



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. 17 OF 2015**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**JOSHUA CHACHA MORONGE.....ACCUSED**

**RULING NO. 1**

1. On 07/04/2015 the accused person herein was charged before Court with the murder of one **Esther Gati**. The accused person denied the charge and a trial was ordered. By a ruling rendered on 18/06/2015 the accused person was released on conditional bail. The accused person was formally released from custody on 22/03/2016 when a surety was approved. It seems that immediately upon his release the accused person absconded and since then he has never turned up before Court.

2. The surety was eventually arrested and despite grant of time he could not avail the accused person. This Court ordered for the forfeiture of the parcel of land known as **Suna West/Wasweta II/2729** which was used as security but the Auctioneer wrote to this Court on 19/02/2019 and indicated his inability to locate the property due to its remoteness and opined that an alternative mode of recovery be initiated.

3. The prosecution has now applied to this Court on the basis of **Article 50(2)(f)** of the **Constitution** that the hearing proceeds notwithstanding the absence of the accused person. The Defence Counsel submitted that the prosecution should instead withdraw the information under **Section 87A** of the **Criminal Procedure Code**, Cap. 75 of the Laws of Kenya (hereinafter referred to as '**the CPC**').

4. **Article 50(2)(f)** of the **Constitution** provides as follows: -

**50(2) Every accused person has the right to a fair trial, which includes the right-**

**(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;**

5. The aim of a criminal trial is to expeditiously accord justice to all parties. An accused person found guilty of an offence ought to be accordingly sentenced in line with the law otherwise one must be acquitted forthwith. It is that balance which a trial aims to achieve. Therefore, in a case where one of the parties makes the trial unable to proceed then such a party visits an injustice to the other. That being so, a Court of law is fully enabled to deal with such instances. On one hand if the delay is occasioned by the prosecution the Court has powers to even compel the hearing to proceed. On the other hand, if the delay is occasioned by the accused person **Article 50(2)(f)** of the **Constitution** comes to play.

6. For a Court to take refuge in **Article 50(2)(f)** of the **Constitution** and proceed on with a trial in the absence of an accused person the Court must first be satisfied that such inability to proceed with the trial is caused by the deliberate conduct of the accused person. That therefore means if the Court forms the opinion that the delay is not caused by any deliberate conduct on the part of the accused person then the trial cannot legally proceed in the absence of the accused person. To reach any of the findings, a Court must carefully consider the particular circumstances of the case.

7. In this case the Accused person was placed on bail and since his release from custody in 2016 he has not attended Court. This Court has since taken various possible measures to have the accused person availed before Court including the issuance of a Warrant of Arrest which still remains in force. The trial has since not proceeded in the hope that the accused person shall be arrested and arraigned before Court. On 19/04/2016 the Defence Counsel informed the Court that the accused person had contacted him through a call where the Counsel impressed upon the necessity of the Accused person attending Court and the attendant repercussions in default.

8. The act of jumping bail is a deliberate act on the part of the Accused person. Given the history of this matter, the chances of the accused person availing himself before Court are very minimal unless arrested. Since 2015 when the accused person pleaded to the information the trial has never begun despite witnesses turning up on several hearing days. I am satisfied that it is the deliberate conduct of the accused

person in this matter which continues to delay the trial.

9. On the way forward the Defence Counsel submitted that the prosecution ought to instead withdraw the information under **Section 87A of the CPC**. I have severally dealt with the issue as to whether an information can be withdrawn under **Section 87A of the CPC** and held that **Section 87A of the CPC** does not apply to informations. (See **Kakamega High Court Criminal Case No. 13 of 2009 Republic vs. Daniel Shikuku Kwoba (2015) eKLR**, **Kakamega High Court Criminal Case No. 50 of 2009 Republic vs. Patrick Manane Bukachi (2015) eKLR** among others). I still hold that position. In the event the prosecution is intent on terminating a trial based on an information it may consider other avenues but not a withdrawal under **Section 87A of the CPC**.

10. In view of the foregone I now find and hold that **Article 50(2)(f)** of the **Constitution** perfectly comes to play in this case and order that the trial shall proceed the absence of the accused person notwithstanding.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of June 2019.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Marvin Odero** Counsel for the Accused person.

**Mr. Kimanthi**, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** – Court Assistant.