivered at Bomet this 6<sup>th</sup> day of November 2019.

**George Dulu**

**JUDGE**