



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 45 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

PATIUS GICHOKI NJAI & 2 OTHERS.....1ST ACCUSED

CAESAR WACHIRA MUTHONI.....2ND ACCUSED

MARY NJERI WACHIRA.....3RD ACCUSED

RULING

Following this Court's Ruling of 31st July 2018, the accused persons have filed an application by way of Notice of Motion for review of the orders made therein. The application is supported by the affidavit. Patius Gichoki Njagi the 1st accused and the grounds on its face. The main order sought to be reviewed is the one for the matter to start *de novo*. Mr Okatch for the 1st accused in his submissions cited to the Court three (3) options for consideration i.e.

(i) For the court to set aside the orders of 31/7/18 in their entirety and render a decision on whether the accused have a case to answer or not

OR

(ii) Recall PW2, PW4, and PW5, PW6, and PW9 to give their evidence afresh

OR

(iii) Recall PW2, PW4, PW5, PW6 and PW9 to adopt their evidence on oath.

He asked the court to consider the period the accused persons have been in custody and the fact that over 15 witnesses testified. He said the application was supported by the 2nd and 3rd accused persons.

M/s Onunga for the State supported the application. She concurred that an anomaly had occurred but it was agreed that all witnesses were sworn and cross examined. She asked the court to appreciate the age of the matter and the witnesses too as it makes its decision.

I have considered all that has been submitted by both counsel and the averments by the 1st accused. There is no dispute that this is an old matter and the accused have been in custody for a number of years. It is also not disputed that this is a court of record and the said record shows that the named witnesses were not sworn despite their having been cross examined.

The Counsel and accused persons have told the court that the witnesses were indeed sworn. I have given this matter quite some thought and antagonised over the same. I will review the order for the matter to start *de novo* on one condition. The condition is that the Prosecuting Counsel, all counsel appearing and the accused persons to each swear an affidavit and confirm 2 things namely:

(i) That the mentioned witnesses, PW2, PW4, PW5, PW6, and PW9 were sworn before they testified

(ii) That they will not take up that issue of unsworn witnesses as a ground of appeal

Once that is complied with, I shall move to the next stage of writing the Ruling on the no case to answer.

Orders accordingly.

Signed, dated and delivered this 30th day of October 2018 n open court at Nairobi.

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HEDWIG I. ONG'UDI

JUDGE