REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 83 OF 2012

REPUBLIC.....PROSECUTOR

-VS-

BONIFACE MWITI.....ACCUSED

RULING

[1] On 13th February 2018, the court informed the accused person of his right under Section 200 of the Criminal Procedure Code whereupon the accused person applied for the case to be heard de novo. His major ground for so applying is that he was forced to proceed with the case despite the fact that he wanted to enter into plea bargain negotiations.

[2] Mr. Namiti for the State opposed the said application on the basis of three reasons, namely:-

1. That this was an old case;

2. Witnesses were difficult to procure especially PW2 and PW3; and

3. That there was a reasonable belief that the matter will delay further if it starts *de novo* as it will be extremely difficult to procure witnesses.

[3] The Learned State Counsel demonstrated the difficulties in procurement of witnesses in this case. He stated as an example that, on 10th March 2016, the court had to issue a warrant of arrest against some of the witnesses. Although Mr. Namiti had undertook to file a detailed affidavit to show that there was a reasonable belief that that the matter would delay further if started *de novo*, he did not do so.

DETERMINATION

[4] 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.

[5] 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 consideration 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."

[6] 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".

[7] The reason given by the Accused person for a *de novo* hearing of this case is that he was forced to proceed with the case despite the fact that he wanted to enter into a plea bargain negotiations. The record shows that, 0n 8th December 2014, Mr. Mungai for the State intimated to court that they were likely to enter into plea bargain with the accused. Mr. Mureiithi for the accused person confirmed that position. However, the issue of plea bargain went cold. It was not until 14th July 2017, when Mr. Mulochi for the State intimated to court that the offer for plea bargaining by Mr. Mureiithi for the accused person had been rejected. At this juncture, I should say something about plea bargain in so far as it is relevant to this application.

[8] Plea bargain negotiation is between the prosecution and the accused person and provided for in sections 137A to O of the CPC. The court does not participate in the negotiations; it shall only be notified by the parties to a plea negotiation of their intention to negotiate a plea agreement The court's active role comes once the plea agreement has been fastened between the parties and filed in court. And, the court may or may not accept it. For clarity of thought, see section 137C.

(1) An offer for a plea agreement may be initiated by –

(a) a prosecutor; or

(b) an accused person or his legal representative.

(2) The court shall be notified by the parties referred to in subsection (1) of their intention to negotiate a plea agreement.

(3) The court shall not participate in plea negotiation between a public prosecutor and an accused person under this Part.

[9] The prosecution may also reject the offer in which case, the trial will proceed. Similarly, the accused may reject the agreement and again, trial will proceed. The court may reject the agreement and trial shall

proceed accordingly. Therefore, mere commencement of or intention to commence plea negotiation is not a bar to the hearing of the case. This reason is not good especially that no plea agreement was fastened.

[9] In any c as, there is nothing to show that the accused person was forced to proceed with this matter. He participated fully in the trial. It is also not in dispute that the prosecution has already closed its case and the matter is now only pending for defence hearing. The matter is therefore at a fairly advanced stage. I note that this is a fairly old matter too. The contention by the prosecution that they had difficulties in procuring witnesses remained uncontroverted and has been demonstrated to be so. Article 50 of the Constitution sets out what constitutes the right to a fair hearing. Article 50 (2) 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."***

[10] The need for expeditious disposal of cases and delivery of justice to all parties in a criminal trial is important consideration of justice. See article 159 (2) of the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by principles which include in clause (b) "***justice shall not be delayed***".

[11] The sum total of the foregoing is that the accused person has failed to show what prejudice he will suffer if this case is not heard *de novo.* Accordingly the Accused person's application is without merit and same is dismissed in its entirety. The case shall proceed from where it reached. It is so ordered.

Dated, signed and delivered in open Court at Meru this 4th day of April, 2018

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F. GIKONYO

JUDGE

In the presence of:

Mr. Kiarie for State

Murithi for accused – absent

Accused – present

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F. GIKONYO

JUDGE