



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO. 166 OF 2003**

**REPUBLIC.....PROSECUTOR**

**-VS-**

**JOSHUA MWORIA MWITI.....ACCUSED**

**RULING**

**Starting case *de novo***

[1] The accused person Joshua Mworria Mwiti has asked the court to hear this case *de novo* on the grounds that:-

- 1. He did not have the benefit of his counsel's representation (namely; Carl Peters Mbaabu) and***
- 2. There were certain aspects of evidence which the accused required to cross examine the witnesses given the gravity of the offence.***
- 3. Although the case was old, the prosecution brought some witness only in 2016. Some witnesses were from Nkubu which was not far and were fairly young.***
- 4. No prejudice would be occasioned on the prosecution***

[2] Mr. Namiti for State, vehemently opposed the application and gave his reasons, to wit:-

- 1. That this case in one of the oldest cases in Meru whose finalization has been delayed by the accused person for various reasons ranging from alleged illness and lack of legal counsel to represent him.***
- 2. That, on 29<sup>th</sup> October 2014, Makau J granted the accused 3 months to engage counsel of his choice, but, the this issue dragged up to 2015 when he engaged Mbaambu Inoti who ably represented him.***
- 3. That contrary to assertions by Mr. Carl Peters, the witnesses herein are quite elderly, some had died namely; Pheneas Mwenda and Samuel Kiuga.***
- 4. That, owing to the age of the matter, the status of witnesses and the fact that the accused was***

*the source of the delay, the matter should proceed from where it had reached.*

*5. That in any case, the accused had not specified the particular witnesses he wished to recall*

*6. That, the investigations officer had since retired and tracing him would be difficult.*

*7. Lastly, he contended that the accused person was all along ably represented by experienced counsels.*

## **DETERMINATION**

### **The legal test**

[3] Keen I have been on this request to start this case *de novo* because it is a matter of the Constitution and administration of justice for parties in this case. In general. Having carefully considered this application and the rival contentions by the parties, I say thus: It is now abundantly clear from judicial pronouncements that the right to recall witnesses or to commence a case *de novo* under section 200 of the CPC is not absolute. See relevant section 200(3) & (4) of the CPC below:-

*200 (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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right*

*(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.*

[4] There is ample judicial authorities on section 200 of the CPC and I am content to cite the case of **JOSEPH KAMAU GICHUKI .vs. R [2013] eKLR**, where the Court of Appeal, stated that;

*“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 has proceeded, 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.”*

[5] And there are many instances where courts have declined to start cases *de novo* on varied but legally valid reasons. See for instance, the case of **EPHRAIM WANJOHI IRUNGU AND 7 OTHERS –VS- REPUBLIC (2013) e KLR**, where the court declined invitation to start the case *de novo* and stated as follows:

*“To start the trial afresh would involve much inconvenience and delay of the case even if Mr Esmail’s clients who are out of bond do not seem to mind. This case has entered its third year and any further delay is undesirable as justice delayed is justice denied.*

*I am satisfied that Honourable Ochenja exercised his discretion judiciously in declining to order a retrial and such denial does not nullify the subsequent proceedings”.*

[6] What story is told by the facts of this case? The record shows that this case was heard for the first time by Lenaola J (as he then was) on February 2007. The Learned Judge heard 4 witnesses up to 8<sup>th</sup> March 2007. The case was subsequently heard by Justice Emukule and on 19<sup>th</sup> July 2010, Kasango J took over the conduct of the case. The good lady judge asked the accused to state whether he wished the matter to start afresh or to start from where it had stopped, and whether the accused person wished to have any of

the prosecution witnesses recalled. The accused person who was then represented in court by Mr. Manjau intimated to court that he wished to have the matter continue from where it had stopped.

[7] On 19<sup>th</sup> May 2015, the accused person was placed on his defence by Kasango J. On 8<sup>th</sup> November 2011, Lesiit J took over from Kasango J and on that day the accused person then still represented by Mr. Manjau intimated to court that he wished to have the matter start afresh. The application was allowed by Lesiit J and the previous proceedings were declared a mistrial despite objections from the prosecution. On 19<sup>th</sup> June 2012, Mr. Manjau then again appearing for the accused person, intimated to court (Apondi J) that he had talked to the accused person, who had expressed a wish to be represented by another advocate. The court subsequently allowed the said application and the Deputy Registrar was directed to assign the accused person a new advocate. On the same day and in compliance with the order by the Judge, Mr. Rimita was appointed as the new advocate for the accused person. On 16<sup>th</sup> October 2012, the case subsequently started *de novo* before Apondi J as directed by Lesiit J on 8<sup>th</sup> November 2011. On 29<sup>th</sup> November 2012, Apondi J directed the matter be heard on 28<sup>th</sup> and 29<sup>th</sup> January 2013 before any judge. On 29<sup>th</sup> January 2013, the matter was again before Lesiit J and the accused person intimated to court that he again did not wish to be represented by Mr. Rimita. The court again reluctantly allowed the application noting that the same was an afterthought. Nonetheless, the court directed that the accused gets his own lawyer at his own cost.

