REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

R. MWONGO, J

HIGH COURT CRIMINAL CASE NO 46 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

JAMES NJENGA NJOROGE.....ACCUSED PERSON

RULING

1. This is a ruling in respect of an application by counsel Dola Indidis for the accused in which he seeks that this matter do proceed *de novo* on the grounds that the accused is charged with a capital offence, and he is of the view that if this matter proceeds the court may not have a clear picture of the demeanour of the witnesses on record. Counsel did not cite any authorities in support of his application that the hearing do start novo.

2. Mr. Koima for the DPP opposes the application. He has pointed out that this is a 2013 matter which was initially registered in Nakuru as Case No. 6 of 2013. It was later transferred to Naivasha as Case Number 46 of 2015. Accordingly, considering the time the matter has taken – which is about five years – and also given that he has not confirmed if the witnesses are still available, he urges the court to consider the application wholistically. The case, he says, is presently at defence hearing, and starting the case *de novo* will prejudice the rights to a fair hearing, particularly since the availability of witnesses is uncertain. He urges the court to continue the case from the point that it has reached.

3. I have perused the file and proceedings in this matter. I note that four (4) prosecution witnesses had testified, with PW1 having commenced on 15 March 2017. PW4 testified on 11 May 2017 after completion of the evidence of PW3. Thereafter, PW2 was recalled on the application of the defence on the same day, and the prosecution closed its case. Meoli, J, who was hearing the matter ruled on 31 May 2017 that the defence had a case to answer.

4. The defence hearing was fixed for 12 June 2017 when the accused's advocate is recorded to have been bereaved and not present.

The hearing was then fixed for 13 July, 2017, and again the accused's counsel was recorded to have been bereaved and not present on that date. A hearing was fixed for 12 October, 2017, and the record of that date indicates that the accused stated:

> ***"my advocate has said he will not come even though I give him money. I have paid him fully in the case but he is not here. I told him of the hearing date now he is speaking of 13th I asked to proceed on my own or the case to go on with an advocate appointed by the court"***

5. On 18 October 2017 counsel Indidis was present in court for the accused and applied for witness summons for one Zechariah Icharia assistant chief of Maai Mahiu to be issued. He appeared in court again on 12th of February 2018 when he notified the court that the accused would give sworn statement and witnesses. The accused then proceeded and to give a sworn statement on that day and was cross examined by the prosecution. On the same date DW1 gave evidence and was cross examined. The further defence hearing was fixed for 10th May 2018 when Zechariah Icharia and one Mr. Samuel Mburu Njung'e were to attend to give evidence. On 10 May 2018, counsel did this, appeared in court and sought another hearing date for the issuance of fresh summons for the chief of Maai Mahiu Location. The record indicates that the matter was to be mentioned before me today for directions under section 200 of the CPC.

6. I have carefully considered the application and the circumstances surrounding the case as shown in the record. This case is at its defence hearing. Nothing was stated by the applicant concerning what specific aspect of the evidence critically demands that the demeanour of the witnesses was so compelling as to justify re -hearing by this court. The applicant did not also indicate the prejudice that be suffered by the accused if the case proceeded to conclusion.

7. I note that **Section 199** of the **CPC** requires the judicial officer presiding, when he:

"…has recorded the evidence of a witness, he must also record such remarks (if any) as he thinks material respecting the demeanour of the witness whilst under examination"

8. I have carefully perused the provisions of Section 200 of the **CPC** which provides that:

"200. (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) …..

(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 re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) ….."

9. Similarly, I have perused **section 34** of the **Evidence Act** provides as follows:

"34. (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances-

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding-

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused". (Our emphasis).

10. In the case of **Abdi Adam Mohammed -Vs- Republic [2017] eKLR** the court held that reading **Sections 200** of the Criminal Procedure Code together with **Section 34** of the Evidence Act and **Article 51** of the constitution an accused persons rights to a fair trial are clearly entrenched in the constitution. The court went on to say:

"It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, 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. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;

"By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available

locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."

11. I am of the view that in the circumstances of this case which as I have said commenced in Nakuru in 2013 and then proceeded in a Naivasha in 2015, and all but two witnesses having testified, and given the absence of counsel on several instances, and the uncertainty expressed by the prosecution as to the availability of witnesses, it does not appear to me to be an appropriate case to start *de novo*. Whilst I am duly mindful of the need to maintain the entrenched right of the accused to a fair trial, I also note that the aspect of demeanour of witnesses is taken care of by the provision of **Section 199 CPC**, mentioned above, which requires the presiding judge or magistrate to simultaneously record any material aspects of witness demeanour in the proceedings. As such the succeeding officer has access to demeanour remarks from the proceedings.

12. All in all, I am under the circumstances and for the foregoing reasons, unable to grant the Applicant's request for a *de novo* hearing. The application is therefore disallowed. The trial will proceed, and a date for the next hearing shall be taken.

Dated and Delivered at Naivasha this 9th Day of July, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. D. Indidis for Accused

2. Mr. Koima for DPP

Court Clerk – Quinter Ogutu