



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL CASE NO. 15 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MBATIA CHEGE.....ACCUSED

RULING

1. The accused David Mbatia Chege is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 laws of Kenya. The particulars of the offence are that on 20th day of September 2018 at Chemagel location in Sotik Sub-county within Bomet County murdered Leonard Cheruiyot Rono.

2. The Accused took plea before Dulu J on 13th June, 2019 and pleaded not guilty. What followed was a hotly contested bail application. In his ruling delivered on 8th July, 2019, Dulu J overruled the prosecution's objection and granted the Accused conditional bond.

3. The matter came up for mention for directions before me on 10th February, 2021. Mr. Mureithi Principal Prosecution Counsel made an application to the court to order the transfer of the matter to the lower court for trial. In making the application, Mr. Mureithi submitted that he had reviewed the evidence in their possession and come to the conclusion that the evidence does not support the charge of murder. He stated that the Accused was driving a lorry when he caused the death of the deceased. That therefore he ought to have been charged with the offence of causing death by dangerous driving. With that submission, counsel prayed that the matter be transferred to the lower court for trial.

4. Defence counsel, Ms. Chepkemoi submitted that the defence had no objection to the application.

5. The court reserved the ruling on this application to enable it peruse the file and appreciate the proceedings before Dulu J. My perusal of the file however showed that the matter had gone through plea, pre-trial and bond application only. The trial was yet to start.

6. I have considered the application and the applicable law and principles. The Director of Public Prosecutions derives his mandate and prosecutorial power from Article 157 and 158 of the Constitution.

Article 157 (6) provides:-

The Director of Public Prosecutions shall exercise powers of prosecution and may:-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

7. Under Article 157 (9) the powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions. The constitutional provisions under Article 157 and 158 have been given effect by the Office of Public Prosecution Act No. 2 of 2013. Other than this the National Prosecution Policy guides a prosecutor in making prosecutorial decisions including to charge, review, and discontinue prosecution.

8. In making the present application, Mr. Mureithi Principal Prosecution Counsel told the court that he had reviewed the file and made the decision to charge the Accused with the offence of manslaughter. This was well within his powers as mandated by the law above. As stated above, the Director of Public Prosecutions may with the permission of the court discontinue any prosecution at any stage before delivery of judgment.

9. In this case however, the Director of Public Prosecutions has not applied to withdraw the murder charge to which the Accused has pleaded but has instead asked the court to transfer the matter to the lower court. The practical difficulty in the application is that by tradition the high court tries murder cases while the magistrate's court tries manslaughter cases and the offence of causing death by dangerous driving. The right procedure in the circumstances therefore would have been for the prosecutor to apply to withdraw the murder charge or enter a nolle prosequi in this court and thereafter charge the Accused in the lower court with the offence of either manslaughter or causing death by dangerous driving.

10. I disallow the application and direct that the Director of Public Prosecutions makes an application for withdrawal of the murder charge to pave way for the charge of manslaughter or causing death by dangerous driving in the lower court. In the alternative, the Director of Public Prosecutions may substitute the charge in the high court and thereafter have the matter transferred to the lower court for trial. I further direct that the victims of the offence be informed of this development in the case.

Ruling delivered, dated and signed this 25th day of February, 2021.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Accused, Defence Counsel Ms. Chepkemoi, Mr. Mureithi for the DPP, and Kiprotich (Court Assistant).