REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.326 OF 2016

DUNCAN LIVINGSTONE KIMATHI……APPLICANT

VERSUS

REPUBLIC…….....RESPONDENT

RULING

The Applicant, Duncan Livingstone Kimathi was aggrieved by the decision of the trial magistrate's court in which it dismissed the Applicant's application to have the criminal trial commence *de novo* after the previous magistrate was transferred (Hon. E.N. Nyongesa – SRM) and another magistrate (Hon. S. Jalang'o – SRM) took over the proceedings. The Ruling was rendered on 27th May 2016. According to the Applicant, his right to have the trial start *de novo* in accordance with **Section 200(3)** of the **Criminal Procedure Code** was breached when the trial magistrate declined to grant his application and that of his co-accused for the case to start *de novo*. The Applicant urged that it was important, in the interest of justice, for the trial to start *de novo* because the succeeding magistrate should be given an opportunity to assess the demeanour of the witnesses before reaching a determination whether or not the said witnesses are saying the truth. Mr. Nyaberi for the Applicant amplified the grounds put forward by the Applicant in support of his application by stating that it was imperative that the trial court takes heed of the Applicant's request to have the case start *de novo*. The trial court had not given sufficient reasons why it denied the Applicant's application to have the case start *de novo*. He urged the court to take into consideration the serious nature of the charge that the Applicant is facing and reach an appropriate verdict directing the trial court to start the trial *de novo*.

Ms. Sigei for the State opposed the application. She filed grounds in opposition to the application. She submitted that it was not mandatory for a trial court to direct that the trial starts *de novo* when an accused person makes such request. The trial court has to take into consideration several factors including whether the witnesses who had already testified would be available to be recalled if the trial were to commence the trial *de novo*. She urged that the trial court was entitled to make the order that it did in light of the entire circumstances of the case, especially the fact that most of the prosecution witnesses had already testified. She was of the firm view that the Applicant's right to fair trial under **Article 50** of the **Constitution** was not infringed. She submitted that the decision rendered by the trial magistrate also took into consideration the interest of the victim.

This court has carefully considered the rival submission made by counsel for the parties to this application. It also had the benefit of perusing the proceedings of the trial court. Certain facts are not in dispute. It is not disputed that the succeeding magistrate read to the Applicant his rights as provided under **Section 200(3)** of the **Criminal Procedure Code**. That Section provides that:

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by the 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."

In response to the reading of this right, the Applicant informed the trial court that he desired to have the case start *de novo*. It is further not disputed that majority of the crucial prosecution witnesses have already testified.

The Applicant and his co-accused before the trial court, other than stating that they wanted the hearing of the case to commence *de novo*, did not give any reasons why they desired to have the case start *de novo*. In his submission before this court, the Applicant stated that his right to fair trial would be infringed if the succeeding magistrate does not recall the witnesses who testified before the previous magistrate before reaching his verdict. He urged the court to take into consideration the fact that he is facing a serious charge that is likely to result in his facing a severe sentence. On the other hand, the State argued that the trial magistrate was entitled to reach the verdict he reached in the sense that the interest of justice demanded it. The trial court had correctly noted that the Applicant would not be prejudiced if the trial was to continue from where the proceedings had reached.

The right of an accused person under **Section 200(3)** of the **Criminal Procedure Code** has two aspects to it. The first one relates to the requirement that the succeeding trial magistrate informs an accused person of his right to have any witness who had testified before the previous magistrate recalled for the purposes of being re-examined. The second aspect relates to the same court determining whether or not, taking into consideration the views of the accused person and the prosecution, such an order should be made. As regards the first aspect, the same is mandatory. The succeeding trial magistrate is required by law to inform an accused person of his right to have any of the witnesses who had testified before the previous magistrate recalled for the purposes of being re-examined. If the trial court does not inform the accused of this right, an appellate court may, depending on the circumstances of the case, declare a mistrial.

As regards the second aspect, there are principles that guide the court in determining whether or not to direct that the entire trial commences *de novo*. In **Joseph Kamau Gichuki –Vs- Republic [2013] eKLR,** the Court of Appeal held thus:

"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."

In **Republic -Vs- Welington Lusiri [2014]** eKLR Dulu J held that it was not mandatory for the succeeding magistrate to order a retrial upon the request of an accused person where there exists circumstance that militates against such an order being issued. The court stated:

"The third and more important reason why the learned trial magistrate was wrong in allowing the trial to start de novo, is that a magistrate or a trial court is not duty bound to start de novo under section 200 of the Criminal Procedure Code even if the accused demand the recall of witnesses. The succeeding magistrate has to consider the particular circumstances of each case. In the case of Ndegwa –Vs- Republic [1985] KLR 534 the Court of Appeal held that section 200 of the Criminal Procedure Code should be used sparingly. When only a few and critical witnesses have testified and witnesses are available, a new trial may be ordered. Though the court appreciated that a new magistrate may not be able to assess the demeanour of witnesses who have already testified before another magistrate, the court left the discretion to the succeeding magistrate to decide whether to proceed from where a case has reached or recall witnesses, depending on the particular circumstances of each case. In the later case of Ephraim

<u>Wanjohi Irungu & 7 Others –Vs- Republic Nrb HCCR.Rev.No.6 of 2013,</u> the High Court emphasized that a fair trial under Article 50 of the Constitution of Kenya 2010 connotes that the trial should commence and be concluded without unreasonable delay. Starting a trial de novo in our present case obviously constitutes a delay in finalizing a case."

In the present application, the prosecution opposed the Applicant's application to have the case start *de novo* on essentially two grounds: that the majority of the critical witnesses in the case had already testified and further that it would be difficult to obtain the attendance of the witnesses if the court were commence the trial *de novo*. These reasons are not unreasonable in the circumstances of this case. The Applicant did not tell the trial court why he insisted that the trial commences *de novo*. This court notes that the incident that led to criminal charges being laid against the Applicant occurred on 10th May 2012. The Applicant was arraigned before the trial court on 4th July 2012. This court agrees with the prosecution that if an order to commence the case to start *de novo* is made, taking into consideration the lapse of time, the memory of the witnesses to recall the events that happened may be impaired.

It may not serve the interest of justice for the trial to start *de novo*. The Applicant complains that his right to fair trial may be affected if the succeeding magistrate is not given the opportunity to assess the demeanour of the witnesses who had testified before the previous magistrate. That may be the case. However, **Section 200(3)** of the **Criminal Procedure Code** was not intended to aid an accused person to make a blanket request for the recall of witnesses without laying sufficient basis why he wants such witness recalled.

This court has said enough. It is clear from the foregoing reasons that the application lacks merit. It is for dismissal. It is hereby dismissed. The trial shall proceed before the succeeding magistrate to its conclusion. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2017

L. KIMARU

<u>JUDGE</u>