



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIME DIVISION
ACEC REVISION NO. E001 OF 2020

EVANS ODHIAMBO KIDERO1ST ACCUSED/APPLICANT

VERUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

AND

GEORGE WAINAINA NJOGU.....2ND ACCUSED

JOHN NDIRANGU KARIUKI.....3RD ACCUSED

PAUL MUTUNGA MUTUNGI4TH ACCUSED

MANASSEH KARANJA KEPHA5TH ACCUSED

PHILOMENA KAVINYA NZUKI.....6TH ACCUSED

NG'ANG'A MUNGAI NG'ANG'A.....7TH ACCUSED

CHARITY MURINGO NDIRITU8TH ACCUSED

PETERSON ANDEW NJIRU9TH ACCUSED

EKAYA ALUMASI GHOZNOUR.....10TH ACCUSED

JAMES MIMI MBUGUA.....11TH ACCUSED

ELIZABETH WANJIRU NDERITU.....12TH ACCUSED

ALICE NJERI MUNDIA.....13TH ACCUSED

HANNAH MUTHONI KARIUKI14TH ACCUSED

JOHN NGARI WAINAINA15TH ACCUSED

THE CUPS LIMITED.....16TH ACCUSED

RULING

INTRODUCTION

1. The Applicant is facing charges before the Chief Magistrate Anti-Corruption Case No. 8 of 2019 which from the record of the proceedings

Herein, has not taken off for hearing since the plea was taken.

2. For the purpose of this ruling, on 4/12/2019, the trial court made a ruling in respect of the prosecution's application for consolidation of Anti-Corruption Case No. 8 of 2019 and No. 17 of 2019, in which it dismissed the application for consolidation, but made some recommendations to the prosecution in respect of the two cases, which the prosecution had sought to consolidate.

3. The said ruling was subject of High Court Criminal Revision No. 1 of 2020 which the Judge (Ngugi, J) dismissed and found that there was no incorrectness, impropriety or illegality, in the decision of the trial court dated 4/12/2019 or the directions given on 16th January, 2020. Of great importance is the court observation at paragraph 24 which I quote for ease of reference: -

“24. However, once a matter is before the court, the conduct of the proceedings falls within the jurisdiction of the court to be exercised in accordance with the constitution and the law. The law in this case with regard to the procedure to be followed in a trial is the CPC which empowers the court on its own motion to direct that charges should be amended should it deem it necessary. I therefore find no basis for challenging the directions of this court on this ground.” (Emphasis added.)

4. Arising from the said ruling, the prosecution presented before the court a charge sheet, where the accused in Anti-Corruption Case No. 17/2019 became the 2nd accused to Count No. 1 conspiracy to commit an offence of corruption contrary to Section 47 as read with Section 48 of the Anti-Corruption & Economic Crimes Act No. 3 of 2003. The charge sheet also amended the period of the alleged commission of the offence among others.

5. As expected the accused persons objected to taking plea on the said charge and raised several objections to taking plea in ACC No. 8 and No. 17 of 2019, on the **amended** charge sheet.

6. Directions were given that those objections be heard by way of written submissions and affidavit evidence. One of the objections for the purpose of this ruling was that the prosecution had amended the period of the charge sheet through backdoor and that it amounted to consolidation which the court had rejected and in a ruling on the objection to plea taking the trial court rendered himself thus: -

“In ACEC HC (NRB) Crim. Rev. No. 1 of 2020, one of the prayers made to the Honourable Judge, prayer No. 5 was and I quote: - An order be and is hereby issued, quashing and setting aside the trial court's directions that the accused persons in ACC No. 8 of 2019 take fresh pleas.”

From the court's record it is evident that the objections raised herein were very well canvassed before the Hon. Judge as understood by the Hon. Judge at paragraph 21 of her finding.

.....

