



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 24 OF 2018

EDDLIED MANDI JILANI.....1ST APPLICANT

MAKONDE RUWA BUNI.....2ND APPLICANT

NGIRA KARISA CHARO.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Background

1. The 3rd Accused herein **Ngira Karisa Charo** was charged together with the 1st and 2nd Accused with the offence of murder contrary to Section 204 of the Penal Code.
2. However, in the cause of the proceedings and pursuant to a Plea Agreement dated and filed herein on 17.1.19 made pursuant to Section 137 A-Q of the Criminal Procedure Code, Cap 75 Laws of Kenya, the 3rd Accused entered into a Plea Bargain with the Director of Public Prosecutions, and consequently pleaded guilty to the charge of murder. The guilty plea was freely and voluntarily entered into without promise or benefit of any kind, other than as contained in the Plea Agreement and without threats, force, intimidation, or coercion of any kind. Pursuant to that plea the court was persuaded to consider punishment or sentence as contained in the Plea Agreement which included a sentence for a period of 10 years. The Accused person was, in reciprocation, to give evidence on behalf of the prosecution as its witness. The Accused's right under the said Plea Agreement were explained to him by his counsel Ms. Oyier. The accused confirmed that he fully understood the Plea Agreement and terms contained therein, and that he voluntarily executed the same.
3. By the Judgment of this Court dated 8.4.19, this Court jailed the 3rd Accused person to serve a sentence of eight (8) years in prison.
4. Subsequently later on the same day 8.4.19 the 3rd Accused person took to the witness box as prosecution witness number three – **PW3 – Ngira Karisa Charo**. His testimony proceeded on 12.6.19 and on 16.9.19.
5. In the course of the proceedings Mr. Kemu, learned counsel for the prosecution observed that the evidence of the Accused person appeared to be contradictory to the terms contained in the aforesaid Plea Agreement.
6. Accordingly, Mr. Kemu on 30.10.19 made an application under Section 137 (L) (2) and (3) of the Criminal Procedure Code asking the Court to set aside the conviction and sentence passed pursuant to the said Plea Agreement on grounds of fraud and misrepresentation.
7. Counsel submitted that the Plea Agreement was executed by all the parties thereto including PW 3. Part IV of the Agreement was express that the accused person had agreed to give accurate information and to fully cooperate with the State. That cooperation included testifying against his accomplices on behalf of the State. Part II of the Agreement related to the advice to PW 3 of his rights, and that the accused had properly been advised by his counsel, and had willingly waived those rights and agreed to be a witness for the State. The accused had confirmed that he had voluntarily entered into the said Agreement. He was later convicted and sentenced to serve 8 years imprisonment by this Court. Finally, the prosecutor put him on the dock and he testified as PW 3 stating the facts set out in Part III of the Plea Agreement. He testified in the Kiswahili language which he understood. His examination in chief confirmed the facts as laid down in part III of the Agreement.
8. However, in a curious turn of events when he was cross examined, PW 3 reneged on the Plea Agreement. Mr. Kemu submitted that Part V Section 11 of the Agreement obligated PW 3 to give true account of the events. Under Section 13 should the accused fail to comply thereto the State was at liberty to prosecute the Accused person fully. Mr. Kemu submitted that the witness had acknowledged that he was fully aware of the Agreement and that he fully understood it and was happy with his counsel Ms. Oyier.

9. Mr. Kemu submitted that in cross examination the PW 3 turned his back on the prosecution and reneged on the Agreement. He took the Court and the prosecution for a ride. He wasted this Court's time, as well as the time of his co-accused. Counsel submitted that under Article 157 (II) of the constitution, the DPP, in executing his mandate is obligated to consider the public interest and the need to prevent and avoid abuse of legal process. Counsel submitted that the conduct of PW 3 amounts to an abuse of the legal process, and that the 3rd Accused should not be allowed to benefit from a sentence allowed pursuant to the Plea Agreement having declined to meet his part of the bargain.

10. For those reasons, counsel prayed that the Court exercises its discretion under Section 137 (L) and sets aside the sentence and direct PW 3 be prosecuted under the Plea Agreement.

11. Mr. Kemu also prayed that the court orders investigations into possible purgery.

12. The application was not opposed by either the accused persons or by Ms. Oyier learned counsel for the 3rd Accused.

13. The above are the facts leading this Ruling.

The Determination

14. Section 137 L (2) states thus:

137L(2)

“...the Director of Public Prosecution, in the public interest and the orderly administration of justice, or the accused persons, may apply to the court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud and misrepresentation.”

15. I have carefully considered the application. Without going into the merits of the testimony of the accused person PW 3, it is prima facie evident that his testimony materially departs from the Plea Agreement filed in this Court on 17.1.19. the variance between the witness' testimony in Court with the Plea Agreement is not a determination to be made by the Court at this stage. It suffices that the Director of Public Prosecution, a party to that Plea Agreement, is satisfied that the variance is enough for him to made an application for setting aside the conviction and sentence under Section 137(L) of the CPC. The law also does not give the Court an option upon application under Section 137 (L).

16. Accordingly, therefore the application by Mr. Kemu is herewith allowed.

17. The conviction and sentence of the 3rd Accused **Ngira Karisa Charo** is hereby set aside.

18. Upon the setting aside of conviction and sentence, Section 137 L (3) comes into play. It states:

“where a conviction or sentence has been set aside, under sub-section (2), the provisions of Section 137 J apply mutatis mutandis.”

19. Under Section **137 J**, upon rejection of a Plea Agreement or upon setting aside of conviction and sentence a plea of not guilty shall be entered accordingly. This Court therefore hereby enters a plea of not guilty in respect of the 3rd Accused.

20. The prosecutor and the 3rd Accused are at liberty, pursuant to Section 137 J (2) either to proceed with the trial in this Court, or to try the matter afresh before another court.

21. It is hereby ordered and directed that the Directorate of Criminal Investigations investigate possible purgery herein, and/or possible collusion or conspiracy surrounding the matters raised in the application, and to file a report to this Court within a period of 90 days from the date of this Ruling.

Dated, Signed and Delivered in Mombasa this 28th day of November, 2019.

E. OGOLA

JUDGE

In the presence of:

Mr. Magolo for 1st Accused

Mr. Wamotsa for 2nd Accused

Ms. Oyier for 3rd Accused

Mr. Fedha for DPP

Mr. Salim for Family of the victims

Mr. Kaunda Court Assistant