



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 7 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DOYO GALGALO.....1ST ACCUSED

GALMO GUYO GALGALO *alias* MAKANYANGU.....2ND ACCUSED

BOKAYO DID BORU *alias* WABARO.....3RD ACCUSED

SOMO HUKA KANCHORO.....4TH ACCUSED

RULING

INTRODUCTION

1. The factual basis of this application is that the suspects on **28/11/2019** appeared before me for the purposes of plea taking when through their Advocates on record filed an affidavit sworn by **DOYO GALGALO** in which he gave the background information regarding this cause to wit that they were arrested on allegation of having killed the deceased herein as per the intended charge and were detained in custody to allow the State to conclude investigations.

2. He deponed that on 27th December 2018 they were presented before the Deputy Registrar at Meru who ordered that they be remanded at Meru G.K. Prison and on 2nd January 2019 they appeared in the High Court where they were released on bail and case management set for 17th January 2019 when the DPP made an application to consolidate the case of the first three suspects and fourth suspect and to terminate the consolidated case to allow for further investigations.

3. The trial court directed the office of DPP to file a formal application for the termination which was done and the court allowed the termination of the case before the suspects took their plea only for them to be re-arrested and produced before me with fresh information, to the affidavit was annexed several documents including an affidavit sworn by **FREDAH MWANZA** Senior Assistant Director of Public Prosecutions giving reasons for seeking termination.

4. The suspects on the strength of the said affidavit objected to their taking plea before me to which I directed the State to file a response which was done through the affidavit of **IP ERNEST MUA** giving reason as to why this cause should be heard in this court.

5. It was stated that the family of the deceased were living in fear of the suspects because they hail from the same clan and due to the ongoing animosity they fear being harmed. It was stated further that the 1st suspect is a former member of the County Assembly while the 2nd suspect was an aspirant in 2017 Elections and due to their political affiliation they have influence in the Borana community so the situation may explode if the case is tried in Marsabit or Meru which are within close proximity.

6. It was stated that the offence was committed in Marsabit and because of tension within the community the case was registered in Meru High Court, where the situation is not different since the families of the deceased and the suspects are spread across Isiolo County to Meru County making it necessary to file it in Nairobi.

ISSUES FOR DETERMINATION

7. With that factual basis in mind Ms. Nyamosi learned public prosecutor addressed the court exclusively on why the cause should be registered in this court and emphasized that due to the situation on the ground in both Marsabit and Meru it will not be in the best cause of

interest of justice if the matter is heard in Meru.

8. Mr. Sagana and Mr. Kiget on the other side submitted that the reason for bringing the suspects to this court was that the prosecutor was not happy with the bond terms given by the initial trial court as stated in the supporting affidavit of **FREDAH MWANZA** while asking court to terminate the cause and that it amounts to forum shopping for a suitable court in respect of the issue of bond.

9. Whereas the DPP has a constitutional mandate under **Article 157 (6) (a)** to institute and undertake proceedings against any person before any court (other than court martial) in respect of any offence alleged to have been committed in exercising that power the DPP is required under **Section (11)** thereof to have regard to public interest, the interest of the administration of justice and the need to avoid abuse of the legal process.

10. It is not disputed that the suspects were first arraigned in the High Court of Kenya at Meru in Criminal Case No. 125/2018 and Criminal Case No. 6 of 2019 respectively which cases were on 25th day of January 2019 discontinued when the State entered a *Nolle prosequi* accepted by court and the trial court made the following order:-

“The accused are hereby discharged subject to conditions that in the event the State decides to charge them they shall summon the accused persons to the police station and shall bond them to attend to the police station or the court whenever is appropriate.”
(Emphasis added)

11. My understating of the reading of the order “*the court*” means the then trial court in Meru and I take the view that while exercising its constitutional mandate, it would have been good practice for the State upon conclusion of further investigations to had arraigned the suspects in Meru High Court with fresh information for them to take plea or for the DPP to make an appropriate application to have the cause transferred to this court or any other court if they so wish for trial and determination.

12. In view of the material placed before me and having come to the conclusion that in having the suspect brought before this court and without complying with the orders earlier issued herein in Meru is an abuse of the court process for which this court is not willing to grant the prosecution unlimited powers to decide where to charge an accused person at its convenience and in violation of their constitutional rights under **Article 49 (1) (4)** of the **Constitution**.

13. I therefore direct the State to prepare fresh charge sheet for registration before the High Court of Kenya at Meru and the said charge so registered be placed before the Presiding Judge thereat on **31/1/2019** for plea taking with the State being at liberty to make an application before the said judge for transfer of the same to this court if they so wish.

14. For avoidance of doubt the file should not be placed before Hon. A.C.A.A. ONG’INJO J. who has handled the cause and made some orders thereon so as not to prejudice the rights of any party herein and it is so ordered.

Dated, Signed and Delivered at Nairobi this 30th day of January, 2019

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J. WAKIAGA

JUDGE

In the presence of:-

Ms. Onunga for Nyamosi for the State

Mr. Muganda for the 1st and 2nd accused persons

Mr. Muganda for Kiget for the 3rd accused person

Mr. Muganda for the 4th accused person

Accused 1 present

Accused 2 present

Accused 3 present

Accused 4 present

Court Assistant: Karwitha