



REPUBLIC OF KENYA



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**Olow v Director of Public Prosecutions & 2 others (Criminal Application
E009 of 2021) [2022] KECA 603 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 603 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E009 OF 2021
HM OKWENGU & F SICHALE, JJA
MAY 27, 2022**

BETWEEN

MUKTAR SAMAN OLOW APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

PIUS NGUGI 2ND RESPONDENT

CHIEF MAGISTRATES COURT KIAMBU 3RD RESPONDENT

(An Application for stay pending the hearing and determination of an intended appeal from the Ruling and Orders of the High Court of Kenya at Kiambu (Kasango, J) dated 11th February 2021 in Misc Criminal Revision Case No. 308 of 2020)

RULING

1. Muktar Saman Olow (the applicant herein), has by motion dated 15th March 2021, brought pursuant to the provisions of Sections 3A & 3B of the [Appellate Jurisdiction Act](#), CAP 9 of the Laws of Kenya and Rules 5 (2) (a) and 42 of the [Court of Appeal Rules](#), 2010 and any other enabling provisions of the Law sought an order staying the Ruling and Orders of the Superior Court issued on 11th February 2021, by Kasango J, in High Court Misc. Criminal Revision Case No. 308 of 2020, pending the hearing and final determination of an intended appeal.
2. The applicant further seeks stay of any further proceedings in Criminal Case No. 1170 of 2016; Republic v Muktar Saman Olow, pending the hearing and final determination of an intended appeal.
3. The motion is supported by grounds on the face of the motion and an affidavit sworn by the applicant and his counsel who deposed inter alia that the High Court had delivered a ruling on 11th February 2021, allowing the 1st respondent's application dated 12th June 2020, thus effectively overturning the Ruling of Hon S. Atambo, the then Senior Principal Magistrate, Kiambu Law Courts who had ordered



- the matter to *start de novo* and that the lower court matter had been set down for defence hearing on 5th and 6th May 2021 and he was apprehensive that if a stay of proceedings was not granted, the trial would not proceed de novo to his detriment.
4. He further deposed that the High Court failed to take into consideration the clear provisions of Section 200 of the *Criminal Procedure Code* and Article 50 of the *Constitution*, guaranteeing fair hearing and that further he had an arguable appeal and that in the event the orders sought were not issued, the intended appeal would be rendered nugatory.
 5. The brief facts in this matter are as follows: the applicant herein had been charged with various offences before the Kiambu Chief Magistrate’s Court in Criminal Case No. 1170 of 2016. The trial for those offences commenced before Hon. Khaemba (as he then was) up to sometimes the year 2018. Subsequently thereafter, Hon Khaemba resigned from the Judiciary and the case was allocated to Hon S. Atambo, to proceed with the same. On 10th December 2016, the applicant made an application before Hon. Atambo to have the matter start de novo. Vide a ruling delivered on 12th June 2020, Hon. Atambo directed the matter to start de novo. Being aggrieved with the aforesaid ruling, the 1st respondent moved the High Court vide a notice of motion application dated 12th June 2020, seeking inter alia revision of the order requiring the matter to *start de novo*. On 11th February 2021, Kasango, J allowed the said application and set aside the orders of Hon. Atambo directing the matter to start de novo in effect holding that the case proceed from where it had reached and thus provoking the instant application that is now before us.
 6. The motion was opposed by the 2nd respondent vide Grounds of Opposition dated 31st March 2021 and a replying affidavit dated 5th April 2021 sworn by the 2nd respondent who deposed inter alia that before this Court can issue stay orders, the applicant is required to show that he had an arguable appeal which would be reduced into an academic exercise if the order of stay is not granted and that in the present case, the applicant had not met this test. Further, that the applicant had been to various Courts including this Court, in a bid to stop his prosecution and that this Court faced with a similar application like the one that is now presently before us, had dismissed the same on 18th July 2018, which information the applicant had concealed from this Court.
 7. On 7th February 2022, the motion came before us for hearing “via GoToMeeting video link” on account of the Covid 19 protocols. Mr. Amanya Learned Counsel appeared for the applicant whereas Mr. Solomon Njeru appeared for the 1st respondent. Mr. Kiragu Kimani SC appeared together with Mr. Eddy Owiti for the 2nd respondent.
 8. It was submitted for the applicant that he had made out a case for stay of proceedings and that should the Court proceed with the defence hearing, and later this Court finds that the Court erred in law in reaching its findings, it would destroy the substratum of the appeal; that the balance of convenience tilts in favour of the applicant as was determined by the first trial court when it directed the matter to *start de novo*; that the order of the learned judge to proceed with the defence hearing was equivalent to an order directing the trial court to convict the applicant as the impugned proceedings are still on record yet they do not reflect what transpired during the trial.
 9. It was further submitted that the appeal raises hefty issues that revolves around the import of Section 200 of the *Criminal Procedure Code* in so far as the non derogable right to a fair trial is concerned in the criminal justice system and that further unavailability of witnesses was one of the reasons that the High Court ordered the trial to proceed from where it had ended on 25th September 2018, which reasoning was flawed given the applicant had provided cogent overwhelming evidence on the availability of witnesses.



