REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL (MURDER) CASE NO 32 OF 2016

JOSEPH MUSEMBI SILA.....1ST ACCUSED/ APPLICANT

BENSON M. NZIOKI MUASYA *alias* VUTUS.....2ND ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Vide an application filed on 27.5.2020 that was brought under Section 81(d)(e) of the Criminal Procedure Code and Article 50(2)(e) of the Constitution, the applicant sought the following orders:

a. ***That this court be pleased to issue an order of production/availing of proceedings in Criminal Case 907 of 2016 vide HC Cr Appeal 72 of 2018 in which the applicant was acquitted;***

b. ***Spent***

2. The reasons given for the instant application are indicated in a supporting affidavit thumb printed by the applicant. What can be gathered from the same is that the applicant is that he had been charged before the chief magistrate's court at Machakos with an offence of attempted murder contrary to section 220 of the Penal Code and was later convicted and sentenced to life imprisonment. He lodged an appeal before the High Court and was thereafter acquitted of the charge.

3. The state opposed the application vide replying affidavit that was deponed by Martin Mwongera on 22.6.2020. It was averred that the accused person was charged with the offence of attempted murder contrary to section 220 of the Penal Code and was convicted and sentenced to life imprisonment in the Chief Magistrates Court at Machakos. It was averred that the applicant was dissatisfied with the decision and appealed to the High Court vide Appeal 72 of 2018 where the applicant was acquitted. It was deponed that the charge of murder is distinct from that of attempted murder; that the deceased in the murder charge is Samuel Munyao Kakovu and in the attempted murder case the complainant is Joseph Kilonzo Kavusi. The deponent averred that the crime happened on the night of 17th and 18th August, 2016 and the victims were watchmen, further that the fact that the offences occurred simultaneously did not bar the prosecution from proceeding with the high court matter. It was averred that the issue of double jeopardy would not suffice since the victims are different and the charges are separate and distinct. The court was urged to dismiss the instant application as the same was frivolous and an abuse of the court process.

4. The application was canvassed vide oral submissions and Counsel Muthama holding brief for Counsel Kituku on behalf of the accused sought to rely on the supporting affidavit. Counsel for the state equally sought to rely on the replying affidavit.

5. The singular issue for determination is whether the application has merit.

6. The applicant has invoked the provisions of section 81(d)(e) of the Criminal Procedure Code that provides as follows;

(1) Whenever it is made to appear to the High Court—

……

(d) that an order under this section will tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice or is required by any provision of this Code,

it may order—

(i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;

(iii) that an accused person be committed for trial to itself."

7. The applicant has also invoked Article 50(2)(e) of the Constitution that provides that an accused has a right "to have the trial begin and concluded without unreasonable delay"

8. The above self-explanatory provisions of the law speak about the fact that the same have no nexus with an order to supply proceedings in a matter that had been concluded. The operative law that provides for supply of proceedings is consisted in Article 50 (5)(a) and (b) of the Constitution that provides as follows;

"(5) An accused person--

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

9. Section **392** of the Criminal Procedure Code echoes the constitutional provisions and it provides as follows:

"***392. Right to copies of proceedings***

If a person affected by a judgment or order passed in proceedings under this Code desires to have a copy of the judgment or order or any deposition or other part of the record, he shall on applying for the copy be furnished therewith provided he pays for it, unless the court for some special reason thinks fit to furnish it free of cost.

10. The said provision of the law suggests that once the applicant pays for the proceedings, then he may be availed with the same.

11. In the instant case, the record bears witness that the proceedings in the instant case bear no relation to an acquittal of the applicant and therefore the instant application is improperly before the court. The applicant is counselled to direct his application to the relevant file where he will be subjected to the provisions of Article 50 (5)(a) and (b) of the Constitution and section 392 of the Criminal Procedure Code.

12. As noted above, the accused's application seems muddled and at the hearing hereof learned counsel Mr. Muthama sought to distance himself and suggested that the accused person prosecutes the application himself. It is clear that the accused is somehow making two requests namely that the proceedings in both the lower court and high court be availed to this court for perusal and secondly that the said proceedings is evidence that he has already been dealt with under the law and will suffer double jeopardy if the trial continues. Learned counsel for the prosecution Mr. Mwongera vide his replying affidavit deposes that the charge facing the accused is different from the on the accused had been charged with and in which he was later acquitted. It was also deponed that the victims of the offence are different.

13. I understand the accused to be implying that since he was acquitted of the charge of attempted murder then he shouldn't be taken through this charge of murder. However, as it has been shown that the complainants are different then the accused's intended plea of autrefois acquit is likely to be an uphill task. The fact that the witnesses may be similar is no bar to the accused's prosecution. The accused is at liberty to present such a defence of autrefois acquit at the opportune time. It might be prudent for the accused to engage his Advocates over the matter before the hearing begins in earnest.

14. In the result, I find the application lodged by the 1st accused and filed on 27.5.2020 lacks merit. The same is dismissed.

It is ordered.

Dated and delivered at Machakos this 28th day of September,2020.

D. K. Kemei

Judge