Consequently, she found no incorrectness, impropriety or illegality in the decision of the trial court dated 4th October, 2019 on the directions given on 16th January, 2020 and went ahead to dismiss the application for revision. Having laid bare what the constitution requires in order to enable a fair trial and the finding and holding of the Superior Courts, I find that my hands are tied by the law and the said decision. In any case it was improper for parties to have raised the said objections having known the outcome of their application for revision to the High Court in ACEC HC (Nrb) Crim. Rev. No. 1 of 2020, I hence find the objection incompetent and vexatious and deserved to be dismissed which I hereby do.” (Emphasis supplied.)

7. Being dissatisfied with the said decision, the Applicant through a Certificate of Urgency dated 8/1/2020 filed a Notice of Motion under Articles 25 (c), 50(1), 165(6 & 7) and 259 of the Constitution and Section 362 and 364(1)(b) & (2) of the Criminal Procedure Code in which he sought the following orders: -

1. Spent

2. Spent

3. Pending the hearing and determination of this application the order of the trial court that the accused persons in Anti-Corruption Criminal Case No. 8 of 2019, Republic Vs Evans Odhiambo Kidero & 15 others takes fresh plea on 13th July, 2020 or at any other time be and is hereby stayed.

4. The High Court do and hereby calls for the record and proceedings of the trial Court (Hon. D. Ogoti) in Nairobi Chief Magistrate Court Anti-Corruption Criminal Case No. 8 of 2019 Republic Vs Evans Odhiambo Kidero & 15 others for purposes of ascertaining the correctness, legality and propriety of the decisions and ruling made on 11th June, 2020 and to issue any other order or give any directions that is appropriate to ensure the fair administration of justice.

5. An order be and is hereby (sic) quashing the charges contained in the amended charge sheet dated 16th January, 2020.

8. The application was based on the ground that the trial court did not determine the question of the defective charges on merit or at all, but summarily dismissed the objection on the basis that it was incompetent and vexatious, because of the earlier objection made by the applicant, to an earlier ruling by the court on 4/12/2019 and the subject matter of High Court ACEC Revision No. 1 of 2020.

9. That the issue of defective fresh charges had neither arisen at the time nor was it the subject of the application for Revision before the High

Court and therefore the applicant had a right in law to challenge and not be coerced to plead to defective and unfair charges, that could undermine and/or contravene his rights and fundamental freedoms, including the right to a fair hearing and equal protection of the law.

10. The application, was supported by the annexed affidavit sworn by the applicant, in which he deposed that he objected to taking fresh plea, on among other grounds, the fact that the fresh charge had not been availed in advance so that the parties could take an informed plea and/or address the court on the propriety of the charges, contained in the fresh charge sheet. He contested that the trial court did not determine all issues placed before it, including the question of defective charges on merit or at all.

11. It was contended that the trial court wrongly relied on the decision of the High Court (Ngugi, J) on an application for revision in **Revision ACC. No. 1 of 2019**, to condemn as vexatious and incompetent even issues which were not before the said court.

12. The 2nd accused filed an affidavit in support of the application herein and deposed that the trial court did not determine the question of the defective charge sheet on merit and that pursuant to Section 214(1) of the Criminal Procedure Code, the court has powers to order the alteration of the charge sheet either by way of substitution, amendment and introduction of a new charge, subject to pre-condition appealing to the court including:- consideration of evidence, defectiveness of the charges either in substance or form.

13. It was contended that the trial court still had an obligation to hear and determine any other new issues that had arisen in the objection and to make a fair and objective determination on those issues, as it did not matter how many times the objects are raised in a criminal trial.

14. The 11th accused person also filed an affidavit in support, in which he deposed that he was adversely affected by the order impugned herein, with the resultant amendment of the charge. It was averred that in the ruling of 11/6/2020, the Court misdirected himself by ignoring the fact that before him were two criminal cases involving seventeen (17) different individuals and accused persons whose submissions the court ignored by making a ruling based on a high court decision in respect of only one accused person. He contended that throughout the period of his trial, the prosecution had never specifically applied to amend his charge nor provided a basis for increasing the duration to which he was to defend himself. He finally stated that for the accused person to be expected to prepare and defend himself for a period increased from twelve (12) days to over nine hundred (900), days was a major departure by the prosecution that required proper canvassing.

