



**Director of Public Prosecutions v Mwanzuga & 2 others (Criminal Case 83 of 2020) [2023] KEMC 270 (KLR) (21 August 2023) (Ruling)**

Neutral citation: [2023] KEMC 270 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
CRIMINAL CASE 83 OF 2020  
ZK KAGENYO, RM  
AUGUST 21, 2023**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC**

**AND**

**SALIM CHILUNGU MWANZUGA ..... 1<sup>ST</sup> ACCUSED**

**HAKIM SALIM ..... 2<sup>ND</sup> ACCUSED**

**CHRIS SALIM ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The three accused person are facing, jointly, an indictment of forcible detainer contrary to section 91 of the Penal Code.

The particulars are that on the 20<sup>th</sup> day of February 2020 at Kajiado area in Diani location in Kwale county within coast region, jointly being in possession of a piece of land namely Kwale/ Diani S.S/ 129 of Lydia Wambui Gitau without colour of right, held possession of the said land in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of a peace against Lydia Wambui Gitau who was entitled by law to the possession of the said land.

2. This matter proceeded for hearing before my former Head of Station Hon. J.M Omido, (SPM) who was transferred to Shanzu Law Courts in the capacity of the Head of Station effective 23<sup>rd</sup> January 2023.
3. Before his departure, Hon. Omido had taken the evidence of one witness, the complainant.
4. This matter was thereafter allocated to me by the Head of Station for adjudication and as is the legal requirement, the court informed the accused person of his rights under section 200 of the Criminal Procedure Code, hereinafter the CPC, and more particularly section 200 (3).



5. At this stage of the trial, the accused persons states that they have now appointed counsel one Mr. Mkhan.
6. Each of the three accused persons elected to have the matter start de novo a proposition that was vehemently opposed by the prosecution, the prosecution urging that the right under section 200 of the CPC is not an absolute right while the defence maintained that the right therein is an absolute right that goes to the root of fair trial and is reserved for the accused and his election thereof should be taken as is and in essence is binding to the court.
7. Section 200 of the Criminal Procedure Code provides thus,
  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 resubmit 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 resubmitted 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.
8. From the said section, the scenario before the court is the one under section 200 (3) of the CPC.
9. My reading of section 200 (3) of the CPC gives an inference that;
  - i. The accused has a right to apply before Court that any witness be resubmitted and reheard by the succeeding magistrate;
  - ii. The court presided by the succeeding magistrate has the obligation to inform the accused of this right;
  - iii. The right of recall is not absolute and can be denied;
10. Section 200 (4) of the CPC suggests that the right to re-summon any witness is not absolute and lays down the test to be satisfied as;
  - a. Whether the accused shall suffer material prejudice.
11. This court is therefore duty bound to determine whether disallowing the application by the accused person shall occasion him material prejudice.



12. From the onset, I associate myself with the pronouncement of the Court of Appeal in *Ndegwa -v- Republic* [1985] eKLR that,

No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.

13. In the *Ndegwa* case (*supra*), the Court started by stating that,

Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. Section 200 is not to be invoked where, as seemingly in the instant case, such a halfheard trial is a short one, it could be conveniently started *de novo* because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.

14. In this case, it was said that the witness had testified and recalling her would be resulting to delayed trial. Further, it was said that the witness is elderly and lives with a walking disability. The said witness testified on 2<sup>nd</sup> November 2021, 21 months ago, which is considerably a long time ago.
15. I have looked at the record and I find that the accused persons had an advocate previously who failed them by not attending court and it is true that this is the first time they are appointing one.
16. I have also seen that when PW 1 was testifying, the accused persons cross examined her as they were granted that opportunity.
17. For failure by the prosecution to have furnished the accused persons with some documents, the matter was adjourned on 8<sup>th</sup> March 2021 and after consolidation of the charges, the said witness testified a second time on 2<sup>nd</sup> November 2021 where all the three accused persons were present and cross examined her.
18. While appreciating that the role of an advocate in a criminal trial cannot be gainsaid and in fact it being a constitutional right, I am also called upon to look upon at the rights of the victims of a crime. The witness testified twice and was cross examined. It was not demonstrated how the accused persons shall suffer prejudice if she is not recalled.
19. Counsel for the accused said that recalling the witness is not an extension of a favour to the accused persons but is an opportunity and a right to give the court that is in conduct of the matter and the counsel coming on record in the matter an opportunity to look at the charges, appreciate the evidence brought by the prosecution and deal with the matter with much information so as the accused's right to fair trial is not infringed. My inference of counsel's proposition is that upon coming on record, the counsel shall analyze the file and forge the way in which to deal with the file. Does it therefore mean that the counsel is yet to apprise himself with the record in the file and hence his objection and application is made on perceived prejudice as opposed to actual prejudice? It is my view that by now, counsel ought to have studied the file and moved the court with the particularity deserving the recalling of the witness.



What if this court grants the application for recall and counsel finds that he even does not have any question to that witness? In that scenario, shall the law have protected the complainant?

20. It is for the foregoing that I find that it has not been demonstrated that any prejudice shall be suffered by the accused persons by not recalling the witness who has testified.
21. I find that this matter was registered in court on 21<sup>st</sup> February 2020 and even though the witness listed on the face of the charge sheet are just two, 1277 days later, the file is still mark-timing within the system. This matter shall be prioritized and shall get an early hearing date with an aim to have it concluded before December 2023.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 21<sup>ST</sup> DAY OF AUGUST 2023.**

**KIONGO KAGENYO**

**RESIDENT MAGISTRATE**

In the presence of:

Mr. Archibald Kimbada - Court Assistant.

Ms. Mwaura, Principal Prosecution Counsel, for the State

Salim Chilungu Mwanzuga, 1<sup>st</sup> Accused

Hakim Salim, 2<sup>nd</sup> Accused

Chris Salim, 3<sup>rd</sup> Accused