10. On the other hand, it was submitted for the 1st respondent that the reason given by the magistrate for ordering that the trial do begin de novo was that the proceedings did not reflect the actual evidence adduced during trial and that it was not clear how this magistrate who was not the one who took the evidence determined that the record was not correct. Further, that the applicant had not raised any issue regarding the accuracy of the proceedings which he had in his possession at the time of submission of no case to answer.
11. It was further submitted that the trial magistrate did not consider that under Section 200 of the *Criminal Procedure Code*, the applicant's concerns would have been addressed by permitting him to re-summon specific witnesses whose evidence was allegedly inaccurately recorded by the preceding magistrate and that it cannot be that the entire record was wrong and that in the circumstances, the magistrate's decision was flouted with impropriety and irregularity.
12. Regarding the availability of witnesses, it was submitted that the trial was long and protracted; that the State had called a total of 21 witnesses and that the allegation by the applicant that witnesses were available was a fallacy as he only identified 3 witnesses. We were further urged to find that even if the applicant was to give his defence and still be convicted, he would have a right of appeal in which he can address the issues he is raising herein or in any other matter that may arise.
13. Consequently, we were urged to find that the application lacks merit and ought to be dismissed.
14. On the other hand, it was submitted for the 2nd respondent that the applicant's appeal was not arguable for the reasons inter alia that it was not sustainable to start trials afresh every time a magistrate is not available to conclude it since judicial time is a scarce resource and that in the instant case, the offence was committed in September 2011, a period of more than 10 years and that the memory of witnesses do fade, a factor which needs to be considered before ordering a de novo trial even where the witnesses who have testified were available, (which was not the case here).
15. It was further submitted that the allegation by the applicant that the proceedings were inaccurate was without merit as the applicant had never given specifics on what was inaccurate despite the fact that he had always been represented by the same firm of advocates; that the applicant did not seek to recall a specific witness or witnesses as he is entitled to under Section 200 (3) of the *Criminal Procedure Code*; that the applicant wants the entire trial to start afresh without justifiable reasons; that the applicant would have his day in court and that there was no basis for allowing the application. Consequently, we were urged to dismiss the applicant's application with costs.
16. We have anxiously and carefully considered the motion, the grounds thereof, the supporting affidavit, the 2nd respondent's Grounds of Opposition and replying affidavit, the rival written submissions, the oral highlights made by the parties before us on 7th February 2022, the authorities cited and the law.
17. The applicant herein seeks stay of any further proceedings in Criminal Case No. 1170 of 2016; Republic v Muktar Saman Olow, pending the hearing and determination of an intended appeal. The gist of the applicant's motion is that the High Court had on 11th February 2021, made a ruling allowing the 1st respondent's application dated 12th June 2020, which ruling effectively dismissed the lower court's ruling by Hon. Atambo which allowed Kiambu Criminal Case No.1170 of 2016, Republic v Muktar Saman Olow, to start de novo. It was the applicant's contention that he was aggrieved with the aforesaid ruling as the High Court failed to take into consideration the clear provision of Section 200 of the *Criminal Procedure Code* and Article 50 of the *Constitution* guaranteeing fair hearing.
18. It is indeed not in dispute that vide a ruling dated 12th June 2020, Hon. S Atambo (the trial court) allowed the applicant's application for Criminal Case No. 1170 of 2016; Republic v Muktar Saman



Olow to *start de novo*, on the ground that the proceedings did not reflect the actual and true reflection of what had transpired in court.

