



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 3 OF 2012

REPUBLICPROSECUTOR

VERSUS

SAMUEL LETARUM SERICHOACCUSED

Ruling pursuant to Directions under Section 200 as read with

Section 201 (2) of Criminal Procedure Code

RULING OF THE COURT

1. On **21st June, 2016** this matter came before the court for the taking of directions pursuant to **Section 200 as read with Section 201(2) of the Criminal Procedure Code**. The matter had previously proceeded before Hon Lady Justice Jaden, who has since been transferred. The court explained to the accused person that under the above **Sections** of the **Criminal Procedure Code** he has the right to elect to either proceed with his case before this court from where the earlier judge left the matter, or to have the matter start afresh, in which case, the accused would have the right to recall any witnesses who may have testified.
2. The accused person in the exercise of his rights under the said Sections opted not to continue with this matter from where it had reached with Justice Jaden, but to have the matter start afresh. Three (3) witnesses had given evidence and there are eight (8) more witnesses to go.
3. **Mr. Machogu**, the State Counsel, objected to the matter starting afresh, submitting that no reasons have been given by the accused person as to why the matter should start afresh.
4. In reply **Mr. Ngolya** submitted that the accused person does not have to give reasons for his option adding however, that in any event the witnesses which have testified have not been seen by this court, which needs to observe their demeanour. Further Mr. Ngolya submitted that the witnesses stay in Makueni and can be accessed.
5. **Mr. Machogu** requested for more time to investigate the availability of the witnesses which had testified. He later filed a letter herein on **26th July, 2016** from the National Police Service giving the history of the case and how the case has dragged since 2012. On several occasions the prosecution had been ready to proceed but the defence had requested for adjournments. The letter ended by stating that it would be difficult to secure the attendance of the witnesses that had testified since they had relocated. The letter also stated that justice delayed is justice denied and that this matter should proceed from where

the last judge left it.

6. The State also filed an affidavit sworn by **No. 73292 Cpl. David Kungu Mwangi** on **30th August, 2016**. The deponent is the investigating officer in this matter and he deponed that his attempts to trace the whereabouts of **Jane Nduku Munguti and Andrew Ndabai Mbiru**, some of the witnesses who had testified earlier in the matter have been futile, and that the matter should proceed from where it had reached.

7. **Mr. Ngolya** replied to the State's Replying affidavit, submitting that the provisions of **Section 200(3) of the Criminal Procedure Code** is worded in a way that leaves no room for maneuver. The accused has opted for hearing *de novo*, and that should be accepted. A *de novo* hearing means that the witnesses who have already testified would be summoned and reheard. An accused person is not expected to explain the choice he makes under the **Section 200(3)**. Citing the case of *Erick Omondi vs Republic*. **Mr. Ngolya** submitted that the accused person's choice be upheld.

8. **Mr. Machogu** for the State submitted that the application under **Section 200** as read with **Section 200(2)** is opposed. Counsel submitted that four (4) witnesses have testified. Two (2) of them can be recalled while the other two (2) cannot be traced. Counsel submitted that **Section 200** should be used sparingly. A party who chooses to have the matter start *de novo* must give reasons. **Article 50** also allows each party access to justice. Starting the matter *de novo* will constitute delaying the case. The case cited by the accused counsel does not apply in this case. The case concerned only with compliance with **Section 200**.

9. **Mr. Ngolya** emphasized that **Section 200(3) of the Criminal Procedure Code** does not obligate an accused person to explain himself but simply to exercise his rights as given to him under the statute.

Determination

10. Sections 200

“ 200 (1) Subject to subsection (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 resummon the witnesses and recommence the trial.

2. where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has had and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

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 resummoned 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.

Section 201(2)

(1) The provisions of Section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.”

11. The above Sections put an obligation upon the trial court to explain to the accused persons their right under those Sections. Upon an accused person making an option, the same is not binding on the court. This is so because of the discretionary wording of the section. It means that a court will have to make the final determination dependent on the nature of the case, availability of witnesses to be recalled, the concept of access to justice speedily for all the parties, and so on. So it is clear that even after an accused person has made his choice, the court may still reject the option.

12. In the case at hand, the court has considered the submissions of the State that two of the witnesses that have testified may not be available since they cannot be traced. There is a letter from National Police Service dated **25th July, 2016** to that effect. There is also an affidavit by the investigating officer to that effect. Those are not reasons which can be easily disregarded by the court. This court is the bashion of justice for both parties. To insist that the matter starts *de novo* would amount to denying the state crucial evidence relevant to their case. There is no reason why a court of law intent on doing justice should make a decision which directly divests one party of crucial evidence, which evidence cannot be replaced by other means. On the other hand, to retain the kind of evidence by allowing the matter to proceed from where the last judge left it does not cause any prejudice to the accused person since the evidence is already on record and was procured procedurally.

13. Again, this court takes notice that the accused was charged with the said offence in January, 2012, and it is in the interest of both the accused, the State and other affected parties to have this matter heard and concluded without admitting any further delay.

14. It is for the foregoing reasons that this court hereby orders that despite the accused person opting for the case to start *de novo*, this case will proceed from where Hon. Lady Justice Jaden had left it.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Machogu – for State

Samuel L. Sericho - Accused