



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR (MURDER) NO. 2 OF 2016

REPUBLIC APPLICANT

VERSUS

B M 1ST RESPONDENT

DOUGLAS GITONGA MUTEMBEI 2ND RESPONDENT

S M 3RD RESPONDENT

DANIEL GITONGA MWANGANGI 4TH RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 21st February 2018 by the Director of Public Prosecution for state asking this court for the following prayers namely:-

(i) That the application be certified urgent.

(ii) That this court does declare that the conduct of the 1st and 3rd Respondents have made it impossible to conduct trial herein in their presence.

(iii) That the state be allowed to proceed with the case in the absence of the 1st and 3rd Respondents.

(iv) That the decision reached after the trial herein do bind the 1st and 3rd Respondents their absence notwithstanding.

2. The grounds upon which this application has been are as follows namely:-

a) That the Respondents herein were first arraigned in court on 22nd March, 2016 charged for jointly committing an offence of murder contrary to section 203 as read with section 204 of the Penal Code.

b) That this court through a ruling delivered on 21st July, 2016 directed that the case be heard expeditiously on two consecutive days that is on 30th August, 2016 and 12th September, 2016.

c) That on 30th August 2016 the prosecution applied for adjournment but this court stick to its decision made on 21st July 2016 to the effect that the trial was to go on and it did where four witnesses testified.

d) That when the matter came up for further hearing on 16th January, 2017 the 1st and 3rd subjects were absent as they had escaped from a children's custody in Meru. Consequently, warrants of arrest were issued.

e) That the 1st and 3rd subjects were subsequently arrested and brought to court on 19th June, 2017 and the matter was fixed for directions on 17th July, 2017 but again the 1st and 3rd Respondents escaped again and have never been apprehended despite efforts to trace and arrest them.

f) That the 1st and 3rd Respondents have made the trial impossible to proceed in their presence and it would be in the interest of justice to proceed with the case as the 2nd and 4th subjects have religiously availed themselves in court whenever required to appear.

3. The motion is supported by the affidavit of IP Kyalo Maeke sworn on 21st February, 2018. I.P Kyalo depones that he is the investigating officer in this case and that they have tendered a report to this court on the efforts made to apprehend the escapees (1st and 3rd Respondents). He has further added that all police stations in Tharaka Nithi County and Meru North and South are working in concerted effort to apprehend the absconding subjects and that the two will be brought to court as soon as they are apprehended.

4. Mr. Machirah learned counsel for the applicant has submitted this motion is based on the provisions of Article 50 (1) (e) and (b) of the Constitution of Kenya 2010 which provides that trial should proceed without unreasonable delay. He further submitted that the deliberate absence of the 1st and 3rd Respondents infringes on the right of 2nd and 4th Respondents to have the trial against them to conclude without unreasonable delay.

5. The state has further contended that the conduct of the two subjects should be censured by this court because they have virtually made it impossible for trial to proceed. In their view amending the charge sheet at this stage will cause further delay which is detrimental to the interest of justice. Mr. Machirah has relied on the decision Republic -vs- Galma Abagaro Shano [2017] eKLR where the court decided that the court would proceed despite the absence of the accused persons who had deliberately decided to absent themselves upon being put on their defence.

6. The 3rd Respondent through Kijaru Advocate opposed this application opining that the provisions of **Article 50 (1) (b)** should be read together with the provisions of Section 206 of the Criminal Procedure Code. In his view the provisions of the cited statute provides that a court can proceed with a hearing or trial in a criminal case in the absence of an accused person only if the offence relates to a misdemeanor. He further submitted that under **Section 206 (4)** this court can only issue a warrant of arrest but cannot proceed with the trial because the respondents in this case face felony charges.

7. This court has considered this application and the response made on behalf of the 3rd Respondent who is also the escapee having escaped from a lawful custody in Meru Children/Juvenile home. The records of proceedings in this case shows that the two respondents (1st and 3rd) have escaped from lawful custody on two occasions on 11th February, 2017 when they had been taken to Meru Law Court for another criminal case and on 21st June 2017. This matter is a part heard as four witnesses have already testified but for more than a year now the matter has stalled because the 1st and 3rd accused persons have escaped and thereby forcing this court to adjourn the trial every time it comes up for hearing. This court had expected that the subjects would be apprehended quickly given that they are suit minors but given the polite reports filed in this court it is apparent that the parents of the minors have been complicit in their disappearance and although the police have taken action against them, the two minors are still on the run.

8. The provisions of Article 50 (1) (e) clearly provides that one of the rights of an accused person facing any charge in court is to have the trial begin and conclude without unreasonable delay which begs the question as to what happens to a situation like in this instance where there are more than one accused person and one or some deliberately either abscond on bond or escape from lawful custody making it difficult for the trial to be concluded expeditiously? In my view all accused persons enjoy equal rights under the constitution and the conduct of one of the accused persons should not be allowed to infringe on the rights of the Co-accused persons.

9. The 3rd Respondent's counsel has cited the provisions of **Section 206** of the **Criminal Procedure Code** which provides that a court cannot proceed with a trial in the absence of an accused is charged with a felony. While it is true that the accused in this case are facing murder which is a felony. I am not persuaded that the provisions of a statute can override a constitutional provision. **Article 2** clearly provides for the supremacy of the constitution and any law or provision of a statute like in this case (**Section 206 of Criminal Procedure Code**) that is inconsistent the constitution is void to extent of the inconsistency. **Section 206 (1)** of the **Criminal Procedure Code** is inconsistent with the provisions of **Article 50 (1) (e)** because while the statutory provisions provides that a court cannot proceed with a trial of a felony in the absence of the accused, doing so in my view would stall a trial or cause delay which infringes on the right of the co-accused persons and the victims family and that is contrary to the provisions of **Article 50 (1) (e)** of the **Constitution**. A trial should be conducted and concluded without unreasonable delay. The conduct of the 1st and 3rd Respondent in my view are not only unreasonable but deliberate either to stall the trial or escape the administration of justice. That conduct is abhorred by the law and certainly this court cannot entertain it.

10. This court is satisfied with the efforts made by the police in trying to apprehend the escapees but since the efforts are yet to yield any fruits it is quite apparent that it may take time to apprehend them and it would be unfair to punish the other Respondents- who are co-accused in this case by delaying the trial and in the process denying them their constitutional right. I am persuaded by the reasoning of the court in the cited decision in the case of Republic - vs- Galma Abagaro Shano [2017] eKLR where the court made the following observations:-

"..... it is my considered view that the trial against the accused person must proceed in the interest of justice. It has been pending since 14th October, 2015. The family of the deceased deserves justice and their rights must be considered. By absenting himself, the accused abrogated his constitutional right to be present during his trial. I therefore allow this application and direct parties to make final submissions notwithstanding the absence of the accused person to pave the way for judgment on the evidence on record."

The 1st and 3rd subjects herein have deliberately chosen to absent themselves and deprived themselves the right to be present during trial. They should and cannot be allowed to cause delay and infringe on the rights of the other subjects in this trial who have been attending court and are desirous to have the trial concluded.

In the premises I allow the application dated 21st February, 2018 and direct that the trial proceeds from where the other court left. The findings of this court upon conclusion of the trial will be binding to the 1st and 3rd Respondents their absence notwithstanding.

Dated, signed and delivered at Chuka this 20th day of June, 2018.

R.K. LIMO

JUDGE