19. The 1st and 2nd respondents on the other hand had opposed the application on the grounds that the trial had been protracted and that 21 witnesses had already testified and that a majority of them were now not available. Being aggrieved by the aforesaid Ruling, the 1st respondent filed a motion dated 12th June 2020, seeking review/revision of the aforesaid orders by Hon. S. Atambo which application was allowed by Kasango, J on 11th February 2021.
20. In a well-reasoned Ruling as we shall proceed to demonstrate shortly, Kasango, J rendered herself *inter alia* as follows;

“ 37. the take from that case which the learned trial magistrate should have taken notice of before ordering *de novo* hearing is whether it was impossible to recall prosecution witnesses for the *de novo* hearing, that is whether such witnesses can be traced; there was need to consider how far the trial had reached; there also was need to consider the possibility of loss of memory by witnesses; and the learned magistrate needed to consider what prejudice would be suffered by all the parties. Had the learned trial magistrate considered the case of Abdi Adan Mohamed (*supra*), she would have noted the Court of Appeal cited with approval the holding in the case of Nyabutu & Another v R (2009) KLR 409 where the court stated that Section 200 of the Criminal Procedure Code was to be used “very sparingly and only in cases where the exigencies of the circumstance, not only are likely but will defeat the ends of justice.”

.....

39. by that Ruling the learned trial magistrate although alluding to submissions by DPP and Pius, that there was difficulty in availing the witnesses for a *de novo* hearing, and further alluded to DPP’s submission that to order *de novo* hearing, after the previous trial magistrate put Muktar to his defence, would be tantamount to setting aside that Ruling; however, the learned trial magistrate failed to analyze those submissions. This is evident from the trial magistrate’s Ruling. The learned trial magistrate after reproducing Section 200 of the Criminal Procedure Code Act concluded her ruling thus;

Having considered the pleadings, proceedings, submissions and authorities relied by the advocates, and the status of the case. The court having been informed that the proceedings does not reflect the actual submission and evidence adduced during the trial, such would be against the spirit of Article 50 (4) of the Constitution,

“evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

The application is hereby allowed that the case to start *de novo* and the case to be heard on priority basis.”

40. The learned trial magistrate failed to state in her ruling how her consideration of the pleadings, proceedings and submissions and authorities reflected the facts of the case. By the time the learned



magistrate took over the trial, twenty-one prosecution witnesses had testified. Out of those witnesses the learned trial magistrate was informed by the I.O, through his affidavit, that nine of those witnesses were unavailable with at least two, probably three, being out of the jurisdiction of court, that is out of Kenya. Therein lay prejudice to the prosecution's case. The consideration of that prejudice is absent from the Ruling of the trial magistrate ordering the trial to start de novo.

41. But perhaps the one thing that uppermost shows incorrectness and lack of propriety of the Ruling is the fact that the previous trial magistrate had placed Mukatar on his defence. Was the trial magistrate going to set aside or review that finding? Wouldn't that be tantamount to the trial magistrate sitting in appeal against her colleague magistrate? These questions should have exercised the mind of the trial magistrate and the learned magistrate needed to resolve those questions in her ruling. That is one consideration she needed to have, as held by the Court of Appeal in the case *Abdi Adan Mohamed* (supra) that; "how far the case has gone." (Emphasis added).

21. At page 24 of her Ruling, the learned judge further went on to say;

"In making the order for de novo hearing the Learned magistrate failed to take note that Muktar was first charged with the same offences in the year 2011. Those charges were withdrawn by DPP. He was again arraigned for the same offences in the year 2016 and that is the trial that proceeded before Khaemba up to September 2018 when Muktar was put on his defence. The matters therefore for which Muktar was tried occurred before the year 2011. The passage of time from when the offences was alleged to have been committed to the time Muktar sought de novo hearing was material to be considered before an order for de novo hearing was made." (Emphasis ours)

22. This Court has in a plethora of authorities, had the occasion to consider the provisions of Section 200 of the *Criminal Procedure Code* and the extent and/or scope of its application.

23. In *Abdi Adan Mohamed v Republic* [2017] eKLR, for example, this Court (differently constituted) while considering the provisions of Section 200 of the *Criminal Procedure Code* rendered itself thus;

"It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, 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. See *Joseph Kamau Gichuki v. R. CR. Appeal No. 523 of 2010*, cited in *Nyabutu & Another v. R.* (2009) KLR 409, where the Court stressed that:

"By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge 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. See *Ndegwa v. R.* (1985) KLR 535. In this case the trial judge



passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded.” (Emphasis ours).