15. It was finally deposed by the 11th Accused that on 17th February, 2020, his Advocate filed a formal objection as directed by the court limiting the objections to answering if a fresh plea could be taken without a fresh round of pre-trial ensuing and that up to and including the 11th June, 2020, when the trial court overruled objections raised, as incompetent and “vexatious”, no coherent application had been presented by the prosecution rather than the only ground that the charge sheet are ready pursuant to the court’s directions, and that the court did not take into account his submissions in making its decision.

16. The Respondent filed a replying affidavit in response to the application sworn by **HELLEN MUTELLAH** a Senior Prosecution Counsel, in which she deposed that pursuant to court’s direction issued on 4th December, 2019 and 16th January, 2020, the prosecution presented to court an amended charge sheet, for the purposes of taking fresh plea, which the accused persons objected to, which the court ruled on, on 11th June, 2020 as incompetent and without basis.

17. It was deposed that on 13th July, 2020, even before the prosecution could make its application for the substitution of the charge sheet, the 1st accused objected to the taking of fresh plea in the matter and did not disclose the reason for the objections, nor demonstrated to court the defectiveness if any of the charges. It was concluded that the amended charge sheet was presented in compliance with the directions issued by the trial court on 4th December, 2019 and in compliance with Sections 89, 90, 134, 135, 137, 214 and 382 of the Criminal Procedure Code.

SUBMISSIONS

18. Directions were issued by the Court (Onyiego, J) that the application herein be canvassed by way of written submissions, which were duly filed. On behalf of the 1st accused it was submitted that the trial court in his ruling on 11th June, 2020, summarily dismissed the objections without considering whether the charge sheet presented before him for the accused person to take plea thereon was defective. It was submitted that the new charge sheet presented in court on 21st January, 2020 was not as directed by the trial court, but instead the prosecution presented a single new charge sheet, which made Joshua Aduma Owuor as the 2nd accused person, thereby surreptitiously going around the trial court’s decision by altering the facts and particulars, without applying or seeking to amend the individual charge sheets and without leave of the court. Reference was made to the case of **STANLEY MUNGA GITHUNGURI Vs REPUBLIC [1986] eKLR 80-82** on the principle that a prosecution is not to be made good by what it turns up, it is good or bad when it starts.

19. It was submitted that to allow the foundation of the charge to keep on charging and undergo metamorphosis as the trial goes along, will negate the constitutional guarantee under **Articles 29 (a) & (b), 49(1)(a)(1) and 50(2)(b)** of the Constitution. It was submitted that the trial court having held that he could not decipher from the period of the charges, that the transactions involved formed part of the several transactions or a series of transactions, thereby rejecting the application for consolidation of **ACC Case No. 8 of 2019 and 17 of 2019**, the fresh charge-sheet presented was defective *ab initio*.

20. It was further contended that based on the recorded and known facts underpinning the charges against the applicant and Joshua Aduma Owuor, the two could not be joined together in the same charge or one charge and that the said charge contravened **Sections 135 and 136** of the **CPC** and that the trial court had a duty and ought to have addressed himself as to the propriety or otherwise of the new charge sheet, which did not include all the essential ingredients and material particulars of the offence, to enable him understand the nature of the offence with which he was accused. Support was placed on the cases of **REBECCA MWIKALI NABUTOLA & 2 OTHERS v REPUBLIC [2016] eKLR**, **REPUBLIC v GEORGE PETER KALUMA [2018] eKLR**, **STEPHEN ODDIAGA KIKOMBERO & ANOTHER v REPUBLIC [2019] eKLR** and **JUDY NKIROTE v REPUBLIC [2013] eKLR**.

21. It was finally submitted that the joinder of Joshua Aduma Owuor as a 2nd accused person in Anti-Corruption Criminal Case No. 8 of 2019, was illegal and unlawful thereby rendering the entire charge sheet dated 16th January, 2020 fatally defective and that the trial court erred in failing to consider and determine the issue placed before him and reject the charge sheet dated 16th January, 2020.

