



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 45 OF 2013

REPUBLIC.....APPELLANT

VERSUS

PAUL KIPTOO KETER.....RESPONDENT

RULING

This is a case where three prosecution witnesses were heard by *Justice G.K Kimondo* on 23rd January, 2017. The said judge was thereafter transferred to Murang'a High Court. On 6th June, 2018 when the case was before *Justice H. A Omondi*, the provisions of *Section 200(3)* of the *Criminal Procedure Code* were complied with. The accused elected to have the case heard De Novo. *Mrs. Mokuu* who was appearing then for the state requested for a mention date to confirm availability of the three witnesses. On 26th June, 2018 when the parties appeared before me, *Mrs. Oduor* was opposed to hearing of the case afresh. She did not wish to testify again.

They are children of the accused and the deceased did not wish to be traumatized in narration of the evidence of which would give them bad memories. Some photos were referred to in the evidence of which they did not wish to see again. She relied on the case of ***James Kamau Kihui -vs- Republic, Criminal Appeal No. 17 of 2014***, where it was held that the right to have a case heard De Novo is not absolute. Circumstances of the case and reasons given need be weighed. *Mrs. Oduor* further contended that the accused was represented by the very same Advocate he has when the three witnesses were heard, and they were cross-examined fully. He gave no reason for his intention to have the case heard De Novo. Proceedings from the point reached won't prejudice him in anyway. I was urged also to consider the views of the victims which as well matters. The case is old, of 2013 and hearing it afresh will occasion further delay.

Mr. Miiyinda for the accused was not of the same view. He submitted that the right to recall any witness and to have the case heard De Novo lies with the accused person. The relied on decision does not take away that right. *Article 50* of the *Constitution of Kenya 2010* was said to be of the effect. The Advocate further averred that it's accused's right on how his case is handled and tried. Circumstances are appreciated but do not oust the rights granted by the law. In such a scenario the state was said to be helpless. This court on the reasons was urged to order that the case do start De Novo.

Looking at *Section 200 (3)* of the *Criminal Procedure Code, Cap 75 Laws of Kenya*, it reads: -

“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”.

The use of the words, ***“... the accused person may demand...”*** shows that the accused once informed of the right under *Section 200 (3)* of the *Criminal Procedure Code*, if he intends any or all witnesses recalled, must make an application for it. In such application he must give reasons justifying recalling of the witness. Recalling of a witness involves a repeat of what had been done and doubtlessly must be justified. It can't be a question of just the accused expressing the wish and the court going by it.

Article 50 of the Constitution which is about fair hearing was also relied on by the defence. The provisions under the Article which I find applicable to our situation are:-

50(2), which states that, ***“Every accused person has the right to a fair trial, which include the right-***

(e) to have the trial begin and conclude without unreasonable delay;

(k) to adduce and challenge evidence.

It's clear that *Article 50* of the *Constitution* is about the rights of an accused person. However, fairness in a trial is not all about an accused person as he or she is not the only party to it. Other parties in it who are equally pursuing justice, like the state, the complainant and the

victims, must have their interest weighed in every move the court makes in a trial. The court shouldn't allow a move by whichever party in a trial that would unfairly prejudice the position of a legitimate party in pursuit of justice. Recalling of witnesses occasions delay in a trial which is against the spirit of *Article 50 (2) (e)*.

The witnesses the accused wishes recalled gave evidence and were cross examined fully by his Advocate. He therefore had full opportunity to challenge their evidence, in compliance with *Article 50 (2) (k)*.

In the relied on case by the prosecutor of *Kihiu -vs- Republic, Criminal Appeal No. 17 of 2014*, the court rightly observed that the right to recall witnesses by the accused is not absolute and will depend on the reasons given and circumstances obtaining in a case.

The Court of Appeal considered the issue in the case of *Ndegwa -vs Republic (1985) eKLR 534*, where the judges observed that:-

“The provisions of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are likely to defeat the ends of justice if the succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor”.

In *Ephraim Wanjohi Irungu and 7 others -vs- Republic (2013) eKLR*, the court declined to have the case start De Novo and expressed the following; -

“To start the trial afresh would involve much inconvenience and delay of the case even if Mr. Emali’s clients who are out on 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”.

The foregoing court findings shows that the court has discretion to allow or disallow an application by the accused made under *Section 200(3)* of the *Criminal Procedure Code*, but such discretion should be exercised judiciously.

The court will also not allow the application where it would occasion inordinate delay in a case that has already been delayed or taken long.

The court should allow the application where if disallowed would occasion injustice to the accused person or the applicant.

In the case before hand, the accused was charged on 30th April 2013. We are now in the month of June 2018 which means the trial has so far taken over 5 years. The court in such a matter is apprehensive of any move likely to occasion a further delay, like the application herein, to recall witnesses. Such would be against the spirit of *Article 50(2)(e)* of the *Constitution*, where the accused has a right to have the trial begin and conclude without unreasonable delay.

The accused in his application did not give a reason for it. It's simply an expressed wish, which is not justified in anyway. The state opposed it giving very sound reasons in relation to the circumstances and position of the witnesses sought to be recalled. To some, the deceased is their mother and the accused their father. They do not desire to undergo a repeated agony of the bad memory on how they lost their mother, of which the process involves identification of some undesirable photographs. In my view their feeling is valid and need be protected by this court especially where non-recalling them does not prejudice the applicant in any way.

On the foregoing reasons the application is unmerited and is hereby rejected. The case will proceed from the point reached.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 19th day of July 2018.

In the presence of:-

- (1) Ms. Khayo holding brief for Mr. Miyienda Advocate for the accused
- (2) Ms. Mokuia for State prosecutor
- (3) Mr. Joseph Mwelem Court clerk