REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIM. APPLICATION NO. E003 OF 2020

1. MGANDI KALINGA

2. JOHN DOGO

3. ATHUMAN MALAU

4. KOMBO MOHAMMED

5. MAKANZU KAZUNGU

6. BIMBA KAZUNGU

7. ALI RASHID.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Marende Necheza Advocates for the Appellants

Mr. Mwangi for the State

R U L I N G

This is a notice of motion by the intended appellants seeking leave of the Court to file an appeal out of time against the ruling of the Court dated 26.4.2019. In support of the notice of motion as reflective of the record is a representative affidavit sworn by one **Mr. Kalinga**. The grounds relied on to support the application are as follows:

(i). That the applicants were charged with robbery with violence contrary to Section 296 (2) of the Penal Code Cap 75, malicious damage to property contrary to Section 339 (1) of the Penal Code Cap 75 and committing an indecent act with an adult contrary to Section 11 (A) of the Sexual Offences Act No. 3 of 2006.

(ii). That the matter proceeded for hearing before Hon. N. S. Lutta, where all the prosecution witnesses testified.

(iii). That the presiding Magistrate was later transferred thus prompting an application that the matter starts de novo before Hon. D. M. Ndungi.

(iv). That the said application was opposed by the prosecution and a ruling was delivered on behalf of Hon. D. M. Ndungi and by Hon. S. K. Ngii.

(v). That Hon. S. K. Ngii took over the case from Hon. D. M. Ndungi and he adopted the ruling he had delivered on behalf of Hon. D. M. Ndungi.

(vi). That Hon. S. K. Ngii did not comply with Section 200 of the Criminal Procedure Code Cap 75 by informing the applicant of their statutory right.

(vii). That the applicant being dissatisfied with the ruling seeks to lodge an appeal out of time.

(viii). That due to the nature of the offence we are facing it is prudent that the succeeding Magistrate is able to assess personally and independently the demeanor of the witness.

(ix). That the appeal has high chances of success.

(x). That it is in the interest of justice that the applicants be allowed to file the appeal out of time to enable them get to a fair hearing.

(xi). That it is in the best interest of justice that the orders be granted as prayed.

Determination

It is trite that the Court enjoys unfettered discretionary power to grant an extension of time to a party but that discretion is exercisable if sufficient material is presented before that very Court to enable it to judiciously exercise its discretion for the interest of justice. The guiding principles on the relevant factors so to speak are entrenched in a number of case Law. I borrow a leaf on this issue from the realm of Civil Law. The Court in **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} eKLR** held as follows:

"(a). Extension of time is not a right of a party, it is an equitable remedy that is only available to a deserving party at the discretion of the Court.

(b). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.

(c). Whether the Court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(d). Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court.

(e). Whether there would be any prejudice suffered by the respondent if the extension was granted ….."

In **Paul Wanjohi Mathenge {2013} eKLR and Leo Sila Mutiso v Rose Hellen Wangare Mwangi CA No. 255 of 1997**, the Courts held that:

"in exercising discretion the Court has to consider:

(a). The length of the delay.

(b). The reasons for the delay.

(c). The chances of the appeal succeeding if the application is granted.

(d). Finally, the degree of prejudice to other parties if time is extended."

Applying the above principles to the facts of this case, the length of the delay is very important. The record shows that the impugned ruling was delivered on 26.4.2019 the application to extend time by the applicant was lodged in Court on 7.10.2020. It is important to remember that the applicant's time began to run immediately the decision was arrived at by the Learned trial Magistrate on 26.4.2019. In calculating the length of delay in making the application for an extension of time its is my view that it was inordinate in the circumstances of the case. In adherence with the Law, the applicant in terms of Section 349 of the Criminal Procedure Code had them at disposal a period of fourteen (14) days to lodge an appeal. The application to challenge the ruling was filed far outside the statutory period of fourteen (14) days.

Imperatively, in **Arawak Wood Working Establishment Ltd v Jamaica Development Bank Ltd {2010}** the Court laid down the following principles:

"That requirements laid down by the rules are not mere targets to be attempted but they are rules to be observed. In achieving the overriding objective litigants are entitled to have their cases resolved with reasonable expedition, otherwise such delay as has been shown to have taken place in the instant case will indeed cause prejudice to the other party in the litigation."

In the instant case, the ruling of the trial Magistrate highlighted the importance of Section 200 of the Criminal Procedure Code and the purpose it was intended to serve in the administration of criminal justice. It follows therefore when considering the application of Section 200 (3) of the Criminal Procedure Code by the design of the general provisions, the trial Court is obligated to inform accused persons' existence of a right to have any witnesses recalled in an adjudication involving take-over of proceedings by another session Magistrate. The binding nature of the provision is to explain that right to the accused persons to recall any of the witnesses for the state who have already testified either to clarify matters in cross-examination or to give evidence. In making a determination and applicability of Section 200 of the Criminal Procedure Code. The Court in **Ndegwa v R {1985} KLR at 534** stated:

"Section 200 of the Criminal Procedure Code is a provision of the Law which is to be used sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a successful Magistrate does not or is not allowed to adopt and continue a criminal trial started by a predecessor or owning to the latter becoming unavailable to complete the trial."

