



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE E061 OF 2021**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**BENSON MPUTHIA.....1<sup>ST</sup> ACCUSED**

**CONSOLATA NJERI KARIUKI.....2<sup>ND</sup> ACCUSED**

**MARTIN MSAMALIA WANYAMA.....3<sup>RD</sup> ACCUSED**

**NICHOLAS SANG CHERUIYOT .....4<sup>TH</sup> ACCUSED**

**LILIAN CHERONO CHEMUNA ..... 5<sup>TH</sup> ACCUSED**

**JAMES MWANIKI ..... 6<sup>TH</sup> ACCUSED**

**RULING**

This matter has come up today for plea taking. While the other 5 persons named as accused are present, accused 2 is absent. The prosecution has expressed readiness to take the plea, a position supported by the Law Society of Kenya and IPOA. The accused have objected to the taking of plea on the following grounds:-

- i) That the 5 accused presents in court have exhibited covid – 19 symptoms and ought to be tested for the same first before plea is taken. That explains the absence of accused 2.***
- ii) THAT the Misc. Cr. E2707/2021 on which they were first presented before court for custodial orders is yet to be withdrawn.***
- iii) THAT accuseds have filed a constitutional petition No. E338/2021 seeking to stop the taking of plea, a matter coming up for mention tomorrow.***

The prosecution side, the Law Society of Kenya and IPOA have objected to the application for deferment of the plea.

I have considered the submissions raised by the parties herein. In my considered view, the following issues are relevant in determining on this application for deferment of the plea herein:

- 1. This is a charge of murder contrary to section 203 as read with section 204 of the Penal Code. all the persons named as accuseds are represented by advocates. They have also been subjected to psychiatrist examination and found fir to plead. These are the 2 primary considerations before plea is taken in a case such as this.***
- 2. The lower court in miscellaneous Criminal E2707/2021 gave the prosecution custodial orders for 14 days which days lapse today. The fact that the application has not been withdrawn would not affect the taking of the plea as the said withdrawal can still be done even after this plea is taken.***
- 3. There is no order from the constitutional and Human Rights Division or any other court stopping these proceedings. In any case, the applicants would still reserve their rights to pursue any suitable orders from the court even after the taking of the plea herein.***

**4. On the issue that the accuseds have shown symptoms of covid – 19, with respect to the counsel for the accused, this is a statement from the bar.**

I have been told that they were only subjected to an assessment yesterday. There is nothing on record to show that such symptoms were noted by the examining Doctors. Neither did any of the accuseds raise this issue. Even today, not a scintilla of medical evidence has been shown to court.

Article 49(1)(f) declares that an arrested person ought to be produced in court as soon as is reasonably possible. The accuseds have been in custody for at least 14 days. I am therefore not convinced by the defence submissions that there has been haste in arraigning the accused for plea today.

The sum total of this is that I do not find any merit in the defence application to have the plea herein differed. I dismiss the same and order that the charges be read out to the accused as fixed. Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**31.8.2021.**

**Omari**

Our instructions were limited to make the application to stop plea. This has been extinguished by the ruling. This is the position of the position of the whole legal team that I lead. So, the 5 are not represented by any of us. The whole defence team has accordingly withdrawn.

**1<sup>st</sup> accused:**

I have withdrawn my instructions. I do not have an advocate.

**Accused 3:**

I also do not have an advocate.

**Accused 4:**

I request the court to give me time to get an advocate. I am unable to take plea.

**Accused 5:**

I now do not have an advocate. I ask for time to hire an advocate.

**Accused 6:**

I ask for time to get another advocate before I take plea.

**Ms. Gichuhi:**

The court should appoint advocates for them. Secondly, we pray that they be remanded at Industrial Area. They may then be treated as the desire. They may also get time to hire advocates. All the 6 cannot stay at Capital Hill police station in view of their allegations. We shall demand written instructions on their new advocates.

**Mr. Havi:**

The court has ruled against deferment. I differ with the ODPP. Since the counsel have withdrawn, we can take plea.

The right to a fair hearing is given. Accused is not compelled to take up the right. If he chooses not to take it, the right is not denied..

Article 22(3)(b) declares that the court shall not be unreasonably restricted by procedural issues. Under Article 49, they have their rights. It does not mean that plea be held. The DPP seeks review of the ordered of the court. Accused 1 has said he does not need the right to representation. The others have chosen against their right.

**Ms. Owino:**

They were fir to take plea. We register our disappointment.

**Court:**

I have considered the submissions. Counsel for the accused have withdrawn. It is not possible to conduct the plea herein. I revise the orders accordingly.

I order that this matter be mentioned tomorrows before the Deputy Registrar for the appointment of advocate for the accuseds. They are free to hire their own advocates who should accordingly appear in court. Matter would then come for plea on Thursday 2.9.2021. Mention 1.9.2021 (Deputy Registrar) plea on 2.9.2021.

**D. O. OGEMBO**

**JUDGE**

**31.8.2021.**

**Court:**

Remanded at Capital Hill Police station.

**Mr. Havi:**

We pray for production order for accused.

**Court:**

Production order to issue for accused 2. Mention before the Deputy Registrar to be done virtually. The mention for plea to be physical.