22. It was contended that the failure by the trial court to address the mischief complained of and the defective charges/charge sheet, by dismissing the applicant's complaint as incompetent and vexatious, betrayed the trial courts unfortunate underlying pervasive attitude and impertinence towards the applicant, thereby affecting his right to fair hearing, as provided for under Article 50(i) of the Constitution and as stated in the case of **KIPKOECH KANGONGO & 62 OTHERS Vs BOARD OF GOVERNORS SANCHO HIGH SCHOOL & 5 OTHERS [2015] eKLR**. It was contended that the trial court denied the applicant the right and comfort of knowing that every dispute that arises in the course of trial, will be resolved by the application of the law, through a fair process.

23. On behalf of the 11th accused person, it was submitted that the prosecution ought to have made his application separately in the respective court files and no court order subsisted in his continued jointly entertaining both criminal cases, as if they were one case. It was submitted that the prosecution never explicitly applied to the Court to amend, substitute or alter the charges relating to the 11th accused persons and that attempt to invocation of Section 214 of CPC by the court failed the due process test, having failed to establish any pre-conditions appearing to court including considered evidence and defectiveness of the charge either in substance or in form.

24. On behalf of the Respondent, it was submitted that there were three issues for determination before this court:-

a) Whether by the prosecution filing an amended charge sheet, the accused person right to fair trial was violated.

b) whether the decision by the trial court on 11th June, 2020 was incorrect, illegal or improper.

c) Whether the applicant is entitled to the orders sought of quashing the charges contained in the amended charge sheet dated 16th January, 2020.

25. It was submitted that the charge sheet presented to court was in compliance with the directions issued by the trial court on 4th December, 2019 and 16th January, 2020 and that Section 215 of CPC allows the prosecution to make an application to amend or substitute the charge sheet, at any time before the close of the prosecution case and that when the charge sheet is amended or substituted, the accused persons must be called upon to plead to the altered or substituted charge or information. It was therefore stated that calling upon the accused persons to plead to the fresh charges, did not violate their right to a fair trial.

26. It was submitted that the issue of the accused persons complaint on the taking of fresh plea on the charges amended, in accordance to the directions of the court and their right to fair trial was decided by Ngugi J, in Criminal Revision No. 1 of 2020 and that the said charge sheet was not defective, having complied with Section 134 of the Criminal Procedure Code and as defined in the case of **YUSEFU & ANOTHER v UGANDA [1969] EA 236** quoted with approval in **MOHAMMED MUHUMED SIRAT v REPUBLIC [2015] eKLR** and **BENARD OMBIMA v REPUBLIC [2019] eKLR**.

27. It was contended that in delivering the ruling, the trial court had stated that he considered all the issues raised by the 1st accused in their submissions. It was finally contended that the application before the court was premature as the applicant will be accorded an opportunity to challenge the nature of the charge on the account of its defectiveness, once they have taken plea and that the remedy sought of quashing the charge contained in the amended charge sheet dated 16th January, 2020, was a draconian remedy, which the court should desist from granting, in the absence of a clear demonstration of the illegality of the charges.

DETERMINATION.

28. I have taken into account the pleadings herein, the submissions by the parties and the authorities submitted in support of their respective positions on the Application before the court.

29. The revision powers of this court are constitutionally granted under Article 165(6) and (7) which confers upon the court supervisory jurisdiction over subordinate courts and empowers the court to make any order or give direction it considered appropriate to ensure fair administration of justice as follows: -

“6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function but not over a superior court.

7. For the purpose of Clause (6) the High Court may call for the record of any proceedings before any court or person, body or authority referred to in Clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

30. This supervisory jurisdiction is statutory conferred by Sections 362 and 364 of the Criminal Procedure Code which provides as follows: -

“362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

31. Section 364 provide that in exercise of the powers on revision the court may: -

“(b) In the case of any other order other than an order of acquittal alter or reverse the order.

