



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 18 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

SIMON NDUNG’U WAINAINA.....1ST ACCUSED

REUBEN SHANGI AKELLO.....2ND ACCUSED

RULING

On 7th November 2018 when this matter came up for mention the accused persons, through their defence counsel, raised certain issues that necessitated this ruling. At the time the issues under reference were made, the accused persons were being represented by Mr. Wamwayi learned counsel for the 1st accused and Mr. Muchiri, learned counsel for the 2nd accused. Mr. Wamwayi held brief for Mr. Muchiri and presented the issues on behalf of both accused persons. The submissions by Mr. Wamwayi were captured as follows:

“The 2nd accused would like to have his defence heard and he wishes to call 50 witnesses who were in prison with him in Naivasha where this matter occurred. Mr. Wamwayi submitted that the court should conduct the trial at Naivasha Prison so that the accused can demonstrate to the court the layout of the scene for the court to have a clear picture of the issues. That the 2nd accused is keen on pursuing a Petition in the Constitutional Division as to the fairness of trial since he was excluded from the trial up to where the case had reached. That the accused believes there were no good grounds in excluding him in the trial and that the same case applies to the 1st accused. It was submitted that the accused persons want to challenge the proceedings. That the 1st accused also has a medical condition that is yet to be treated as ordered by the court on several occasions. That this medical condition is getting worse. That the 1st accused has ulcers and dental problems which require urgent attention as well as a skin disease.

In response Ms. Ikol, learned counsel told the court that she was glad that there is some progress in the case. She said that the reason the matter was brought to Nairobi was due to security reasons. She said that she believed it was due to this that it would not be prudent to take the matter to Naivasha. She said she was aware the Constitutional Petition the accused persons made claiming that they were unjustly treated was withdrawn by the accused persons. She said that the accused persons are using delaying tactics. She asked the court to proceed with the matter in order to conclude it.

In reply Mr. Wamwayi stated that it is only the court that can decide whether to accept or decline request to have the matter heard in Naivasha Prison. He said that court does not visit scene when necessary and that security can be provided. On the issue of the Petition Mr. Wamwayi told the court that the instructions he had is that the Petition was withdrawn by Prof. Nandwa without the instructions and consent of the accused persons and that the accused persons would like to file another Petition as soon as possible. Mr. Wamwayi said the defence was ready to take a date for the hearing of the defence case and shall apply for court summons to the witnesses the accused persons wish to call.

To put this matter into perspective, it is vital to give some historical background. I took over proceedings in this matter on 27th October 2014. I noted that both accused persons were not in court. I read the court file and noted an order from my predecessor court (Muchemi, J) excluding the attendance of the two accused persons. For ease of reference, the orders read as follows:

- (a) That the accused persons be excluded from the court proceedings when their case is heard or mentioned;***
- (b) That only their legal representatives will be allowed in the courtroom during court proceedings;***
- (c) That this order be communicated to the officer in charge of Nairobi Remand Prison in writing by the Deputy Registrar of this court;***

(d) That a copy of the letter to the OC Prison be given to the advocates of the accused persons.

The court found it necessary to make the decision to exclude the attendance of the accused persons to these proceedings following an incident that occurred inside the courtroom where, as shown in the court file records, the two accused persons incited other accused persons in the dock to cause chaos in the courtroom thereby making it impossible for the court to transact its business.

At the time of taking up these proceedings, the case had not commenced. I started hearing the evidence of prosecution witnesses on 17th June 2015. I took evidence of five witnesses. After several mentions to allow the prosecution to bring in the pathologist and the Investigating Officer, this court declined further adjournment and the prosecution case was closed on 16th August 2016. This court made a ruling and placed the two accused persons on their defence. The ruling was delivered in the absence of the two accused persons but in the presence of their counsel. Directions were given by this court that it was necessary for the accused persons to attend court to be informed of their rights to defend themselves and to allow them the opportunity to explain to the court how they wished to give their defence and to indicate whether they would be calling witnesses. Due to the difficulties experienced regarding communication with the accused persons by Mr. Kagura learned counsel representing the 1st accused and Mr. Mutitu learned counsel representing the 2nd accused, the two counsel applied to be discharged from representing the accused persons. This court allowed the application. Professor Hassan Nandwa came on record for both accused. Production orders were issued and the two accused persons attended court on 15th May 2017. On that date, this court was informed that the accused persons would be give sworn evidence in their defence and would be calling **25 witnesses**. Defence hearing date was set for **5th and 6th June 2017**.

On **5th June 2017** Prof. Nandwa told the court that the hearing of the defence case was unable to proceed on that day because the 1st accused was unwell and had sought specialized treatment at Kenyatta National Hospital with an appointment given for **12th June 2017**. He sought to have the matter adjourned to another date. Court was informed that the 2nd accused and the prosecution were ready to proceed. The matter however did not proceed due to the issues raised by the 1st accused. The matter was adjourned to **20th June 2017**. On **20th June 2017** Ms. Lelima learned counsel appeared in court on behalf of Prof. Nandwa. She told the court that she was not able to proceed because she had just been assigned the file and wanted more time to read it in order to prepare for defence hearing. She also said the 1st accused was sick and required to be taken to hospital. Nothing was said about the hospital appointment of **12th June 2017**. The court was not told whether there were any challenges in having the 1st accused taken to hospital nor was the court moved to issue orders in that regard. This court allowed **an adjournment to 11th and 12th October 2017**.

