



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MURDER CASE NO. 12 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOEL GACHAU KAMAU.....ACCUSED

RULING

1. This is a case where the accused is charged with offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap. 63 of Laws of Kenya**. Particulars being that on 28/06/2018 at Kieni Village in Kiambaga Location, Nyandarua Central Sub-County, Nyandarua County murdered Elishiba Wangeci Kamau.
2. The prosecution has called 3 witnesses including a doctor. The matter was coming for further hearing on 24/06/2021 but the prosecution sought to amend charge and add Count II where of the accused will stand charged additionally for Murder of Bright Njoki Kamau. The particulars are the same in date, time and place, thus the killing was done in the same incident.
3. Thus the prosecution sought amendment under **Section 214 (1) of the Criminal Procedure Code Cap. 75 of Laws of Kenya** as the witnesses are the same save for the doctors who did postmortems of victims.
4. The defence oppose the amendment on the grounds that the prosecution should institute another criminal case to be heard separately to avoid delay of the instant case as the accused is in custody and it has taken 4 years for the prosecution to realize their mistake.
5. The defence submits that the accused will be prejudiced and suffer substantial injustice as he may seek recall of the witnesses for cross – examination or seek the case to start denovo thus be prejudiced by the delays.
6. The prosecutor one Ms. Rugut states that she is not the one who crafted charges/information in the matters but she has realized the mistake of omission of one victim of the murder incident.
7. The matter herein was lodged in court on 29/06/2018 when the then Judge Wendoh mentioned it. On 24/07/2019 the PW1 testified in presence of Ms. Rugut who was prosecuting and in his evidence he alluded to the 2 victims of murder. He even says he went to the scene and saw the 2 bodies lying on pools of blood.
8. Then PW2 testified on 26/011/2019 and also alluded to the 2 victims of killing and also went to the scene.
9. One doctor has testified and confirmed conducting postmortem exercise of Elishiba Wangui Kamau one of the victims. The second doctor who conducted postmortem exercise of Bright Njoki Kamau second victim is yet to testify.
10. This demonstrates that the State Counsel Rugut was aware since 2019 at least that there were 2 victims as she must have read the statements of witnesses and in any case she was leading witness on same evidence.
11. Alternatively, she must have assumed maybe the charge sheet constituted information for the 2 victims or further alternative there was another unknown reason. She did not come out clearly.
12. It is not disputed that the witnesses save the doctors who conducted postmortem exercises are the same. The venue/scene and time of the incident are the same. The allegations are all against the accused as the perpetrator of the murders.
13. The institution of fresh charges on the count of the Bright Njoki Kamau murder would be replication of the trials and prolong accused agony of being in custody than continuation of the instant matter with 2 victims being the subject of the information.
14. The court under **Section 214 of the Criminal Procedure Code** has discretion to allow or to deny amendment or substitution of the

charges where the circumstances obtain. The provisions aforesaid are to the effects; **Section 214 of the Criminal Procedure Code** provides for amendment of charges. It reads as follows:

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

15. The aforementioned Section gives the court a wide discretion to allow amendment of a charge sheet upon an application. Needless to say, the said discretion must be exercised judiciously. I find that the amendment by adding count 2 thus including name of the second murder victim is not in any way prejudicial to the Applicant and there will be no miscarriage of justice to be occasioned as accused will be at liberty to recall witnesses for cross-examination. Thus the court makes the following orders;

(i) The amendment by adding count 2 thus adding name of Bright Njoki Kamau of the information is allowed.

Dated, Signed and Delivered at NYAHURURU this 29th day of June, 2021.

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CHARLES KARIUKI

JUDGE