



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NUMBER 41 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**GALMA ABAGARO SHANO.....ACCUSED**

**RULING**

Mr. Galma Abagaro Shano, hereinafter “the accused” was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the 5<sup>th</sup> day of May 2011 at Gatina Village in Kawangware in Nairobi within Nairobi County he murdered Mohamed Halkano Duba. The accused pleaded not guilty to the charge. The case proceeded to full trial. The prosecution called a total of eleven (11) witnesses in support of the case against the accused. The evidence for the prosecution was that the accused stabbed the deceased who was his neighbour at Gatina Village. The accused died while undergoing treatment at Kenyatta National Hospital.

After the prosecution closed its case, this court analysed all the evidence tendered in court. It made a finding that the accused person had a case to answer and in its ruling delivered on 1<sup>st</sup> July 2015 the court placed him on his defence. The accused, through his defence counsel Mr. Omari, informed the court that he would testify under oath and would not call any witness. The court fixed the hearing date for defence case as 16<sup>th</sup> July 2015. On that day Mr. Omari was not in court. He had sent Mr. Mogaka to hold his brief. The case was adjourned to 14<sup>th</sup> October 2015. On the scheduled date, the accused did not turn up in court. His counsel Mr. Omari was also not present. His brief was being held by Mr. Mokuia who informed the court that Mr. Omari was trying to locate his client the accused and would be attending court later that morning. When Mr. Omari arrived in court he informed the court that his client had travelled to Moyale and thereafter to Mandera and that information received from the relatives of the accused indicated that accused had fallen ill and was unable to travel to Nairobi to attend the hearing. The matter was adjourned to 10<sup>th</sup> November 2011 for mention for purposes of confirming attendance of the accused or his whereabouts. From that date to date, the accused has been at large. Attempts by the Investigating Officer to track the accused down have been unsuccessful. The execution of the warrant of arrest issued by this court on 10<sup>th</sup> November 2015 has not been carried out.

It is against that background that the Office of the Director of Public Prosecutions has brought this application. The application has come by way of submissions which submissions are based on the affidavit sworn by Senior Sergeant John Rotich on 1<sup>st</sup> March 2017. The affidavit narrates the unsuccessful efforts the officer has put in trying to track down the accused and execute the warrant of arrest. The prosecution is asking this court to proceed with the hearing of this case as if the accused were present in court. The prosecutor is asking the court further to find that the accused has waived his right to be present during trial and opted not to tender any defence.

Mr. Omari for the accused did not submit in response to the application. He opted to leave matters to the court to make a determination.

The prosecution is asking the court to declare Section 206 (1) of the Criminal Procedure Code inconsistent with the Constitution. Section 206 of the Code provides thus:

***206.. (1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.***

***(2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.***

***(3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.***

***(4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.***

Plain reading of Section 206 (1) Criminal Procedure Code shows that it only addresses misdemeanours. Sub-section (4) tells the court what to do when the offence is a felony or where the court refrains from convicting an absent accused person. The court shall issue a warrant of arrest. The section does not address the situation where the accused cannot be found for the execution of the warrant of arrest!

The prosecution is asking the court to declare this section inconsistent with Article 50 (2) (f) of the constitution. This Article provides thus:

***(2) Every accused person has the right to a fair trial, which includes the right:-***

***(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;***

Article 50 is about the rights of an accused person to a fair trial. These include the right to be informed of the charge, with sufficient detail to answer it (Article 50 (2) (b)); right to have adequate time and facilities to prepare a defence (Article 50 (2) (c)); right to have the trial begin and conclude without unreasonable delay (Article 50 (2) (e)); right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence (Article 50 (2) (j)); right to adduce and challenge evidence (Article 50 (2) (k)).

I have singled these sub-articles out because Article 50 (2) (f) cannot be read in isolation. It is a fact and also common sense that the rights specified above can only be enjoyed by an accused person who is present during trial.

The prosecution has cited a Ugandan authority **Uganda v. Gulindwa Paul and Tumusiime HCT-00-AC-CM-005-2015** and Kenyan case **Republic v. Yagnesh Mohanlal Devani & 9 others HC Criminal Revision No. 229 of 2012** to support their application. I have read both authorities. The Ugandan case has similar facts as this case. The accused absconded after the court placed him on his defence and explained to him his rights to defend himself.

Firstly, I wish to deal with the constitutionality or otherwise of Section 206 (1) of the Criminal Procedure Code. By virtue of Article 2 (1) and (4) of the Constitution, the Constitution is the supreme law of the

Republic of Kenya and any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

Plain reading of Article 50 (2) (f) shows that every accused person has a right to a fair trial which includes right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed. The Article does not qualify the offence facing the accused person, whether felony or misdemeanor. All accused persons before the court enjoy this right. This is what I understand this Article to be stating. Section 206 (1) of the Criminal Procedure Code on the other hand differentiates between an accused person facing a felony and that facing a misdemeanor. Where the accused is charged with a felony, sub-section (4) says that the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court. What happens where, as is the case here, all efforts to track down the accused fails and he cannot be arrested and presented in court? Do the authorities give up on him and let the matter lie? Will justice be served by taking that action? I do not think so. Having critically considered this issue I am persuaded to find, which I hereby do, that Section 206(1) of the Criminal Procedure Code is inconsistent with Article 50 (2) (f) of the Constitution in so far as it fails to include all offences be they felonies or misdemeanors.

On the second issue, it is my view that the accused's conduct that may deny him the enjoyments of the right to be present in court during his trial include situations where for instance the accused person becomes violent or unruly during proceedings to such an extent that it becomes impossible for the court to conduct the proceedings or where he deliberately absents himself or absconds. Care must be taken to carefully consider the circumstances behind an accused person's failure to attend court.

In this case, the accused was aware of his case. The charges were read to him and he pleaded not guilty. He was released on bond of one million Kenya shillings (1,000,000) with one surety of similar amount or cash bail of three hundred thousand Kenya shillings (300,000). He took the alternative option and paid cash bail. He participated in the trial and heard evidence of all the prosecution witnesses. He participated in the cross examination of all the witnesses. He was placed on his defence and he addressed the court, through his defence counsel, on the manner he wished to defend himself. He failed to turn up in court on the day his defence was scheduled to start.

The investigating officer swore an affidavit explaining the efforts he put in place in an attempt to track down the accused. It is now 1 ½ years since the accused absconded. His advocate does not know about his whereabouts. The accused does not have a surety to be summoned to show cause. A warrant against the accused's arrest, which this court kept issuing afresh, could not be executed. Under these circumstances I find that I am persuaded by the authorities cited by the prosecution. Specifically, in the **Uganda v. Gulindwa** case (supra) the court faced with similar circumstances had this to say:

**“In my view, a defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights. I hold this view because I do not think that one who voluntarily chooses not to exercise a right given to him by the constitution, cannot turn around and say he has lost the benefits he might have expected to enjoy had he exercised it.”**

See also **Regina v Johns (1972) 1 WLR 887** and **Diaz v United States 223 US 442 (1912)** which authorities have been cited with approval in the above Ugandan case.

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

**Dated, signed and delivered this 24<sup>th</sup> day of April 2017.**

**S. N. Mutuku**

**Judge**