REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 12 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

ARNOLD OUMA MUNYEKENYE.....ACCUSED

RULING

1. On 7th November, 2016 Ms Achala who appears for Arnold Ouma Munyekenye, the accused person herein, requested this Court to allow her client to make a fresh election under Section 200 of the Criminal Procedure Code, Cap 75 (CPC). This request was not opposed by the prosecution and I proceeded to comply with Section 200 CPC afresh. The accused person elected that the matter starts *de novo*.

2. In an election made on 25th July, 2016 when I had just taken over this matter from Tuiyott, J, the accused person had stated that the matter should continue from where it had been left by the previous Judge.

3. The State has opposed the request to have the matter start afresh. This was done through a replying affidavit sworn on 14th November, 2016 by Sergeant Gufu Garacha, the Investigating Officer.

4. The State's case is that out of the eight witnesses it intends to call in the trial, six have testified. It is the State's position therefore that the hearing of the matter has substantively proceeded and it is almost closing its case.

5. According to the prosecution, it is not practically possible to recall the witnesses who have testified as some of them are related to the accused person. Given as an example is PW1 Celestine Nabwire who is said to have remarried and relocated hence making it difficult to trace her. Further, that calling the witnesses to retell the story would traumatize them.

6. The prosecution also contends that the incident occurred on 5th March, 2014 and there is possible memory loss due to lapse of time. It is the State's case that it will be prejudiced and inconvenienced if the Court orders the matter to start *de novo*.

7. Finally, the prosecution asserts that the accused person will not suffer any prejudice if the matter proceeds from where it was left as he had a counsel throughout the trial and the advocate cross-examined each of the six witnesses who have already testified.

8. In reply to the State's opposition to the matter starting *de novo*, Ms Achala commenced by pointing out that Article 50 of the Constitution provides for fair trial and Article 159 of the same Constitution instructs the courts to administer justice without undue regard to technicalities. According to Ms Achala the accused person is exercising his rights under the Constitution.

9. On the averment that one of the witnesses remarried and relocated, the defence's case is that such an averment is not sufficient reason to deny the accused person an opportunity of having the matter start *de novo*. Ms Achala submitted that it is the duty of the investigating officer to liaise with the investigating authority and avail all the witnesses in Court.

10. On the assertion that the witnesses may have suffered memory loss, she submitted that two years is a short time for the witnesses to suffer memory loss. She urged the court to allow the matter to start afresh as this will allow her client to have a fair trial.

11. The question for the determination of this Court in this matter is whether there exist reasons for denying the accused person the opportunity to have the prosecution witnesses testify afresh.

12. Section 200 of the CPC provides that:

"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 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."

13. By virtue of Section 201(2) of the CPC, the provisions of Section 200 of the CPC shall apply *mutatis mutandis* to trials held in this Court.

14. It is the duty of the trial Court to inform the accused of his right under Section 200 of the CPC. In **John Bell Kinengeni v Republic [2015] eKLR**, the Court of Appeal addressed the import of Section 200(3) at length and concluded that **"the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate.**

15. In the case at hand, this Court has complied with the requirement of Section 200(3) not once, but twice. The accused person in his second election has demanded the recall of all witnesses who have testified. In the **9th Edition of Black's Law Dictionary** the term 'demand' is defined at page 495 as follows:

"1. To claim as one's due; to require; to seek relief; 2. To summon; to call into court.

16. The word "**demand**" as used in Section 200(3) of the CPC gives the impression that an accused person's decision is not subject to the discretion of the Court. Where constitutional rights are involved, one is not asked and is not under any obligation to explain why she or he wants to enjoy a particular right.

17. Section 200(3) has, however, been given interpretation by the Court of Appeal in several cases. In **Joseph Kamara Maro v Republic [2014] eKLR** the Court of Appeal held that:

"Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code."

18. That the Court of Appeal has been of the view that a succeeding magistrate or judge is not obliged by Section 200(3) of the CPC to start a trial *de novo* was also stated in **Joseph Kamau Gichuki v Republic [2013] eKLR** when the Court stated that:

"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 considerations to be borne in mind before invoking Section 200 include whether it is convenient to commence the trial de *novo*, how far the trial had 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."

19. The position taken by the Court of Appeal is one I entirely embrace for it ensures that justice is done both to the defence and the prosecution. Although Section 200(3) as drafted appears not to give room to the trial Court to upstage the decision of an accused person to have the matter commence afresh, the trial court as a protector of justice is entitled to consider whether a request to have a matter start afresh is in the interests of justice. The Court should consider the length of time the matter has been in Court, the availability of the witnesses who

have already testified, the possibility of loss of memory by the witnesses and in the words of the Court of Appeal in **Nyabuto & another v Republic [2009] KLR 409** the demand by public policy that **"justice be swiftly concluded**". I must add that it is only the incoming trial magistrate or judge who after studying the file will understand what the demands of justice dictates in that particular matter. In doing so, the Court should always bear in mind that Section 200 of the CPC is one of those provisions that are meant to protect and enhance an accused person's right to a fair trial as guaranteed by the Constitution. It is a balancing act as the Court must also bear in mind the need to ensure that victims of crime receive justice.

20. Indeed, the Court of Appeal, succinctly summarized the guiding principles surrounding the application of Section 200 of the CPC in **Lenyesio Lekupe & Another v Republic [2016] eKLR** when it cited its decision in **David Kimani Njuguna v Republic, Nyeri CRA No. 294 of 2010** where it was held that:

> **"In all these pronouncements, this Court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale, and philosophy behind Section 200 of the CPC more than thirty years ago. In NDEGWA VS REPUBLIC [1985] KLR 534 where it held that;**
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> 1) **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 not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.**
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> 2) **The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started *de novo*. Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.**
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> 3) **No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.**
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> 4) **The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanor and credibility of witnesses should always be maintained.**
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> 5) **A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanor of all the witnesses."**

21. Turning to the circumstances of this case, I find that six prosecution witnesses have already testified. They all testified in 2015 over one year after the crime was allegedly committed by the accused person. One year later the accused person has asked this Court to have his matter start afresh. There is no evidence from the prosecution that its witnesses are not likely to recall an incident that happened less than three years ago.

22. There was the claim by the prosecution that PW1 Celestine Nabwire has since remarried and may not be easy to trace. The affidavit does not explain why the investigating officer thinks it would be difficult to trace this particular witness.

23. The essence of Section 200(3) of the CPC is to ensure that the judicial officer who makes a decision in a criminal trial has had the opportunity of hearing and seeing witnesses testify so as to be in a position to assess the demeanor of the witnesses for himself or herself. The importance of the right of an accused person to recall the witnesses is discernable from a reading of Section 200(4) which empowers the High Court to set aside a conviction and order a new trial where it is of the opinion that the accused person was materially prejudiced by a conviction that was based upon evidence that was not wholly recorded by the convicting magistrate. The right to have a trial commence afresh is therefore not one to be taken lightly.

24. The State asserted that their witnesses will be traumatized if they are called to retell the story afresh. Is that trauma greater than the fact that the accused person will be sentenced to suffer death if found guilty? In the quest for justice some little inconvenience is bound to be suffered by the parties.

25. In the circumstances of this case, weighing all the factors, I find that this is one case that the accused person's right to have the matter start *de novo* should be protected. I therefore reject the State's opposition and direct that this matter starts anew.

Dated, signed and delivered at Busia this 8th day of Dec., 2016

W. KORIR,

JUDGE OF THE HIGH COURT