



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. CR. APPLICATION NO. E41 OF 2021**

**OMAR KIPKEMBOI CHERUIYOT.....1<sup>ST</sup> APPLICANT**

**FRED NAMWAMI MOLA.....2<sup>ND</sup> APPLICANT**

**GRACE ACHIENG OKEYO.....3<sup>RD</sup> APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicants, **OMAR KIPKEMBOI CHERUIYOT**, **FRED NAMWAMI MOLA** and **GRACE ACHIENG OKEYO** have asked the Court to stay the proceedings in the case of **REPUBLIC Vs ROBERT OUKO OTIENO & 6 OTHERS, PMCCRC NO. 70 OF 2018**, (at Maseno), until the application was determined.

1. Secondly, the asked the stay of all further proceedings in the criminal case, at Maseno Law Courts, until their intended appeal was heard and determined.

2. It was the Applicants' case that although they were charged alongside 4 other accused persons, the said other persons had never attended the trial. In effect, the prosecution had continued to canvass the case against only the 3 Applicants

3. A total of three (3) witnesses testified on behalf of the prosecution, and on 8<sup>th</sup> April 2021, the learned trial magistrate delivered a Ruling in which he held that a prima facie case had been proved against the 3 Applicants herein.

4. It was the Applicants' case that the ruling which put them to their defence was illegal, difficult and an "*uncomfortable position*", because they were being called upon to defend themselves against a Charge that was jointly preferred against 7 accused persons, yet 4 of the said persons were absent.

5. The Applicants submitted that the illegality in the proceedings was so grave and unacceptable that it vitiated the entire proceedings.

6. The Applicants further submitted that they had not been afforded a fair trial, and that the entire proceedings were a sham as it was a gross violation of constitutional provisions which safeguard a fair trial.

7. The trial was also said to have violated the provisions of the Criminal Procedure Code, as it had been conducted in a manner that was prejudicial to the Applicants.

8. Accordingly, the Applicants reckon that the trial had caused injustice and grave prejudice to them. And for that reason, the Applicants invited this Court to hold that the proceedings in issue cannot be allowed to stand.

9. The Applicants submitted that they had an arguable appeal, which had good prospects of success. Therefore, they asked this Court to stay proceedings which require them to put forward their defences, as they believe that otherwise, the substratum of the appeal would be destroyed.

10. A further contention of the Applicants was in the following terms;

**“11. That the balance of convenience weighed in favour of the applicants as the trial court found no sufficient evidence against them, that no prejudice will be suffered by the respondent if stay is granted, for, if the appeal is dismissed, the hearing of the criminal case would proceed.”**

11. I note that when they were canvassing the application, the Applicants did not specify the particular provisions of either the Constitution or the Criminal Procedure Code, which had been allegedly violated by the trial court.

12. But on the face of the Notice of Motion, the Applicants cited the following provisions, as the basis upon which their application was founded;

**“Rules 1 (2), 5 (2) (a) 42 (1) and 47 of the Court of Appeal Rules and Article 50 (2) (a), (c) and (f) of the Constitution of Kenya.”**

13. In my understanding, the Court of Appeal Rules are not applicable to matters which were being canvassed at the High Court.

14. In any event, the Applicants did not demonstrate to this Court how the Rules they had cited, should be applied to the application herein.

15. Meanwhile, **Article 50 (2) (a)** of the **Constitution** stipulates that every accused person has the right to a fair trial, which includes the right –

**“(a) to be presumed innocent until the contrary is proved.”**

16. At no time has any of the Applicants shown this Court how the trial court had violated that right.

17. **Sub-Article (2) (c)** of the **Constitution** specifies that every accused person shall have the right –

**“to have adequate time and facilities to prepare a defence.”**

18. I find no material which has been made available to satisfy me that the Applicants were not accorded adequate time and facilities to prepare their respective defences.

