



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 10 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOYCE WANZA MUTUA.....ACCUSED**

**RULING**

Mr. Wakaba, counsel for the accused, bought two issues for this court to determine in his submissions on the 29<sup>th</sup> October 2020 during proceedings conducted virtually. The first issue relates to scene visit. The basis for the application to visit the scene is that the description given by the prosecution witnesses during the hearing of this case was flawed and that unless the description is understood it would cause prejudice to the defence case. The accused felt that it would be in her best interest to visit the scene at the defence stage for the court to observe the scene from the gate to the house. The accused also prayed that she be allowed to testify at the scene. This application was opposed by the prosecution on the grounds that the integrity of the scene could not be vouched for because there is no way of knowing whether the scene has been interfered with or not or whether the scene remained in the state it was at the time of the offence given that the scene is the home of the accused and she lives there having been released on bond. The prosecution submitted that any issues about the scene can be addressed during submissions by the defence. It was submitted that a visit to the scene at this stage of the trial would be prejudicial to prosecution case.

I have considered the application to visit the scene. I have read the evidence in order to determine whether failure to visit the scene would be prejudicial to defence case. I have noted that several witnesses have described the scene. Cpl Zacharia Nderitu (PW2) was among the first officers at the scene. He testified on what he observed and was cross examined by Mr. Mutisya for the accused. Mr. Nelson Mburu Mbugua (PW3) a retired Lieutenant Colonel and a neighbour of the accused was at the scene in answer to accused's distress call. He also testified about the scene and was cross examined. PC Kipng'etich Kitur (PW4) took photographs of the scene. These photographs have been tendered in evidence as exhibits. He too was cross examined by the defence. Anthony Kitheka Mwinzi (PW7) worked in the court where the house the scene of this offence is situated. He too testified and was cross examined by the defence and finally there is SGT Paul Chebet the Investigating Officer. He gave evidence of the scene and what he found when he went there. He was examined at length by the defence. As far as this court is concerned and in the interest of justice, there is ample evidence describing the scene. This court fully understands the layout of the scene as described in evidence and will have no doubt about the layout of the scene when it considers and determines this case. It is therefore misconceived on the part of the applicant to state that the description of the scene will not be understood and that this will be prejudicial to her case.

Secondly, the accused has been out on bond in the course of these proceedings. She lives in the house which is the scene. She did not, through her legal counsel, make an application to visit the scene during the hearing of this matter at the prosecution stage. This court is not in a position to determine whether the scene remains in the same state it was when this offence was committed. The scene was not preserved by the police and therefore this court cannot vouch for its integrity. It would be dangerous and prejudicial to this case to visit the scene at this stage of the trial given the circumstances. Besides, the witnesses were cross examined at length about the scene and I am satisfied that the scene was sufficiently described to enable this court fully appreciate it and understand its layout. There will be no prejudice or miscarriage of justice to any party for failure to properly describe the scene because it has been adequately described as far as this court is concerned. For this reason this court declines this application and finds that the application to visit the scene lacks merit. It is hereby dismissed.

The second issue does not require a determination. However, I feel that it is important to make some comments about the issue because it touches on the integrity of this court. This issue relates to withdrawal by the accused of her application dated 23<sup>rd</sup> May 2019 and filed on the same date. The applications seeks recusal of this court from proceeding with this case and referral of the matter to another judge for hearing and determination. The application was supported by grounds found on the face of the application itself and on the supporting affidavit sworn by the accused on the 22<sup>nd</sup> May 2019.

The gist of the grounds in support of the application is that the presiding judge lacks independence and impartiality to try this matter because she had already predetermined the guilt of the accused even before the case was concluded. It is further stated that the presiding judge has had discussions on the merits and demerits of the case with the then defence counsel Mr. Mutisya. A transcription of what is said to be a recorded conversation between the presiding judge and Mr. Mutisya was attached to the application and marked "JMW- 1".

It is normally very difficult for a judicial officer to handle an application for his or her recusal. This is because such a judicial officer is handling his/her own cause. Further, to be adversely mentioned in a case one is handling is very painful for a judicial officer and emotions are bound to occur. This court would have loved to have Mr. Mutisya brought to court for cross examination and also have the matter investigated by anti-corruption agencies and DCI. However since the accused has sought withdrawal of the application it might be misunderstood to pursue the matter further. To state that the presiding judge had held discussions with Mr. Mutisya on the merits and demerits of this case is paint the judge as corrupt and an officer who lacks scruples. The accused is just one of the many accused persons and parties who pass through the judicial hands of the presiding judge in this case and I cannot help wondering what the applicant had in mind to imagine that the judge has time from her busy schedule to meet accused's legal counsel outside the courtroom to discuss this case or to

predetermine the guilt or otherwise of the accused. It is very sad indeed.

This court does not take the accused seriously when she says she acted on the instructions and advice of her former counsel Mr. Mutisya. The application was filed by the accused at a time her relationship with Mr. Mutisya was on the rocks. The timing of the application is also suspect. Indeed Mr. Maseki who took over the defence of the accused after the accused fell off with Mr. Mutisya informed the court that the application was filed by the accused in person. It was only brought up after the court gave a ruling that the accused had a case to answer. It is obvious to this court that the accused was trying to buy time and shop for forum to hear her case.

The training of a judicial officer, this judge included, includes training on how to rise above petty issues and rely on the law and evidence to make ends of justice meet. The accused cannot be in better hands. It is the law and the evidence that will dictate whether the accused is guilty or not and not any other considerations. The presiding judge feels maligned and her integrity and reputation besmirched. The least that the accused could have done is to apologise to this court as she applies to withdraw her application. Let her be assured that this judge is not in the business of holding discussions with legal counsels or accused persons or any party before the court outside the courtroom where everything that is said is recorded for posterity. I wish to caution the accused and give her my advice that not everyone is corrupt and that she need to calm down and allow the law to take its course. I will leave it to her conscience to decide whether to apologise to this court or not. As far as this court is concerned the accused is a party like any other person that appears before this court and that this court will protect her rights just like it does on any person before this court. And that whatever goes on in this court is according to the dictates of the law. With that said I will allow the accused to withdraw her application and direct that proceedings shall continue to their conclusion. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY 2021.**

**S. N. MUTUKU**

**JUDGE**