(5) when an appeal lies from a finding, sentence, or order and no appeal has been brought, no proceedings by way of revision shall be entertained at the insistence of a party who could have appealed. “

32. In the case of **GEORGE ALADWA OMWERA v REPUBLIC [2016] eKLR** this court had this to say on the exercise of supervisory jurisdiction:-

“22. In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.

23. In VEERAPPA PILLAI v REMAAN LTD the Supreme court of India has this to say:-

“The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made.....”

24. The above principle is applicable to the exercise of revisional jurisdiction of the court wherein the court too cannot sit in appeal and re-appreciate the evidence. It is only exercised to correct the manifest error in the order of the subordinate courts but should not be exercised in a manner that turns the Revisional court into appeal. The jurisdiction cannot be exercised mainly because the lower court has taken a wrong view of the law or misapprehended the evidence tendered. See PATHUMMAA & Anor v. MUHAMMED 1986 (2) SCC 585 where it was stated that in revisional jurisdiction the High Court would not be justified in substituting its own view for that of the magistrate on question of facts.”

33. In this matter, I must point out that whereas Ngugi J, correctly stated that the trial court is justified in making suggestions to the prosecution on how to frame charges, I take the view that our system being adversarial in nature, the trial courts should be slow in advising or making suggestions to the prosecution, so as to be seen to be a neutral arbitrator in the dispute and that had the court not advised the prosecution, on how to draft their charges against the applicant, we might not have been in the position where we now find ourselves. The court should only step in where is absolutely necessary for proper administration of justice.

34. It is not in dispute that the prosecution presented a “fresh charge” before the trial court and the accused persons objected to taking plea therein, on the ground that the prosecution had presented before the court a single consolidated charge sheet, which is what the trial court had refused it to so do. There was also the objection that they should be supplied with documents before they take plea among others.

35. The issue which was therefore before the trial court, as rightly pointed out by the Applicant, was the propriety or otherwise of the new charge sheet and not the direction given by the Court, which was conclusively decided upon by Ngugi J, and which no appeal has been lodged against. My understanding of the objection from the court record, is that it was a fresh objection, on the nature and form of the charge sheet produced before the court.

36. The Respondent on the other hand took the view that the charge sheet as presented was in compliance with the direction by the trial court and therefore the application herein was premature as the Applicant took the objection before taking the plea.

37. The complaint by the Applicant as I understand it, is that the trial court casually dismissed their objection without giving reasons for the same, by only ruling that it was ***“incompetent and vexatious and deserves to be dismissed.”*** The court is therefore called upon to examine the said decision as to its correctness, legality and or propriety.

38. The issue for determination is whether the trial court in dismissing the objection placed before it, by the accused persons as incompetent and vexatious, answered to the required legal standard, the objection which was raised, as regards the taking of plea or the charge sheet as presented.

39. From the record of proceedings, the objection raised by the Accused persons which required the trial court’s determination was as follows:-

a) Whether the charge-sheet present was in compliance with the direction issues by the Court on 4th December, 2019.

b) Was the charge sheet presented a consolidated charge sheet in respect of this trial and case No. 17 which the court had rejected before issuing his guidelines.

c) Were the issues raised by the applicants in the objection, the same in substance and form with those that were raised as regards the directions given by the court to the prosecution, which was the subject matter of Revision No. 1 of 2020 so as to make the objection incompetent and vexatious.

d) Was the fresh charge sheet an amended or substituted charge sheet and whether the prosecution needed leave of the court to

present the same.

e) Was the charge sheet as presented defective.

40. A reading of the objection as raised by the applicants clearly shows that it was a fresh objection and not similar to the objection which was raised in respect of the courts advise to the prosecution on how to frame the charges, which advise was found by Ngugi, J, to be proper and therefore to rely upon the said decision as having settled the issues which had not been raised at the time when it was determined, as far as one can discern, the court did not make any determination on the objection which was placed before it.