On **11th October 2017** Ms. Lelima told the court that 1st accused was not feeling well and the defence was not ready for hearing. Secondly, court was told that the accused persons had fellow prisoners from Naivasha and Kamiti Prisons as witnesses and wanted to find out their names and prison numbers to enable them seek court summons. Counsel sought an adjournment. The matter was again **adjourned for mention on 18th October 2017**. On that date Ms. Lelima told the court that a hearing date could be fixed. The **matter was fixed for hearing on 18th, 19th and 20th of December 2017**. The court also **issued witness summons to 10 inmates whose names and particulars were to be supplied to the Deputy Registrar by the defence counsel**. Court record shows that **on 18th December 2017 the defence counsel did not turn up** and the hearing did not proceed. The matter took a while before the current defence counsel were assigned to represent the accused persons leading to this application.

My understanding of the issues is that the accused persons are seeking the following:

- (i) To have the trial conducted at Naivasha Maximum Prison. The reason given for this application is that the accused persons want to demonstrate to the court the layout of the scene for the court to have a clear picture of the issues.
- (ii) They accused persons will call 50 defence witnesses who are fellow prisoners in Naivasha Prison and may require court summons.
- (iii) The accused persons wish to pursue a constitutional petition to challenge the orders of this court (Muchemi, J) that excluded them from attending the court during the trial of their case stating that the court failed to give good grounds for those orders.
- (iv) That 1st accused is sick with ulcers, skin and dental issues and claim that court orders to take him for treatment are not being obeyed by the prison authorities.

In the course of this trial I have had the chance to read the court file records and to listen to the witnesses that have testified. This matter was transferred to Nairobi from Nakuru. This court has a duty under the law to hear and determine this matter expeditiously. This duty of the court is informed by Article 50 (2) (e) of the constitution which states that:

Every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay.

It is therefore in the best interests of the accused persons to have this trial conclude without unreasonable delay. This is a right granted them by the law. I believe that it is within the right to fair trial for an accused person to seek to visit the scene. This is what I believe the request to have the trial conducted at Naivasha Maximum Prison to mean. However the justification for this request is that the accused persons want to demonstrate to the court the layout of the scene for the court to have a clear picture of the issues. It is upon the court as the arbiter of this trial to exercise its discretion to grant or decline granting such a request. I have considered the request and the reasons why this matter was transferred to be heard in Nairobi. I am also aware of the facts of this case. From the evidence of the witnesses who have testified, the scene of the crime was a cell at Naivasha Maximum prison. The cell had three prisoners, the two accused person and the deceased. From the evidence so far adduced this court is fully aware and understands the issues of this case. I fail to understand the reason why the accused persons would seek to demonstrate to this court the layout of the scene. From the evidence adduced, there are no issues arising from the facts

surrounding the scene. I find no prejudice to the accused persons or to the prosecution if this court fails to visit the scene. The request to have the matter transferred to be heard in Naivasha Maximum Security Prison is declined.

Secondly, I have considered the application to call 50 witnesses all from Naivasha Maximum Prison. The offence occurred in a cell occupied by the two accused persons and the deceased. Of course there are the security guards and the other Prison Officers. Some of them have testified and have been cross-examined. In my considered view, and while taking into account that the accused persons have a right to call witnesses and to determine the number of those witnesses, I find it unreasonable the application by the accused to call 50 witnesses. This application is not genuine in my view. This is because the record shows that at first the accused persons had intimated that they would be calling 25 witnesses. At one time they applied for court summons for 10 witnesses. The number of possible defence witnesses keeps on changing and has now increased to 50 witnesses. It seems to me that the accused persons are using the right granted to them by the law to call witnesses to unreasonably delay this trial. In my view the accused persons are not genuine in their application. I need to remind the accused persons that, by their actions in delaying this case, they may actually be trampling on the very law that protects them. Instead of giving the law and the court the opportunity to operate in order to have this case heard and concluded without unreasonable delay, they are actually delaying the case and doing so deliberately, in my view.

Thirdly, the accused persons have a right to challenge any court decision and order made in their case. They have a right to challenge the order of this court (Muchemi, J) excluding them from being present in court. This however should not be used as an excuse to delay this trial. Whatever actions they decide to take can be taken without affecting the progress of this case and that action may have no bearing whatsoever with the progress of this trial unless there is a court order stopping this court from proceeding with the trial.

Finally, this court takes exception to the issue touching on the medical condition of the 2nd accused. Although it was submitted that the 1st accused has a medical problem, the court record shows that it is the 2nd accused who has been applying for treatment. In my view, this is an issue that is brought to the attention of the court on and off. This again should not be used to interfere with the progress of this trial. His condition if it is genuine can be handled as the trial goes on. I also wish to state that the accused persons should give their defence counsel support to enable them facilitate the court in having this matter finalized.

Having considered taken into account all the issues raised by the accused persons in this matter and having considered the same, I hereby make the following orders:

- (i) The application to conduct the case to Naivasha Maximum Prison is hereby declined.
- (ii) The accused persons are at liberty to call any number of witnesses they wish but this should be reasonably done and should not be used as a delaying tactic because this court is aware of the circumstances under which the offence is alleged to have been committed.
- (iii) The accused persons are at liberty to pursue a constitutional petition or any other lawful recourse to challenge any orders made by this court in respect of this case but this should not be used to delay the expeditious determination of this case.
- (iv) The medical condition of the 2nd accused should not be used to delay this trial because it is an issue that can be addressed as the case progresses.
- (v) This court shall fix a date for the hearing of the defence case in consultation with the defence and prosecution counsel. The date taken should be respected by all the parties and particularly by the defence failing which this court shall make appropriate orders.

Orders shall issue accordingly.

Delivered, signed and dated this 26th day of February 2019.

S. N. Mutuku

Judge