



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 36 OF 2018

REPUBLIC

PROSECUTION

VERSUS

FELIX AKUMONYO

ACCUSED

RULING

1. The Accused is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.
2. The Accused denied the charges and the matter before J. N. Njagi and Justice P. J. O. Otieno. On 7th November 2023, the court found that the prosecution had established a prima facie case and placed him on his defence.

3. The defence failed to be heard on several dates, partly due to the trial Judge's transfer, and later, due to the absence of the Accused.
4. On 27th November 2024, the Accused attended court and tendered an explanation for his previous failure to attend court whereby he was excused and a date for defence hearing fixed.
5. On 27th January 2025, the court inadvertently failed to take directions pursuant to Section 200 of the Criminal Procedure Code and since the Accused person's Advocate were ready to proceed, the Accused tendered his defence and closed this case after which the parties were given 45 days to exchange written submissions. The matter was fixed for judgement on 16th September 2025.
6. When I retired to write the judgement, I noted the anomaly in the proceedings and on 16th September 2025, I informed the Accused's Advocate of the failure to take directions. The Accused, through his Advocate then applied that the court declares a mistrial on the ground that his rights under Article 50 of the Constitution had

been irretrievably prejudiced leaving the court with no option but to acquit the Accused.

7. Ms. Chala for the State submitted that at all material times, the Accused was ably represented by Counsel who is conversant with the law. She urged that the omission lay with the court as well as both parties and since the court had arrested the error before delivering its judgement, then there was no prejudice. She urged that the Accused informs the court of the kind of prejudice he had suffered and contended that the application of the law should be practical and not technical. She asserted that the Accused had not informed the court whether they had the intention of recalling any of the prosecution witness. She submitted that should the court find that Section 200 must be complied with, the court should re-open the defence case and not start *de novo*.
8. In rejoinder, Mr. Nyiva for the Accused submitted that a clear reading of Section 200 as quoted does not bestow the omission on the defence Counsel. He argued that the said law as set is mandatory and that mistrial is a defence tactic and the omission is incurable as there are clear

provisions as to how to remedy the omission as earlier submitted.

9. Section 200 of the Criminal Procedure Code provides that:-

(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.”

10. Section 200 of the Criminal Procedure Code is one of the bedrocks of fair trial as guaranteed under Article 50 (1) (g) of the Constitution of Kenya. It ensures that an Accused

person is not prejudiced where the Judicial Officer presiding over his trial is changed in the course of the trial. The underlying principle behind Section 200 is that an accused person's case should as much as is possible be decided by the Judicial Officer who heard the case to its conclusion.

11. The main factor that gave rise to the need for Section 200 is founded on the understanding that a Judicial Officer has the opportunity to hear and observe witnesses in the course of the trial and from their demeanour and tone. The demeanour and tone of witnesses is a critical factor in evaluating evidence and determining the credibility of the witnesses. Further, there is also the need to ensure procedural integrity of the trial by forestalling prejudice to the accused in the event of procedural errors or an incomplete record of the previous trial court's proceedings.
12. Under Section 200 as read with Section 201 (2) of the Criminal Procedure Code another Judge can take over a trial before a case is concluded, subject to compliance with Section 200. Section 200 provides the accused

person with the option to elect whether he would want the court to proceed from where it had reached before the previous Judicial Officer or for the case to start *de novo*. In the event the accused opts to proceed, he has a right to recall any witness he deems necessary. The omission in this case denied the Accused the opportunity to make an election as the realization that the mandatory provisions of the law had not be complied with came after the close of the defence case.

13. I hasten to add that the Section 200 (3) gives the trial Judge the discretion to choose how the matter should proceed. Generally, the accused person is allowed to recall witnesses. Rarely does the court make an order that the trial starts *de novo* due to the challenges of re-assembling witnesses for a fresh hearing. Hence, the Accused must make a compelling case to persuade the court to order that the matter be heard *de novo*. In **Director of Public Prosecution v. Peter Odongo & 2 others [2015] KEHC 91 (KLR)**, the court held:-

“Section 200 (3) of C.P.C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.”

14. In the case of **Joseph Kamau Gichuki v. Republic [2013] KECA 448 (KLR)**, the Court of Appeal held as follows:-

“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.”