41. Whereas the trial court had the right to dismiss the objections raised based upon the justifiable grounds, the Application on the other hand, were entitled to be given satisfactory reasons for the decision made under the provisions of Articles 47(2) and 50(1) of the Constitution of Kenya, which is one of the hall marks of accountability and transparency on the part of the court. The reasons for arriving at the decision to dismiss the objection would therefore have assisted the court in performing the supervisory function or facilitated the appeal on the part of the Applicants.

42. I take the view that under the principles of natural justice and the right to fair trial, the trial court was under a duty to answer the issues raised and identified by the applicants, on the objection to the charge sheet that was presented to court by the Respondent, as a result of the directions earlier given by the court, which had been found by this court to be regular and proper.

43. A Judicial Officer is under a general duty to provide reasons for his/her decision, to allow all the parties to see the extent to which their arguments had been understood and accepted or rejected by the court. It is only through this that judicial accountability will be promoted. The statement that the court had considered relevant matters and discarded all irrelevant matters as was in the matter complained of, will fall short of satisfying the obligation upon the court in arriving at a just and fair decision.

44. In this matter I find the court holding, to the effect that

“Having laid bare what the constitution requires to enable a fair trial and the finding and holding of the superior courts, I find that my hands are tied by the law and the said decision.” did not answer the specific issue raised in the objection which was placed before him as the issue was not what the constitution says or what the superior courts have said but whether the charge sheet as presented, was in compliance with the court’s direction or a consolidated charge sheet which the court had reject or an amended or substitute charge sheet. The court accordingly failed to accord the applicants their right to fair hearing.

45. In the case of **JOSEPH NDUNGU KAGIRI v REPUBLIC [2016] eKLR** the court had this to say on the right to fair hearing which I associate myself with fully:-

“As pointed out above, the right to fair trial is not one of those rights that can be limited under Article 24 of the Constitution. The cardinal principle in criminal justice is that the accused persons is presumed innocent until proven guilty. In this regard, it is apt to reproduce a passage from a decision by the Supreme Court of India in the case of NATASHA SINGH v CBI where it was held as follows”-

“Fair trial is the main object of Criminal Procedure and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner, Fair trial entails the interest of the accused, the victim and the society and therefore, fair trial includes the grant of fair and proper opportunities person concerned and the same must be ensued as this is a constitutional as well as a human right. Thus under no circumstances can a person right to fair trial be jeopardized.”

46. From the records of the proceedings, I have come to the conclusion that in relying on the earlier revision ruling by this court as the basis of his decision, the court did not take into account the specific fresh issues raised by the Applicants, neither did he give reason for rejecting or dismissing their objections and therefore the finding that the objection as “incompetent” and “vexatious” was irregular and improper and did not ensure the fair administration of justice as required under the constitution.

47. The objections by the Applicant was not properly handled by the trial court and that the reasons given for dismissing the same were inadequate and caused prejudice to the Applicant and the foundation from the conclusion reached was not correct, and this being a revision application, the only logical conclusion is to remitting the matter to the trial court, for fresh consideration and further proceedings taking into account the issue raised in the objection.

48. I would therefore allow the application herein and reverse the decision and the ruling of the trial court made on 11th June, 2020 by revising the order dismissing the objection and remitting the file back to the court to make determination on all the issues raised in the objection before the court, as identified in paragraph 40 above.

49. For avoidance of doubt I decline to quash the charge sheet dated 16th January, 2020, as to do so will be taking over the role of the trial court, who has not pronounced itself on the issues which were raised by the applicants on the same and which jurisdiction, the court cannot exercise on revision, which is only limited to the issue of correctness, propriety and legality, of orders or directions made by the subordinate court, which should not be invoked to micromanage the lower courts, in the conduct and management of their proceedings.

50. Each party shall bear their own cost.

Dated, Signed and Delivered at Nairobi virtually this 28th Day of January 2021

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kihara for DPP

Mr. Odongo for 3rd interested party

Nyawera Kinyua for Miss Soweto,

SC James Orengo, SC Prof. Ojienda and Mr. Havi for the Petitioner

Mr. Mohochi for 10th interested party

Ms. Achola for Mr. Kithi for the 2nd, 15th, and 16th accused persons