REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 36 OF 2013

REPUBLIC

- Versus -

STEPHEN MUTWIRI NGAE.....1ST ACCUSED

WILLIAM GITONGA NTOMARIO.....2ND ACCUSED

RULING

Starting case *de novo*

[1] This case was heard by Wendoh J. The accused were called upon to enter into their defence on 3rd March 2016. For reasons known to the accused persons, one or other of the accused person would be absent and the case would be adjourned. Sometimes the judge had to issue warrants of arrest against the 1st accused person. Despite giving last adjournment to the defence, defence hearing never took off before Wendoh J. The judge left station and this case was assigned to me. On 2nd May 2018 when the case was scheduled for defence hearing before me, Mrs Kaume applied for this case to start *de novo* on the grounds that:-

1. ***This court did not observe the demeanor of witnesses but the earlier judge did.***

2. ***The 2nd accused did not understand proceedings well; and***

3. ***The prosecutor was different from the current one; wrong information was provided to the current prosecutor.***

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

1. ***That this case in one of the old cases in Meru;***

2. ***That availability of witnesses will become a challenge to the prosecution***

3. ***That delay will defeat justice. Victim family are entitled to expeditious disposal of this case.***

4. ***That proceedings are already typed thus, case should proceed from where it ended.***

DETERMINATION

The legal test

[3] Keen have I been on this request to start this case de novo, for such is a matter of the Constitution and administration of justice. Justice must be served to all the parties; the accused, the victims and the prosecution who represent the public in the prosecution of cases. 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 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."

[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 show that this case was heard for the first time by Wendoh J. on 26th November 2014. The court heard a total of seven witnesses on diverse dates. Since the time the accused were placed on their defence, the case has never taken off for one reason or other. Sadly, the delay was caused by the accused persons. Needless to state that, under the law, justice in a criminal case is to all parties, the accused as well as the victims. And therefore, no party should become a source of delay in finalization of cases. Such party will offend the old age adage that ''justice delayed is justice denied'' which is now a principle of justice in article 159 of the Constitution. The accused person in this case are responsible for the delay of this case. Any further delay in whatever form would only prejudice the administration of justice.

[7] But before I close, I should state that availability of witnesses who have testified is said to be a challenge in this case. Their procurement may not be guaranteed. Loss of memory is also a factor to be considered. The fact that the court did not observe the demeanor of the witnesses alone is not a bar to the continuation of with this case from where it ended. The allegation that the current prosecutor was given wrong information is neither here nor there. It is not even substantiated. Similarly, the argument that a different prosecutor is handling the case should cause de novo hearing of the case does not hold sway. In sum, there is no prejudice that the accused will suffer of this case proceeds from where it stopped. Much time has also lapsed and the prosecution will suffer prejudice if they are told to procuring witnesses whose availability is obscure or difficult if not impossible. Regrettably, most of the delay has been caused by the accused persons. It should be minded that in such eventuality, the victims herein will be denied justice completely. Administration of justice should be for the good of law as well. Therefore, when all is taken into account, it is not convenient to start this case *de novo*. This case is at a fairly advanced stage now; pending defence hearing. Undeniably, it is a fairly old matter and the delay continues. I thought that fair trial in Article 50 (2) of the Constitution includes *''the right to have the trial begin and conclude without unreasonable delay."* Accordingly, I will answer to the constitutional calling of the court and dismiss the request by the 2nd accused on *de novo* hearing of this case. Instead, I order the case to proceed from where it was left by my predecessor. The case be fast tracked for it is over 5 years old. Proceedings are already typed and so the hearing should be smooth sailing. It is so ordered.

Dated, signed and delivered in open court at Meru this 4th day of June, 2018.

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F. GIKONYO

JUDGE

<u>In the presence of:</u>

Mr. Namiti for State

M/s. Nelima for Mrs. Kaume for 2nd accused person – absent

1st accused - present

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F. GIKONYO

JUDGE