15. Similarly in **Abdi Adan Mohammed v. Republic [2017] KECA 517 (KLR)**, the Court of Appeal rendered itself thus:-

“As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-

"It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even

though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion."

16. Notwithstanding the fact that the Accused did not demonstrate how he has been prejudiced with this court's failure to comply with Section 200, the court must be guided by the law that entrenches the accused's right to a fair trial which entails, inter alia, compliance with Section 200.

17. The Supreme Court in **Hussein Khalid & 16 others v. The Attorney General & 2 others [2020] KESC 30 (KLR)** discussed at length the requirement for compliance with Section 200 and stated that:-

"19. Under the de novo principle, once a judicial officer trying a matter ceases to exercise jurisdiction over a matter during pendency of trial, through transfer or other circumstances, his successor in jurisdiction gives the parties right to

elect how to proceed. Either to proceed from where the hearing had reached or start de novo.

20.A Judicial officer who hears the case is the one preferred to decide on it, unless parties elect otherwise, so that the accused is not prejudiced by having a successor in jurisdiction, who never had the opportunity to appreciate the evidence of witnesses by observing their demeanor, credibility, emotions and the like, deciding based on record, where such aspects of evidence may not be recorded in a detailed manner as required under section 199 CPC. See Indian Supreme Court case of Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal, (2011) 9 SCC 638. In this case, de novo hearing was viewed as one of the cardinal principles of Criminal trials guarding the rights of an accused person so that his case should be decided by the judicial officer who heard it.”

18. Where there is a fundamental procedural flaw in criminal proceedings, the court can order a re-trial or acquit the Accused. This was the position that the court held in

Fatehali Manji v. Republic [1966] E.A. 343 quoted by the Court of Appeal in **Mutabiri Mitika Koome v. Republic [2016] KECA 462 (KLR)** where the court stated:-

10. The principles that apply in considering whether a retrial should be ordered are now old hat. We take it from Fatehali Manji v. Republic (1966) E.A 343:

“In general a retrial will be ordered when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for

retrial should only be where the interests of justice require it”.

11. There is no denying that the trial before the High Court took many years to conclude and the appellant has been in custody for a considerable time. That would favour the release of the appellant without trial. But human life was lost in this matter and a balance has to be struck between according the family of the deceased some measure of restitution for a heinous crime which led to the loss of their loved one and extending the benefit of doubt to the appellant. The error was committed by the court and not the prosecution. The witnesses come from the same village and are available. We are persuaded by the justice of giving the appellant the opportunity to vindicate himself in a retrial even as the victim’s family gets a lawful closure to this incident.”

19. In Samuel Teddy Gitau v. Republic [2022) KECA 33 (KLR), the court had this to say:-

“15. Having held that the trial of the appellant was a nullity for want of compliance with the statutory provisions, we do not see the need to deal with the other issues framed for determination. What then? Should the appellant then be allowed to walk Scot free because of the omission by the trial court? We think not, more so when he was suspected to have committed a heinous crime. A retrial is an option. An appellate court may order for a retrial where it is of the opinion that on the consideration of the admissible or potentially admissible evidence a conviction might result, where the interest of justice requires it and should not be ordered when it is likely to cause an injustice to the person, when the original trial was illegal and defective, time that has lapsed and possibility of securing witnesses. See *Mwangi Vs. Republic [1983] KLR, 522, Lelimo Ekman Vs. Republic [2005] eKLR* and *Abdi Adan Mohamed Vs. Republic [2007] eKLR*.

16. The appellant is alleged or suspected to have committed a horrendous offence, murder of his

wife. The interest of justice will be best served by an order of retrial in the circumstances, the evidence on record that we have perused if re-tendered is most likely to return a conviction. The witnesses, we think are readily available as most of them were relatives of the deceased. We have also considered the fact that the appellant was convicted and sentenced on 16th November 2015, which is not such a long period of time as to make a retrial of the appellant prejudicial.

20. Having said that, the court finds itself in a situation where there was failure to comply with the mandatory statutory requirement of Section 200. However, Judgement is yet to be delivered. Due to the procedural defect, the court has no option but to declare a mistrial.
21. The upshot is that I do order that this matter do go for a retrial before Honourable Justice Mbungi.

Dated, signed, and delivered at Kakamega, this 17th day of November 2025.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Chala for the State

Ms. Arwanda for the Accused

Court Assistant: Polycap

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