

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 1 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

WARIO LIBAN.....ACCUSED

RULING

1. This case has had rather dramatic and scaring incident. On 4th October 2018, when the case came up for further hearing the accused who had stated earlier that he understood Kiborana language and two witnesses had already testified, turned around to say that he did not understand Kiborana and that he only understood Amharic language of Ethiopia.

2. With this turn of event, the prosecution said also that their witnesses had not yet arrived and the case was adjourned and put aside to be brought back after team break. In the meantime the accused was interjecting in a language which could not be understood by the court even when his own lawyer was saying something. The matter was however put aside and the accused was put back into the cells.

3. When the case came up after the break, the Principal Prosecuting Counsel Mr. Okemwa stated that they did not have witnesses, as the said witnesses could not travel to Garissa that day and sought for an adjournment. The accused was still interjecting and talking in a language which nobody could understand though the Borana interpreter stand just next to him and was translating.

4. Because witnesses were not available, it was agreed by counsels on both sides that case be adjourned. However, instead of the accused sitting down or going back to the cells, he produced a white folded piece of foolscap paper, gave it to the clerk and pointed it to his lawyer Mr. Onono in indication that it should be handed over to his lawyer. When Mr. Onono unfolded the piece of paper, he confirmed that it contained what appeared to be bhang and Mr. Okemwa also confirmed the same. The case was however still adjourned with a remark that the prison officers should find out where the accused had collected this bhang. A short while thereafter, while still standing, the accused lifted a glass soda bottle and threw it in the direction of the Judge and it hit the upper glass part of the door to the Chambers and broke the glasses and the soda bottle also broke into small pieces all of which was spread in the Judge's Chambers which disrupted court proceedings.

5. On the 5th October 2018, I put the matter for mention on 10th October 2018 which later became a public holiday and the matter came up for mention on 11th October, 2018. On that 11th October 2018, defence counsel Mr. Onono asked to withdraw from representing the accused person. He stated that he regretted the unfortunate incident which occurred in an open court and which he had not witnessed in a very long time he had practiced as a lawyer. He emphasized that it was by grace of God that the court was not injured. He said that though the accused was entitled to legal representation, he should be excused and allowed to withdraw from acting for the accused person.

6. Mr. Okemwa in response stated that the accused was facing three offences before the Chief Magistrate's Court for the unfortunate incident. He stated also that he was recently convicted on his own plea of guilty to breaking the glass window of a Government vehicle ferrying him and other prisoners. He stated that the accused was a security risk both to the court and court users but there are only two options in the matter, one to transfer the case to another court and the other for this court to hear the case in his absence. He stated that transferring the case to another court in Nairobi would be very inconvenient and expensive as witnesses came from Habaswein in Wajir County and only three out of nine witnesses had testified. Counsel urged that Mr. Onono should reconsider his conscious and remain on board.

7. I have considered the request by Mr. Onono to withdraw from acting for his client and the views expressed by the prosecuting counsel. Indeed transferring the case to Nairobi will cause a lot of inconvenience and additional expenses. I will not expect Mr. Onono also to go to Nairobi to defend his client as his is a pauper brief. In my view therefore, that option though available is not in the best interest of justice.

8. The case being heard here also is a risk venture because of the conduct of the accused in open court as well as outside the court. He has disrupted court proceedings and engaged in a dangerous venture putting everybody participating in this trial at a risk of injury. I appreciate that he is being tried in the Magistrate's Court for other offences. I am aware of the Constitutional requirement that the accused should be present in court throughout his trial. However, he has been interrupting the proceedings and interjecting even when his lawyer and the court are trying to explain something. He has also demonstrated violence in open court as I have said earlier. In those circumstances in my view, the trial should proceed at Garissa but this trial will proceed in his absence in accordance with Article 50 (f) of the Constitution as he has made it impossible for the trial to proceed in his presence. It will be unfair to leave him without a defence counsel who will atleast cross-examine prosecution witnesses on his behalf and their answers recorded for justice to be seen to be done. I thus respectfully decline to allow Mr. Onono to withdraw from conducting the defence of the accused herein.

Dated and delivered at Garissa this 30th day of October, 2018.

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George Dulu

JUDGE