19. Under **Article 50 (2) (f)** of the **Constitution**, every accused person shall have the right –

**“to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.”**

20. The Applicants have been present before the learned trial magistrate, throughout the trial.

21. It is the other four (4) accused persons who had not attended court. And as I understand the application herein, the Applicants were complaining about themselves. As all the 3 Applicants were in court when the prosecution was adducing evidence against them, I find that **Article 50 (2) (f)** has no relevance to the application before me.

22. If the trial court had ordered that the other 4 co-accused, who had never attended court when the prosecution witnesses were giving evidence; had been put to their defence, the said other 4 accused persons may have had a basis for invoking **Article 50 (2) (f)**.

23. In any event, I note from the record of the proceedings that on 25<sup>th</sup> July 2018, the Complainant, **ABDALLA AHMED**, sought to withdraw the complaint against the 1<sup>st</sup> and 6<sup>th</sup> Accused persons. The prosecution had no objection to the Complainant’s request; and the learned trial magistrate ordered that the case against those 2 accused persons was withdrawn.

24. The record of proceedings on the said date, shows that accused persons were represented by Advocate **OUMA**.

25. Following the withdrawal of the case against those 2 accused persons, Mr. Ouma Advocate said;

**“The case is for hearing, however, the court gave directions on negotiations.**

**The case can proceed for hearing against the remaining 3 Accused persons.”**

26. In the light of that express statement made by the advocate for the Applicants herein, I find it extremely strange that the Applicants were now complaining that the prosecution went ahead with the case against them, in an illegal or irregular manner.

27. Even on 10<sup>th</sup> December 2018, Mr. Ouma, the learned advocate for the Applicants herein, informed the court that the Applicants were ready to proceed.

28. At that point, the learned prosecuting counsel, Mr. Bange told the Court that he was unable to proceed. In response to Mr. Bange, the advocate for the 3 accused persons said;

**“This matter has been pending for sometime.**

**The complainant withdrew the case against 3 Accused persons. We are not told why the complainant is not in court. We will therefore pray that the prosecution be granted a last adjournment.”**

29. The learned trial magistrate allowed the prosecution’s request for an adjournment. However, the court also made it clear that that would be the last adjournment at the behest of the prosecution.

30. From the foregoing record, it is obvious that the Applicants herein had been ready to proceed with the trial.

31. On 18<sup>th</sup> November 2019, the prosecution amended the Charge. The said amendment was effected 2 months after the prosecution had intimated to the court, (on 18<sup>th</sup> September 2019), that it would be amending the Charge.

32. The Applicants took plea on 18<sup>th</sup> November 2019, on the basis of the Amended Charge.

33. In the said Amended Charge, there were only 3 accused persons.

34. It is noteworthy, that Mr. Ouma, the learned advocate for the accused persons, informed the court that he had no objection to the amended charge.

35. **PW1** testified after the accused persons had taken a plea on the amended charge. He was cross-examined at length, by Mr. Ouma advocate.

36. I therefore find that at the time the prosecution canvassed its case, there were only 3 Accused persons who were on trial.

37. In those circumstances, there was no need for the trial court to issue warrants for the arrest of the persons who were not cited in the Amended Charge, as accused persons.

38. I also find that there was absolutely no justification for the Applicants’ contention, that the trial court had put them to their defence even though the said court had found no sufficient evidence against them.

39. Of course, as this is an interlocutory appeal, I will not re-evaluate the evidence, to verify whether or not the decision by the trial court, (to put the accused persons on their defence), was properly founded.

40. The record of proceedings reveals that the learned trial magistrate resolved to place the accused persons on their defence, after he had given consideration to “*the evidence adduced by the prosecution.*” He then came to the conclusion that the accused persons have a case to answer.

41. Nowhere did the trial court find that the evidence adduced by the prosecution was insufficient.

42. In conclusion, I find no merit in the application dated 14<sup>th</sup> April 2021. It is therefore dismissed.

43. The trial court may proceed with the case.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF MARCH, 2022**

**FRED A. OCHIENG**

**JUDGE**