REPUBLIC OF KENYA

IN THE HIGH COURT O KENYA AT KAKAMEGA

MISC. CRIMINAL APPLICATION NO. 13 OF 2014

(Being an application for review of the subordinate court's

Orders requiring the criminal case to start de novo by

Hon. P. Achieng, Ag. PM dated 11th February, 2013)

REPUBLLIC …..... APPLICANT

VERSUS

WELINGTON LUSIRI ….....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 27/2/2014 brought under **Section 362** and **367** of the Criminal Procedure Code (Cap.75). The application was filed by the Director of Public Prosecutions on behalf of the State. The prayers are as follows -

1. **That the application be certified as urgent and heard on priority basis.**
2. **That the proceedings in the lower court file Kakamega (Chief Magistrate) Criminal Case No. 908 of 2010 be stayed pending the hearing and determination of this application.**
3. **That this Honourable court be pleased to review the court orders granted on 11th February 2013 by Hon. P. E. Achieng, that this case starts *de novo*.**
4. **That this Honourable court be pleased to order that Section 200 of the Criminal Procedure Code (Cap. 75) be complied with.**

The application has grounds on the face of the Notice of Motion. The grounds are firstly that Section 200 of the Criminal Procedure Code was not complied with by the learned magistrate. Secondly, that the case before the subordinate court had proceeded to hearing substantially and had reached defence stage when the court, without according to the prosecution an opportunity to respond, ordered on 11/2/2013 that the matter starts de novo. Thirdly, that the matter had already been heard from the year 2010 and that crucial witnesses who had already testified at the trial had relocated and could not currently be traced.

The application was filed with a supporting affidavit sworn by Cynthia Akoth Opiyo a Prosecuting Counsel. In the affidavit, it was contended that the criminal case had initially been heard by Hon. Ooko, a Resident Magistrate. That the succeeding Magistrate, P. Achieng, thereafter on 11/2/13 ordered that the trial should start *de novo.* The affidavit annexes a copy of the record of the criminal proceedings, including the proceedings for the 11/2/13.

The application is opposed. A replying affidavit sworn by the respondent Wellington Lusiri was

filed. It was contended in the replying affidavit, that it was not true that the prosecution was not given a chance to respond to the request that the case starts de novo.

This is an application for review of the orders of the subordinate court which ordered that the criminal case herein starts de novo. The order made on 11/2/13 meant that all witnesses who had testified till then be recalled to testify afresh.

The record of the proceedings on the 11/2/13 in the subordinate court, is as follows -

> ***Before P. Achieng, Ag. PM.***
>
> ***Court prosecutor – C.I.P. Mursoy***
>
> ***Court clerk – Elias***
>
> ***Accused – present***
>
> ***Mr. Osango for Accused***
>
> ***Mr. Osango – This case proceeds before Hon. Ooko without even participation. Our client raise that the case starts de novo.***
>
> ***P. ACHIENG, Ag. PM***
>
> ***Court: Matter to start de novo.***
>
> ***Prosecution witnesses who have testified to be recalled. Hearing on 4/4/13.***
>
> ***P. ACHIENG, Ag. PM***

It is from the above orders of the trial court that the State has filed the present application, for review of the trial court's orders, and a request that Section 200 of the Criminal Procedure Code (Cap. 75) be complied with.

Section 200 (3) of the Criminal Procedure Code provides as follows -

> ***200 (3) – 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.***

The succeeding magistrate took over when the prosecution had closed its case and the accused had completed tendering his sworn defence, but was to call his defence witnesses.

From the record of the proceedings, the learned succeeding magistrate did not inform the accused person of his rights above and require him to respond. It is the advocate for the accused who asked for directions that the trial starts de novo. In my view, the obligation of the succeeding magistrate is to inform the accused of his rights in person, and it is the accused in person who should make the demand for a recall of witnesses. It is not right for the advocate for an accused to ask for a trial ***de novo***.

In my view, the right of an accused under section 200 of the Criminal Procedure Code is akin to the right of the accused to be informed of the charge and its substance, and be required to plead. The law is very clear that it is the accused who has to be informed of the right. In my view therefore, the learned magistrate erred in not informing the accused of his rights. It was also wrong for the magistrate to have ordered a retrial on the request of the advocate for the accused. The court had an obligation and a duty to comply with mandatory provisions of the law. The court did not do so. There is therefore a justification

for review of the learned magistrates orders, as they were clearly illegal – see **Section 362** of the **Criminal Procedure Code (Cap. 75).**

It is not in dispute that the trial had commenced in 2010. It is also not in dispute that Mr. Ooko, RM was transferred after all the prosecution witnesses had testified and the accused had tendered his defence on 20/12/2011. The accused had however indicated that he would call three defence witnesses. He was given time to look for those witnesses. Thereafter, the case was mentioned a number of times. Hon. Ooko conducted proceedings in this case for the last time on 2/3/2012, when he put the matter for hearing on 21/5/2012. Thereafter he was transferred. The accused's attendance in court was not regular and a warrant of arrest had to be issued against him on 21/5/12. After several mentions, the cash bail of the accused was forfeited on 23/7/12. In the meantime, the matter was mentioned before a number of magistrates. Subsequently, on 11/2/13, Mr. Osango who had now come on record for the accused in place of Mr. Imbenzi, requested that the hearing of the case starts ***de novo***, which request was granted by the learned magistrate. There is no record that the prosecutor present CIP Mursoy was asked to respond.

The above facts bring out a second reason why the learned magistrate erred in ordering the trial to start ***de novo***. This is because the major part of the delays in finalizing the case by Hon. Ooko was occasioned by the irregular attendance in court by the accused. This necessitated the issuance of a warrant of arrest against him and forfeiture of his cash bail. The accused could not delay the case, and then ask and be granted orders for it to start ***de novo***. That would be a travesty of justice. Secondly, the prosecutor should have been asked to respond for the magistrate to consider the defence and prosecution position, before making a decision.

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 order that a trial starts ***de novo*** under section 200 of the Criminal procedure Code, even if the accused demands 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 Wanjohi Irungu & 7 Others vs Republic – Nrb. HCCR. Rev. No. 6 of 2013,** the High Court emphasized that a fair trial under **Article 50** of the Constitution of Kenya 2010 connotes that a trial should commence and be concluded without reasonable delay. Starting a trial ***de novo*** in our present case obviously constitutes a delay in finalizing a case.

The present case, in my view, is one where the choice is on the accused, to either bring his defence witnesses and continue with the defence trial, or to close his case. Under the first option, the preferable approach will be for the magistrate who has heard the witnesses for the defence to write and deliver the court's judgment. However, if the accused chooses to close his case, then the succeeding magistrate will either write the judgment or request the magistrate who heard the case up to the defence of the accused to write the judgment for delivery. In my view, this is what the law envisages under **Section 200 (1) (a)** and **(b)** of the Criminal Procedure Code, in the particular facts of the present case.

Having reviewed the facts and circumstances of this case, I find that the application by the State has merits. It calls for this court's intervention under Section 362 of the Criminal Procedure Code.

I allow the application, set aside the orders given by the learned magistrate for a trial *de novo*. I instead order that the trial in the magistrate's court proceeds from where it had stopped, before a magistrate with jurisdiction other than P. Achieng, PM. In complying with **Section 200** of the Criminal Procedure Code, the said magistrate should take into account the two options stated above, depending on whether the accused will call his defence witnesses or close his case.

It is so ordered.

Dated and delivered at Kakamega this 8th day of May, 2014

George Dulu

JUDGE