[8] On 7<sup>th</sup> March 2013, the accused person intimated to court that he had not been able to engage an advocate and requested for two months to do so. The accused person was allowed two months to engage legal counsel of choice. The case was, however, scheduled for hearing date on 6<sup>th</sup> May 2013. On 6<sup>th</sup> May 2013, the accused once again intimated to court that he was yet to engage an advocate and requested for another three months to do so. The obliged and allowed him time to engage legal counsel of choice.

[9] Again on 18<sup>th</sup> September 2013, the accused informed the court that he was unable to get an advocate and this time round he asked the court to assign him an advocate. Mr. Otieno was subsequently appointed to represent him on 23<sup>rd</sup> October 2013. The court (Lesiit J) disqualified itself from hearing this case citing personal reasons.

[10] On 7<sup>th</sup> July 2014, the case again proceeded afresh before Makau J. Subsequent thereafter, on 8<sup>th</sup> July 2014, Mr. Otieno for the accused sought to withdraw from the proceedings on the grounds that the accused was not comfortable with him. The accused person intimated to court that he did not wish an advocate to be appointed for him by the Deputy Registrar and that he needed time to hire his own advocate. The accused was given 2 weeks to hire his own advocate. On 22<sup>nd</sup> July 2014, 29<sup>th</sup> October 2014, and 25<sup>th</sup> February 2015, the accused person again stated that he was yet to procure an advocate. On 25<sup>th</sup> February 2015, he was given another 3 months to hire an advocate. This time the court directed that in default thereof, the Deputy Registrar should appoint one on his behalf. On 8<sup>th</sup> June 2015, Mr. Mbaabu was appointed to undertake defence on behalf of the accused.

[11] On 16<sup>th</sup> June 2015, the accused person asked the court (Makau J) to disqualify himself; the court rejected that application as no reasons had been offered for recusal.

[12] On 8<sup>th</sup> February 2016, the parties again agreed that the matter starts *de novo* before Wendoh J. On that day again, the accused person asked Wendoh J to disqualify herself. The accused person's application was rejected; the court noted that there was no justifiable reason to do so. On the same day at 2:00 PM, the accused person was called from the cells but declined to attend court whereupon his own counsel urged the court to proceed in his absence pursuant to Article 50 (2) 9 (f) of the Constitution and the court subsequently proceeded to hear the matter in his absence. The case subsequently proceeded to full hearing culminating in the accused person being put in his defence on 12<sup>th</sup> April 2016.

[13] From the proceedings I have set out above, the accused person's conduct speaks for itself and I need not reemphasize. The accused person clearly comes out as an individual who is bent on obstructing the

course of justice through contrived tactics. Justice is to all; the victims and the accused. Regrettably, however, the accused person's conduct is to say the least, an abuse of the court process- conduct that this court cannot countenance. Needless to state that, it is cardinal tenet of law that justice delayed is justice denied. I am alive to the fact that section 200 of the Criminal Procedure Code CAP 75 of the Laws of Kenya provides a right to request that a case be heard de novo and recall witnesses. However, the court has to determine whether prejudice would be suffered by the accused, victims or prosecution or to the due process of the law if the matter is to begin afresh. The reason given by the accused and his conduct in these proceedings negate his statutory obligation to enable the court dispense justice without delay. He is the source of delay herein and he cannot have the benefit of his own default. I should state here that even when exercising a right, it should not be done at the expense of other people's rights or in flagrant abuse of court process. This is a basic constitutional principle I am stating. This court is aware that this case has been heard *de novo* on three different occasions by three different judges. On this occasion, the reasons advanced by the accused person are not tenable. The contention by counsel for the accused that the accused person did not have representation are certainly false as the accused was always represented in court by able counsels. I did not hear any expression that those counsels were not competent. It is the accused, who, on numerous occasions rejected the counsels assigned to him by the Deputy Registrar for no reason. Similarly, the accused person did not inform this court of the exact nature of the so called aspect of evidence that he wished the witnesses to be cross examined on.

[14] It is not in dispute that some of the witnesses in this matter have since died and some are now elderly. At one instance when the matter started de novo before Apondi J one of the witness had to be stood down to allow her refresh her memory. Loss of memory is evident.

[15] In applying the test I set out, this case is at a fairly advanced stage now; pending defence hearing. I note also that it is a fairly old matter and delay continues. Article 50 (2) of the Constitution provides that every accused person has a right to a fair trial, which includes the right:-

(e) ***“to have the trial begin and conclude without unreasonable delay.”***

This is the constitutional calling of the court and where the delay is by the accused, the court will insist on expeditious disposal of the case. The accused is not interested in justice in accordance with law. I refuse such conduct.

[16] Accordingly, the expeditious dispensation of justice as fortified in article 159 (2) of the Constitution demands that I should now enforce the ever fresh old age clarion call for justice that:

(b) ***“justice shall not be delayed”***.

[17] On the basis of the reasons I have given, I order that this case shall proceed from where it ended. Proceedings shall be typed for smooth trial. It is so ordered.

**Dated, signed and delivered in open court at Meru this 5<sup>th</sup> day of April, 2018.**

.....

**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Kiarie advocate for State

Mr. Carl Peters advocate for accused

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**F. GIKONYO**

**JUDGE**