24. Again the Court went on to state:

“As we conclude we think this appeal demonstrates quite clearly how Section 200 has been applied mechanically in disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate, for example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates. We do not understand why Hon. T. Nzioki who had heard virtually all the witnesses, except one could not return to complete the trial. Starting one hearing afresh three times can cause witness fatigue and apathy. Trial courts ought to comply with the guidance given in the case of *Ndegwa v. R* [supra] that Section 200 should be used sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered.” (Emphasis ours).

25. Again in *Joseph Kamau Gichuki vs Republic*, Criminal appeal No. 523 of 2010, this Court pronounced itself thus on the application of Section 200 of the *Criminal Procedure Code*;

“This Court had 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 consideration 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 commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.” (Emphasis ours).

26. Similarly, in the case of *Joseph Kamara Maro V Republic* (2014) eKLR this Court further 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.” (Emphasis ours).

27. From the decisions of this Court which we have quoted above, the common thread that is emerging is that the provisions of Section 200 of the *Criminal Procedure Code* should be used very sparingly and only in cases where exigencies of the circumstances demand. Of course, each case will depend on its own circumstances. We reiterate that some of the considerations that the courts should take into account before ordering a matter to start de novo pursuant to Section 200 of the *Criminal Procedure Code* includes how far the trial has reached, the availability of witnesses who had already testified, the 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 party.
28. In the instant case, there was ample evidence that the applicant’s trial had been very protracted and the State had called 21 witnesses to support its case and more so the applicant had already been placed on his defence. Similarly, there was uncontroverted evidence on oath vide an affidavit sworn by Chief Inspector Humphrey Kaimenyi on 9th August 2019, that a majority of the prosecutions witnesses were unavailable with some of them having relocated abroad. On the other hand, the contention by the applicant that the prosecution witnesses were available was without basis and was not supported by any evidence.
29. Regarding possible loss of memory, it is indeed not in dispute that the offences that the applicant was charged occurred way back before 2011, subsequent to which the proceedings were later withdrawn at his behest and reinstated back in the year 2016. This is a period of over 10 years from the date when the offences were allegedly committed which is certainly a long period of time and the issue of memory loss, fatigue and apathy cannot be ruled out.
30. It is also not lost on this court that the applicant had unsuccessfully filed several suits both in the High Court and in this Court in a bid to stop his criminal trial which includes; Nairobi High Court Petition No. 277 of 2011, Nairobi Misc. Application No. 397 of 2016 and Court of Appeal Civil Application No. Nai 250A of 2017.
31. Given the law as stated above and the circumstances before us, we are of the persuasion that the applicant has not been able to demonstrate that he has an arguable appeal. However, we do not want to make definite findings lest we embarrass the court that will be seized of the appeal.
32. On the second limb of the appeal being rendered nugatory, the submission by the applicant that the order of the learned judge to proceed with the defence hearing is equivalent to an order directing the trial court to convict the applicant is without basis as the applicant will ultimately have his day in Court and have the chance to tender his defence and appeal if need be pursuant to Article 50 (2) (c) and (q) of the *Constitution*. In any event the mere fact that the applicant has been arraigned in a criminal process does not necessarily mean his rights to a fair hearing pursuant to Article 50 of the *Constitution* shall be infringed in absence of evidence to the contrary. As was stated by this Court (differently constituted) in the case of *Goddy Mwakio & Another v Republic* [2011] eKLR:

“an order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances (see Halsbury’s Laws of England,



4th Edition Re-issue page 290 paragraph 926). The order is not given as a matter of course.”

33. The applicant’s case before us is certainly not one of those cases for the reasons we have already stated. In view of the above, we think we have said enough as to why the applicant’s motion must suffer only one fate; dismissal.
34. Accordingly, the applicant’s motion dated 15th March 2021 is without merit and the same is hereby dismissed in its entirety with costs to the 2nd respondent.

It is so ordered.

This Ruling has been delivered under Rule 32(2) of this Court’s Rules, Kantai, JA having declined to sign.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2022.

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HANNAH OKWENGU

JUDGE OF APPEAL

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F. SICHALE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

