



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CRIMINAL APPLICATION NO. 452 OF 2018**

**WILLIAM KIPKORIR CHIRCHIR.....1<sup>ST</sup> APPLICANT**

**GODFREY KIPNGETICH KURUI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DIRECTOR OF CRIMINAL INVESTIGATION.....1<sup>ST</sup> RESPONDENT**

**OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**RULING**

The two applicants are facing a charge of attempted murder contrary to Section 220 (a) of the Penal Code before the Chief Magistrate's Court Nairobi. It is alleged that on 20<sup>th</sup> of May 2018 at City Park within Nairobi County they jointly, while armed with AK47 rifles Serial Numbers 60034428 and 59010679 respectively, unlawfully attempted to cause the death of Bernard Chege Gathima by shooting his right hand and shoulder. The applicants have approached this court vide the Notice of Motion dated 27<sup>th</sup> July 2018 and filed on 30<sup>th</sup> July 2018 seeking to have the record and proceedings in Milimani SPCR Criminal Case No. 1115 of 2018 examined for this court to satisfy itself as to the correctness, legality or propriety of the orders of the learned trial magistrate dated 27<sup>th</sup> July 2018. The application also seeks to have those orders stayed pending the hearing and determination of this application and to have the charge of attempted murder stayed pending the hearing and determination of High Court Criminal Case No. 28 of 2018. The application is supported by the grounds found on the face of the application and on the grounds found on the affidavit sworn by the 1<sup>st</sup> applicant.

The applicants have filed written submissions. In addition, oral submissions were made in court by Mr. Mutuku, advocate, on behalf of the applicants. Four issues for determination have been framed by the applicants through their legal counsels as follows:

- (i) Whether this Honourable court has the power to invoke its revisionary and supervisory powers over subordinate courts.***
- (ii) Whether the proceedings in the lower court will embarrass the accused persons' defense and the proceedings in the High Court.***
- (iii) Whether the High Court and the lower court can try criminal offences emanating from the same transaction simultaneously.***
- (iv) Whether the plea taking on the charge of attempted murder and proceedings thereof at the lower court will make the High Court a theatre and/or forum for rehearsal of witnesses thereby occasioning prejudice to the accused persons.***

These four issues were collapsed into two during oral arguments at the time of hearing the application: (a) whether this Honourable court has the power to invoke its revisionary and supervisory powers over subordinate courts and (b) whether the proceedings in the lower court will embarrass the accused persons' defense and the proceedings in the High Court. In respect of the first issue it was submitted that this court has powers to supervise and revise the decisions of the subordinate courts. The applicants cited Supreme Court of India ***Sri. Raja Lakshmi Dyeing Works And.....v. Rangaswamy Chettiar [1980] 4SCC 259*** to support this argument. On the second issue it was submitted that to proceed with both matters at the lower court and at the High Court would embarrass the applicants and the High Court proceedings. It was submitted that this is because the witnesses and exhibits in both courts will be the same and that the two offences are alleged to have been committed at the same time. Secondly, the witnesses will have a chance of meeting and this may create a situation where their evidence may be rehearsed.

It was submitted that Section 135 (1) and (3) of the Criminal Procedure Code provide that offences arising from similar facts should be charged together in the same charge or information and that this should be the case in this matter since no prejudice will be occasioned on the

prosecution. Mr. Mutuku cited *Director of Public Prosecutions v. Ummulkheir Sadri Abdalla & 3 Others [2017] eKLR* to support the submissions on this issue. It was further submitted that the applicants will suffer double jeopardy in paying legal fees twice.

The application was opposed. Referring to the respondents' written submissions, Ms Sigei submitted that the applicants have been properly charged before the two respective courts and that each court has jurisdiction to hear the matter before it. She submitted that for the two charges to be heard and determined the prosecution must establish different ingredients and that each charge has a separate victim whose rights should be considered and protected by the court. She submitted that the two charges are not defective and are properly before the respective courts. She conceded that the High Court has unlimited original jurisdiction but cannot hear a charge of attempted murder and that the Criminal Procedure Code reserves jurisdiction for the High Court and the Magistrates' court with distinct procedures on how parties approach the courts. Ms Sigei referred this court to the case of *Nicholas Kipsigei Ngetich & 6 others v. Republic [2016] eKLR* in which the accused persons were charged with murder contrary to section 203 as read with section 204 of the Penal Code. They were acquitted of murder and subsequently charged with attempted murder contrary to section 220 of the Penal Code in the lower court. They sought to quash the trial before the lower court on the grounds that they had been acquitted by the High Court and that charging them with attempted murder would amount to double jeopardy given that the facts were the same in both the murder and attempted murder charges. This application was dismissed and the lower court trial proceeded for determination.

