



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
MISC. APPLICATION NO. 49 OF 2017 AND NO 50 OF 2017
(CONSOLIDATED)

ABDALLAH ODUOR AMUNGA AND ANOTHER.....APPLICANTS

VERSUS

DPP.....RESPONDENT

R U L I N G

Introduction

1. The applicant's herein Abdallah Oduor Amunga and Patrick Okoth Otieno were charged and convicted of Arson in criminal case No. 688 of 2015 at the SPM's court at Mumias. They were sentenced to serve 5 years imprisonment.
2. The applicants have filed two similar applications seeking a stay in their taking of plea in an intended criminal Case No. 8/2016 in the High Court of Kenya at Kakamega. They want this court to order and / or make a declaration that the intended prosecution and criminal proceedings against them is malicious, scandalous unlawful, unconstitutional and an abuse of the court process. They also want this court to terminate the intended prosecution.
3. The applications are based on the grounds on the respective face of the application and supported by the affidavits of the applicant. The applications were consolidated and canvassed orally.

Submission

4. In his submission the 1st applicant Patrick Okoth Otieno explained the circumstances of his arrest and arraignment in court. He maintains there were no other charges against him except the charge of arson. He states that at the trial it was alleged they had killed the complainant's wife but there was no proof. He is now surprised that he is supposed to answer to a charge of murder even after being convicted of arson and sentenced to 5 years on the 31.3.2016. The 2nd applicant is in agreement with the 1st applicant's submissions and wants the murder case stopped as he was not involved in it.
5. Mr. Juma the prosecution counsel opposed the application. He submitted that the applicant's contention that since they were charged and convicted of arson they cannot subsequently be charged with murder cannot stand because the subsequent charge is lawful. He further submitted that the applicants have not demonstrated how their rights under Articles 49 and 50 of the Constitution have been violated.

6. Counsel submitted that while it is true that both Article 50(2)(a) of the Constitution, 2010 and Section 138 of the Criminal Procedure Code provide that persons convicted or acquitted by a court of competent jurisdiction cannot be tried again for the same offence, the applicants case does not fall within the ambit of the said provisions. He further submitted that the offence of arson for which the applicants were tried, found guilty and convicted cannot be said to be the same as the offence of murder. Finally, counsel submitted that orders of stay in Criminal matters should be granted only very sparingly and even then in only exceptional circumstances. He urged the court to dismiss the application.

Determination

7. This court has now carefully considered the rival submissions on the matter in controversy. It is not in doubt that the two applicants have been convicted and sentenced for the offence of arson and that they are both serving five (5) year imprisonment.

8. The prosecution has taken the position that the fact that the applicants were charged, tried, convicted and sentenced for the offence of arson does not stop the police from preferring a subsequent charge against them. From the reading of the applicant's application it is clear that the applicants have not taken plea on the murder charge.

9. The applicants contended that having been so convicted and sentenced, they are being condemned twice which may amount to double jeopardy. As I understand it the two offences are quite different. The applicants were charged on the 1.11.2015 on a charge of arson and on the 31.03.2016 they were convicted and sentenced to serve 5 years imprisonment. There is not sufficient evidence before this court showing that the offence of murder in which the applicants are required to take plea is the same as the offence of arson for which they are now serving sentence. It is premature at this stage for the applicants to seek stay of the murder charge even before plea.

Conclusion

10. In the circumstances, I have reached the conclusion that the two applications are lacking in merit and the same be and are hereby dismissed.

Orders accordingly

Ruling delivered, dated and signed in open court at Kakamega this 31st day of July, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

Both Applicants present in person.....For Applicant

Mr. Juma (present).....for Respondent

Polycap.....Court Assistant