



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 58 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

1. JAMES OCHIENG

2. TONNY BLAYER AROKO

3. GEOFFREY ONYANGO ADEK alias OLIECH.....ACCUSED

RULING

1. The first two accused persons were initially charged in **Kisii High Court Criminal Case No. 67 of 2014** with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. They pleaded not guilty to the charge. Some months later the third accused person was also charged with the very offence before the High Court at **Migori in Criminal Case No. 100 of 2014**. The case at Kisii High Court was thereafter transfer to this Court and the two were consolidated by an order of the Court and fresh plea taken. All the three accused persons denied the offence and a trial was ordered.

2. The hearing was generally hit by several instances of witnesses not attending Court. Adjournments were severally sought by the prosecution which were vehemently opposed by the defence Counsels. There are instances where the Court had to set-aside '**last adjournment orders**' to attain the ends of justice.

3. After six witnesses had testified the prosecution yet again applied for an adjournment which the Court declined and ordered the prosecution to proceed on with the hearing of the case. The prosecution then applied to withdraw the information against the accused persons. The application was not opposed by the three Defence Counsels and the matter was set for this ruling.

4. On enquiry by the Court the prosecution did not state the provision under which it applied to withdraw the information on murder against the accused persons. I have carefully perused the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya (hereinafter referred to as '**the CPC**') and did not find a provision for withdrawal of an information on murder before the High Court. What I came across was **Section 87** of the CPC which relates to withdrawal of criminal cases before the subordinate Courts.

5. **Section 87(a)** of the CPC states as follows: -

“87. Withdrawal from prosecution in trials before the subordinate courts

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal-

(a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b)” (emphasis added).

6. As **Section 87** of the CPC relates to trials before a subordinate court, I have sought to find out if there exists a provision to the effect that **Section 87** of the **CPC** shall apply to trial before the High Court, but also in vain. This Court is aware that there are some instances where the provisions of the trials before the subordinate court applies in the High Court but in such cases the CPC clearly states so. Such an example is provided under **Section 201(2)** of the CPC which states as follows: -

“201 (i)....

(ii) The provisions of Section 200 of this Act shall apply mutatis mutandis to trials held in the High Court”

7. As the foregone is not the position in respect to **Section 87** of the CPC, this Court therefore finds that the law does not provide for withdrawal of an information once instituted against an accused person. I find the rationale to be quite sound and fair to an accused person who faces such a serious offence of murder. I say so bearing in mind that even when such an accused person is found not to have a case to answer on an information of murder, that accused person is instead **‘found not guilty’** of the murder meaning that the matter cannot be revisited. I hence find that the provisions of **Section 87** of the CPC do not apply to trials before the High Court. The application for withdrawal of the information against the accused persons is hereby declined.

8. The prosecution may however consider other options available in law but not withdrawing the information.

9. Had this Court found that **Section 87** of the CPC applies to trials before the High Court, it would have then considered the constitutionality of the said section, but in view of the foregone, this Court has no basis of venturing into such an arena.

10. In sum, this Court makes the following orders: -

(a) The application to withdraw this case is hereby rejected.

(b) The prosecution is hereby ordered to proceed on with the hearing of this case on a date to be fixed today.

Orders accordingly.

DATED, SIGNED and DELIVERED AT MIGORI THIS 27th day of July 2017.

A. C. MRIMA

JUDGE