Ms Sigei further submitted that the Director of Public Prosecutions (DPP) is mandated under Article 157(6) of the Constitution to institute and continue prosecutions and therefore the DPP determines the nature of the charges to prefer and the evidence to adduce in support of each charge.

I have considered the application, rival written submissions and oral submissions as well as the provisions of the law cited. I have also read all the authorities cited and the proceedings in the lower court and the impugned ruling delivered on 27<sup>th</sup> July 2018. What is clear to me is that the accused persons have refused to take the plea in the lower court for attempted murder. In her ruling the trial magistrate, Hon. M. Mutuku, stated *inter alia* that the jurisdiction of the court to hear and determine the charge of attempted murder is not disputed; that there is no argument that the charges as drawn are defective or bad in law; that there was no evidence of intended consolidation of the attempted murder charge with the murder charge and that there was no prejudice if the accused persons took the plea in the lower court.

From my own knowledge of the matter before the High Court (HCCR No. 28 of 2018) and this matter, both offences are alleged to have been committed at the same time by the same accused persons, namely the applicants. My consideration of the submissions and the issues arising in this application is that I agree with the applicants that the Constitution of Kenya under Article 165 (6) and (7) gives this court jurisdiction to supervise the subordinate courts and that Article 165 (3) (a) gives this court unlimited original jurisdiction in criminal and civil matters. Under the Criminal Procedure Code, First Schedule subordinate courts held by a Chief Magistrate, Senior Principal Magistrate, Principal Magistrate and a Senior Resident Magistrate have jurisdiction to try a charge of attempted murder. It is my considered view that the fact that the High Court has unlimited original jurisdiction in criminal and civil matters does not take away this jurisdiction from the lower court. By having the charge of attempted murder being tried by the subordinate court, which enjoys jurisdiction given to it by statute, does not infringe on the rights of the applicants.

I have read the cited authorities by the applicants, specifically *DPP v. Ummulkheir Sadri Abdalla case* (above). I must admit that I did not have the benefit of reading the particulars of the charges in that case but it seems to me that the accused persons had been charged under Sections 6, 24, 25, and 29 of the Prevention of Terrorism Act 2012. I have acquainted myself with these sections and I have noted their contents. I also note that Section 38 of this Act gives subordinate court exclusive jurisdiction to try offences under the Act if the offence is committed within the Kenya borders. This case is therefore distinguishable with the *Nicholas Kipsigei Ngetich case* cited by Ms Sigei for the respondents.

I have read the *Nicholas Kipsigei Ngetich case* (above) and I find the finding of the sister court persuasive in that the charges the applicants are facing both in the High Court and the subordinate court are separate and distinct with different victims, one who died (murder charge in the High Court) and one who is still alive (attempted murder in the Lower Court). These charges have distinct ingredients that the prosecutor must prove beyond reasonable doubt. The only common denominator in the two charges being that both offences are alleged to have been committed on the same day, the same time and by the same accused persons. The witnesses may be the same but this may not be the case. It is my belief that these witnesses recorded statements which they will rely on and on which they will be cross-examined. Besides, it may not be the case that both the trials will be heard simultaneously. The High Court and the Lower Courts operate different diaries and hearing dates in both courts may not coincide.

Now turning to Section 362 of the Criminal Procedure Code which I have considered in respect of this application, it is my finding that the applicants have failed to demonstrate that the decisions of the trial magistrate is incorrect, illegal or improper. In my view the trial magistrate exercised her discretion judiciously and I find no reason to interfere with that decision by exercising the powers of review. The upshot of this conclusion is that the application dated 27<sup>th</sup> July 2018 fails in its entirety. The effect of this order is that the order of stay of the proceedings in *CMCR No. 1115 of 2018 Republic v. Kirui Kipng'etich Godfrey and William Kipkorir Chirchir* ranted by this court on 9<sup>th</sup> August 2018 shall lapse after this ruling is delivered.

Before winding up I wish to point out that I had indicated to the parties that this ruling would be delivered on 17<sup>th</sup> September 2018 when the new High Court term begins. However, I have managed to complete preparing the ruling in this matter today 10<sup>th</sup> of August 2018 but late in the afternoon. It was not possible to call the parties and deliver the ruling. I see no point in keeping the matter until the earlier date indicated to deliver it. I have requested that the ruling be delivered by the judge who will be on duty on 13<sup>th</sup> August 2018.

**Dated and signed today the 10<sup>th</sup> day of August 2018 by Hon. Lady Justice S.N. Mutuku.**

**S. N. Mutuku**

**Judge**

**Delivered on 13<sup>th</sup> August 2018 by Hon. Mr. Justice John Onyiego.**