



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAPENGURIA.

CRIMINAL CASE NO. 13 OF 2019

REPUBLICPROSECUTOR

- V E R S U S -

ERASTUS MNANGAT DUNG'OSIWA1ST ACCUSED

AKORICHOLIA NYANGA..... 2ND ACCUSED

RULING

1. The two accused are charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code (Cap 63) Laws of Kenya. When this case came for hearing on 2nd February, 2021 the prosecution (Mr. Makori) applied for an adjournment on the basis that he did not have any witnesses in court. He further informed the court that they have difficulties in tracing the six (6) witnesses. He therefore sought an adjournment to enable the investigating officer to trace the witnesses.

2. Miss Opondo, for the accused persons opposed the adjournment for the following reasons:-

a. First, he informed the court that this was a 2019 case. She further informed the court that the prosecution was granted a last adjournment. She also informed the court that the two accused persons were students.

b. She applied the case to be withdrawn.

3. Mr. Makori in reply informed the court that the case had not been listed down for hearing previously due to the Corona pandemic.

4. The Court adjourned the hearing to 3rd February, 2021. During the resumed hearing on 3rd February 2021; Mr. Makori for the prosecution informed court that they were unable to get any of the six (6) witnesses.

5. He further told the court that when these six (6) witnesses were called on their cellphones, only three (3) witnesses said they were coming to court on 3/2/2021. He further informed the court that they had not arrived and that the investigating officer had been waiting for them since that morning.

The prosecution then applied for an adjournment to avail the witnesses in the next hearing date.

6. The application was opposed by Miss. Opondo.

7. On my own motion I granted the prosecution an adjournment until the afternoon of the same date to enable those three (3) witnesses to attend court; since the court had been informed they were on the way coming to court.

8. During the resumed hearing in the afternoon Mr. Makori still informed the court that he did not have any witnesses. He also told the court that the investigating officer was in court. He further informed the court that the investigating officer had engaged the administration chief of Sigor to trace the witnesses.

9. Finally, he informed the court that a balance had to be struck between the rights of the accused and those of the victims. And for that reason he applied for a final adjournment.

10. Miss. Opondo for accused opposed the adjournment on the basis that the court had been waiting for those three (3) witnesses until 12 noon and had not arrived. She further informed the court that if the prosecution was granted another adjournment it will infringe on the

rights of the accused in respect of a fair and speedy trial.

11. She further informed the court that “Justice delayed is justice denied”.

She therefore urged the court to disallow the application. She informed the court that the prosecution may withdraw the charge and refile it after tracing the witnesses.

ISSUES FOR DETERMINATION.

12. I have considered the submissions of both counsels in this matter. As a result, I find the following to be the issues for determination.

- a. Whether the prosecution should be granted the adjournment sought.
- b. Whether the grant of an adjournment will infringe on the fair and speedy trial rights of the accused.

ISSUE ONE

13. I find that on 2nd December, 2019 the prosecution were granted an adjournment because they did not have witnesses in court, due to the floods during that season. I further find that on 26th December, 2020 the prosecution was granted another adjournment on the basis that they did not have their witnesses in court.

14. Furthermore, on the 2nd February, 2021 the prosecution sought an adjournment on the basis that they did not have their witnesses in court. The application for adjournment was opposed.

15. I granted them an adjournment until the following day (3rd February, 2021).

16. On 3/2/21 the prosecution informed the court that three of their bonded witnesses were on their way coming to court. I therefore granted an adjournment until afternoon of that date. In the afternoon, the court was still informed that those witnesses had not arrived. That notwithstanding, the prosecution still applied for adjournment to enable the investigating officer to trace the witnesses, which was opposed by the defence counsel.

17. The defence opposed the application for a further adjournment on the grounds that it would infringe on the fair and speedy trial of the accused.

18. In the circumstances, I find that the prosecution had been granted no less than two adjournments to enable them trace and avail the witnesses in court. The prosecution still are applying for an adjournment on the basis that the investigating officer had gotten in touch with administration chief for purposes of tracing the witnesses.

19. It is clear that the prosecution are having problems in tracing the witnesses, since 2019 to date, which translates to about three (3) years. The grant of any further adjournment is unlikely to bear any fruits in view of the history of this case.

20. In the circumstances, I find that the prosecution does not deserve any further adjournment.

ISSUE TWO

21. The accused persons are entitled to a fair and speedy trial in terms of article 50(2) of the 2010 Constitution of Kenya. I also find that they have been in custody since 2019, which translates to a period of about three (3) years. I further find that they are charged with a serious offence of murder which carries a sentence of death. I therefore find that any grant for a further adjournment will infringe on the fair and speedy trial of their case.

22. In the premises, the application for an adjournment by the prosecution is hereby rejected with the result that the accused are hereby acquitted of the murder charge under section 306(1) as read with section 322 (1) of the Criminal Procedure Code (Cap.75) Laws of Kenya.

23. Accused are hereby set free unless held on other lawful warrants.

24. Ruling signed, dated and delivered in open court at Kapenguria this 15th day of February, 2021 in the presence of Mr. Konga for the prosecution and Ms. Sugut holding brief for Miss. Opondo for accused.

J.M. BWONWONG'A

JUDGE.