REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 102 OF 2016

PARKINYARO OLE PURSUMARI KOROI & ANOTHER........APPLICANT

VERSUS

REPUBLIC...RESPONDENT

RULING

The lower court file in **Kibera Cr. Case No. 2291 of 2013** was forwarded to this court with a view to the court satisfying itself as to the correctness, legality or regularity of the proceedings taken by Hon. Mwinzi on 16th October, 2015. This court has revisionary jurisdiction under Section 362 and 364 of the Criminal Procedure Code to revise the orders of courts below it.

According to the Applicant, when Hon. Mwinzi took over the conduct of the trial, he did not comply with Section 200 of the Criminal Procedure Code. The provision requires that when a succeeding magistrate takes over the conduct of the trial, he should explain to an accused person of his right to demand that any witness who had testified be re-summoned or reheard afresh.

The record of proceedings shows that Hon. Mwinzi, SRM took over the conduct of the trial on 1st October, 2015. He thereafter heard the evidence of PW2 before the trial was taken over by Hon. Mutula, SRM on 28th April, 2016. The Applicant urges the court that upon finding that Hon. Mwinzi did not comply with Section 200 of the Criminal Procedure Code orders that the matter starts *de novo*.

The record shows that on 16th October, 2015, Hon. Mwinzi did in fact make some record pursuant to Section 200 of the Criminal Procedure Code. The answers given by the accused persons were also recorded and the court made orders accordingly. To the dismay of this court, the recording by Hon. Mwinzi is in short(abbreviation) form such that it is not possible to discern what exactly the accused persons replied. It is also not possible to tell what the court meant pursuant to the provisions of Section 200. It is trite that the court should make clear recording in unambiguous manner that should not only be understood by the accused, but any other person reading the record. In the circumstances, I am of the view that the record of Hon. Mwinzi in the respect of compliance with Section 200 being illegible means that one cannot deduce that Section 200 was complied with. The question that follows is whether that would call for hearing of the trial *de novo*.

It is clear that PW1 testified twice before Hon. Khaemba. It would be assumed then after Hon. Mwinzi took over the conduct of the trial, the accused persons intended that the matter proceeds from where it had reached as only the evidence of PW2 was called. Moreover, When Hon. Mutula took over the trial and upon compliance of Section 200, both accused persons indicated that they wished to proceed from where the matter had reached. In the circumstances, safe for PW2, there is ultimately no reason advanced to warrant the recalling of PW1. The provisions of Section 200 (3) are not couched in mandatory terms that the wish of an accused person must be adhered to. What is mandatory is the compliance by the trial court with the provisions to explain to an accused person what the law provides. Before me, the Applicant who is the 1st accused has not demonstrated any good reasons that would warrant the recalling of PW1 who testified twice. After all, and he had an opportunity of cross-examining him through his advocate. The only purpose that the recalling of PW1 would serve is to delay the trial. That then would negate expeditious administration of justice

Having made the above observation, I decline to order that the trial be heard *de novo*. I however expunge the proceedings taken by Hon. Mwinzi in respect of the evidence of PW2. I substitute the same with an order that PW2 be recalled to testify afresh unless in the candid words of the accused persons they indicate to the current trial magistrate that they do not wish that the witness testifies afresh. This means that the current trial magistrate must record that the accused persons had indicated to Hon. Mwinzi that they wished that the matter proceeds from where it reached. The trial file is herewith remitted back to the trial court with an order for a mention on 24th November, 2016 for the purpose of fixing a hearing date. This ruling must be served on the trial court for reference and compliance. It is so ordered.

DATED and **DELIVERED** this **15th** day of **NOVEMBER, 2016.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Nyambane for the Applicant

2. Mr. Ongige for the Respondent