In my view, the scope and application of Section 200 of the Criminal Procedure Code should be considered alongside the Constitutional right to a trial within a reasonable time under Article 50 (2) (e) of the Constitution. Before plunging into the broader interpretation of Section 200 of the Criminal Procedure Code it seems opportune for the Court to elaborate issues at stake in the event accused persons elect to have the witnesses recalled for cross-examination. In this respect, it ought to be remembered Article 50 (2) (e) of the Constitution is a living right to be interpreted in the light of the present day conditions. The trial Court therefore faced with the provisions under Section 200 of the Criminal Procedure Code has to adopt a dynamic or evidence approach to fair trial rights under Article 50 of the Constitution before endorsing a claim of recalling witnesses pursuant to Section 200 (3) of the Code. Whilst the notion of recalling witnesses or starting the trial denovo may look attractive to the accused persons, the margin of appreciation goes hand in hand, in this respect. The role of the Court on the finality of Court proceedings as a neutral arbiter is also part of the decisive factors not interfere with the order. I am with the principles of a fair, just and expeditious resolution of disputes in this respect. Central to the issue on extension of time, is whether the Senior Resident Magistrate exercised his discretion under Section 200 of the Criminal Procedure Code judiciously or with caprice"

As a threshold matter under Article 50 (1) of the Constitution, a session Magistrate has unfettered discretion to umpire proceedings that guarantees rights to a fair trial in the corpus of Article 50 of the Constitution. When a decision is taken to recall witnesses or commence the trial denovo even, though the accused desires so, in light of the letter and spirit of Article 50 on fair trial rights such a step should be considered, in particular circumstances not to prejudice the prosecution witnesses. The requirements that witnesses could be recalled and heard viva voce afresh may demonstrate an error in the impugned proceedings. In my view, for accused to successfully challenge the fidelity and sanctity of the earlier proceedings he or she must demonstrate a discernible error or mistake to warrant a recall of witnesses before the new session Magistrate.

When we talk about Section 200 more so Sub-Section (3) of the Criminal Procedure Code, it cannot be pigeon holed singularly on

the rights of the accused but entitles the Court to construe it against the backdrop on equality of arms in the administration of justice. Certain other aspects need to be noted, the cost of recalling the witnesses, their willingness to participate in the trial once again, the availability of witnesses, and discomfort which go with witnesses asked to attend trial for an activity considered closed.

In this regard, the discretion of the trial Court that accused persons have a right to recall witnesses, must be within a margin of appreciation at which if proceedings continue as earlier scheduled, there is likely to be a failure of justice or prejudice to the accused persons. It is not enough for the accused to elect and implore the trial Court to recall witnesses or start the trial denovo, as of necessity the Court must examine a new the relevant facts and circumstances to exercise a discretion by way of review of the proceedings.

In reaching its decision on any of the alternatives provided for under Section 200 (3) of the Criminal Procedure Code, the trial Court must determine, whether taking all the circumstances into account, the continuation of proceedings or recall of witnesses would serve the interests of justice. The accused persons should not be allowed to vex or abuse the Court process under the guise of exercising their rights under Section 200 of the Criminal Procedure Code. I therefore envisage a situation in which the trial Court ensures to maintain a proper balance between the fundamental rights of the accused person, on the other hand and the interest of justice on the other, while noting that the two are not mutually exclusive. The Court should not then unwisely succumb to the temptation by judicial activism to deal with Section 200 on the question of recall of witness likely to render mistrial of the Criminal proceedings.

This becomes evident in the subsequent words on the view I hold to the effect that a new session Magistrate under Section 200 has no automatic right or discretion to order the pending criminal matter to start denovo. It is clear in my view that trial Courts should be disinclined to decide matters to recall of witnesses or starting the trial denovo without first ascertaining the availability of any such witnesses within the jurisdiction of the Court.

By and large, it follows from the foregoing that the application for enlargement of time to file an appeal out of time fails for the applicant being guilty of laches, and the draft memorandum of appeal has low chances of succeeding on appeal. Whatever one makes of the impugned ruling, it is clear there was no overstepping of judicial discretion by the Learned trial Magistrate in which custom interference in the sense of a review would reside in the Court. In **Rex v Wilkes {1770} K. B. Lord Mansfield** had this to say:

"Discretion, when applied to a Court of justice means sound discretion guided by Law. It must be governed by rule not by humor. It must not be arbitrary, vague and fanciful, but legal and regular."

Germane to this discussion is also the dictum by **Justice Marshall** in the case of **Osborn et al v The Bank of United States (184) U.S. 738** thus:

"Judicial power, as contradistinguished from the power of the Laws has no existence. Courts are the mere instruments of the Law, and can will nothing when they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by Law; and when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge, always for the purpose of giving effect to the will of the legislative, or in other words, to the will of the Law."

It is of course, obvious that the intended appellant on appeal would be so concerned on exercise of that discretion by the Learned trial Magistrate pursuant to the provisions of Section 200 of the Criminal Procedure Code.

The language of the draft memorandum is about the abuse of the discretion or failing to act in accordance with the rules in the decision making process. How large is this sphere of discretion under attack, it varies from case to case. In the matter beforehand, by far the most important part of the boundary however is the whole ambit of the appeals Court to interfere with that judicial discretion on the basis only of a party being aggrieved with it.

From what I have said, the notice of motion and the reliefs applied for, lie to emphasize further delay in the conclusion of the trial within a reasonable time. As these words are used, the motion lacks merit. So subserve is the aim of the earlier proceedings and not to defeat substantial justice. It is hereby dismissed.

DATED, SIGNED and DISPATCHED AT MALINDI via email ON 6TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE