



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL CASE NO. E001 OF 2021**

**BENSON MURIGI KARIUKI.....ACCUSED/APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant herein has moved this court via a Notice of Motion dated the 22<sup>nd</sup> day of June, 2021 in which he has sought for orders;

*1) That the charge is defective within the meaning of Section 214 of the Criminal Procedure Code.*

*2) That the court do grant any other orders that it may deem just to grant.*

2. The application is premised on the grounds on its face and it is supported by the annexed affidavit sworn by Kelvin Muchangi Gichugu, an advocate of the High Court of Kenya, on the 22<sup>nd</sup> day of June, 2021.

3. The grounds in support of the application are that: the charge sheet is defective because it is at variance with the evidence adduced in its support; the applicant is likely to stay in remand, while the evidence before the court is clear that he is not the person who committed the murder; the particulars of the charge sheet do not indicate, stipulate the accused as having committed the crime and that the applicant, is ready and willing to abide by the terms and/or conditions that the honourable court may impose.

4. In his supporting affidavit, the deponent deposes that the accused was arrested on the 6<sup>th</sup> day of December 2020 and was in police custody until the 24<sup>th</sup> January 2021 when he was presented to court. That, the deponent has gone through the evidence on record (committal bundle), the witness statement, charge sheet and the expert opinion and the particulars of the charge sheet. It specifies one Dennis Murimi Kanini as having murdered the deceased and not Benson Murigi Kariuki.

5. He further deposed that in his witness statement, one Michael Muthama Mutindi shows that the accused person hit the deceased on the head with a masaai rungu but one John, stabbed him severally on the stomach which evidence he deposed, is supported by that of the investigating officer. Further that, the post mortem report indicates that the deceased death was caused by “*cardio pulmonary arrest from massive internal bleeding from ruptured spleen due to stab wound from assault.*”

6. He averred that the post-mortem report does not indicate that the deceased died due to being hit by a rungu but the cause of death was due to stab wound. That one John Muigai Kariuki is believed to have actually stabbed and killed the deceased and he has never been presented before the court. He urged the court to allow his application.

7. The application is opposed vide grounds of opposition dated the 2<sup>nd</sup> day of July, 2021 on the grounds that;

*1) The application offends the provisions of Article 50 (2) (e) of the Constitution.*

*2) The application is misconceived as it seeks to pre-empt what the prosecution shall adduce as evidence.*

*3) The application is not meritorious as it does not disclose any illegal act or omission on the part of the respondent.*

*4) The application has been brought to court prematurely without any regard to procedural law or rules on admissibility of evidence.*

*5) The application lacks merits and it should be dismissed.*

8. The court gave directions on filing of submissions to which, the respondent complied but the appellant did not file. The court has perused the submissions and they mirror the grounds of opposition.

9. This court has considered the application and the supporting affidavit, the grounds of opposition and the submissions by the respondent.

10. The applicant has moved the court under Articles 25 (c), 50 (4) and 165 (3) (A) of the Constitution and Section 214 of the Criminal Procedure Code.

11. The court has perused the constitutional provisions under which the application has been brought. Article 25 is on Fundamental Rights and Freedoms that may not be limited while 25 (c) deals with Right to a fair hearing. Article 50 is on fair hearing and 50 (4) is on evidence that is obtained in a manner that violates any right of fundamental freedom in the Bill of Rights and it provides that such evidence shall be excluded if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice. Article 165 is on establishment of the High court and its jurisdiction.

12. It is my considered view that none of those provisions has been breached because the trial is yet to commence. The accused person o being arraigned in court, denied the charge and the matter is pending hearing. The applicant has not shown how his right to a fair trial has been violated.

13. Section 214 of the Criminal Procedure Code is on variance between the charge and evidence and amendment of the charge. It provides that at any stage of the trial before the close of case for the prosecution, if it appears to the court that the charge is defective either in substance or form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case.

14. As rightly submitted by the respondent, the information as drafted does not disclose any error as alleged or at all. The prosecution reserves the right to amend the charge sheet if there will be need to do so. The application seeks to pre-empt what the prosecution shall adduce as evidence during the main trial. As it stands now, there is no evidence that has been adduced on the basis of which the court can consider the application as filed. The committal bundle contains the list of witnesses, their statements and other materials that the prosecution intends to rely on. The same is not evidence until the trial commences and evidence adduced as per the law.

15. In the end, I find that the application is devoid of merits and it is hereby dismissed.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF SEPTEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Accused/Applicant

.....for the State