



REPUBLIC OF KENYA



**Karundito v Republic (Criminal Case E011 of 2023)
[2025] KEHC 1046 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL CASE E011 OF 2023
RM MWONGO, J
FEBRUARY 25, 2025**

BETWEEN

DAVID NJIRU KARUNDITO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

The application

1. The applicant is charged with murder contrary to section 203 as read with 204 of the *Penal Code*. The particulars of the offence are as stated in the information dated 15th May 2023.
2. The hearing commenced on 16/10/2023 and five witnesses were heard, before the Judge hearing the matter was transferred in December, 2024.
3. Now before me, the applicant has pursuant to Section 200 of the CPC, sought to have the matter start de novo to accord the court, as currently constituted, a chance to appreciate the clarity and demeanor of the witnesses who had already testified. It was his argument that the witnesses who had already testified all work with the county government, whose offices are within the vicinity of the court. That it they would be readily available to testify again.
4. The application is opposed by the respondent, noting that the applicant has the right have the matter start de novo under section 200 of the *Criminal Procedure Code*. It stated that some of the witnesses are not readily available to testify afresh and it will result in witness fatigue. It urged the court to let the proceedings continue from where they had reached with the previous Judge.

Issues for Consideration

5. The key issue for determination is whether the hearing should start de novo in light of section 200 of the *Criminal Procedure Code*.



Analysis and Determination

6. Section 200(3) of the [Criminal Procedure Code](#) provides:

“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.” (Emphasis added)

7. Clearly, Section 200(3) CPC merely obliges the succeeding trial court to notify the accused of the right to re-summon and re-hear any witness who has already testified. The provision gives no express right to an accused to start proceedings de-novo.

8. The court in the case of *Abdi Aden Mohammed v Republic* [2017] eKLR discussed the application of Section 200 of the [Criminal Procedure Code](#) as follows:

“Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or all together recommence the trial. In that case, 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 re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demenour and credibility of the particular witness or witnesses and to weigh their evidence accordingly..... 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 are likely but will defeat the end of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor. 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.” (See also the case of *Ndegwa v Republic* (1985) KLR 535) (Emphasis added)

9. On the other hand, Section 200 (4) CPC brings to the fore the importance of having a trial conducted from commencement to conclusion by the same magistrate or Judge. The section provides:

“(4) where an accused person is convicted upon evidence that was not wholly recorded by the convicting Magistrate, the High Court may if is of the opinion that the accused person was materially prejudiced, thereby set aside the conviction and order a new trial” (Emphasis added)

10. It is clear that in all circumstances, for a recall or rehearing, there should be a demonstration that the accused person will be materially or substantially prejudiced. That issue is for the discretion of the Court.

11. Overall, Section 200 of the [Criminal Procedure Code](#) leaves the issue of whether to recommence a case to the discretion of the court. This discretion is applied while considering an array of factors, including;

1. Availability of the witnesses who had already testified;



2. The amount of time that has passed since the witnesses testified the application for recommencement; and
 3. Whether an injustice will be occasioned if the application is denied;
12. In this case, the record shows that the 5 witnesses who have already testified are readily available and can be traced. The respondent opposed the application citing witness fatigue and that the 5 testimonies recorded by the previous judge form almost half of the evidence. That is to say that the proceedings had advanced significantly.
 13. From a perusal of the proceedings, the 5 witnesses who have testified are neighbors and relatives of the accused and deceased. The 1st witness testified on 16th October 2023. The previous judge notified the parties of her scheduled transfer on 22nd October 2024, 2 years after the first witness had testified. By the time this court carries on with the hearing, the initial witnesses will have testified more than 2 years before the present hearings, a relatively long time.
 14. Of the five witnesses who have testified, only two witnesses: PW4 and PW5 were allegedly eye witnesses.

Conclusion and Determination

15. In my view, If the hearing of the matter continues from where it was left off, no injustice will be occasioned upon the applicant. However, I am prepared to allow, at the election of the defence, that the eye witnesses be recalled for further testimony or clarification and cross examination.
16. On the foregoing basis, the matter will continue from where the proceedings had reached. The proceedings shall be typed and availed to counsel. The hearing shall proceed thereafter.
17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 25TH DAY OF FEBRUARY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Ms. Nzekele for accused
2. Accused Absent
3. Mr. Karuri for state
4. Francis Munyao - Court Assistant

