



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 8 OF 2016

REPUBLICPROSECUTOR

VERSUS

1. JOSIAH KINYUA NZOKA
2. NICASIO MURIUKI NJERU
3. ABINJA MURUGI NJUE
4. GERALD GIKUNGU MUGO
5. DENNIS KARIUKI NJOKI
6. HUMPHREY MUGENDI

7. ERASTO NZOKA

KIURA.....ACCUSED

RULING

1. When this matter came up for the pre-trial conference on 28th June 2016 Ms Mbae for the state applied to withdraw the murder charge against Nicasio Muriuki Njeru (the 2nd accused), Gerald Gikunju Mugo (the 4th accused), Dennis Kariuki Njoka (the 5th Accused), Humphrey Mugendi (the 6th accused) and Erasto Njoka Kiura (the 7th accused), without specifying the enabling law for her to do so. According to her, she was instructed to have the charge withdrawn due to insufficient evidence against the said accused persons. The defence counsel did not object to the withdrawal of the charge against the said accused persons.

2. A charge of murder in terms of section 204 as read with section 203 of the Penal Code (Cap 63)Laws of Kenya is an offence that carries a death penalty. Notwithstanding the seriousness of this offence, it is tried as a summary offence. This explains the timeous withdrawal by the public prosecutor. Previously there did exist a sieving or filtering process by way of preliminary inquiry, which later was replaced by committal proceedings, in which the magisterial courts through the filtering process determined which murder cases warranted trial by the **High Court. R v Owako and Others (1974) EA 507** illustrates the effectiveness of the filtering process. Thereafter the latter procedure was in turn replaced with the current summary procedure, wherein the offence of murder is prosecuted in the same way as an offence of assault.

3. There ought to be a filtering or sieving process before a person is charged and tried with an offence

that carries a death penalty such as murder. The pre-trial conference is not such a procedure. It is only designed to prepare a case for trial. It is not intended to ascertain whether there is *a prima facie case* in evidentiary terms to warrant an accused being put on trial for murder. The function of ascertaining the existence of *a prima facie case* to warrant trial is exclusively vested by law in the public prosecutor. I hereby draw attention to the authorities concerned to legislatively put in place a filtering or sieving process in respect of offences that carry the death penalty.

4. Now turning to the issue at hand, I find that the withdrawal of the murder charge against the said accused persons is not opposed by their counsel. The withdrawal of the charge in the High Court is authorized by **sections 82 and 83 of the Criminal Procedure Code (Cap 75) Laws of Kenya**. It is also authorized by **Article 157 (6) (I) of the 2010 Constitution of Kenya**, which provisions permit the Director of Public Prosecutions to discontinue at any stage before judgement is delivered in any criminal proceedings.

5. Those prosecutorial powers are exercised by officers subordinate to the Director of Public Prosecutions in terms of **Article 157 (9) of the 2010 Constitution**, or those to whom he has delegated his powers in terms of **sections 82 and 83 of the Criminal Procedure Code**, or those that the Director of Public Prosecutions has appointed as public prosecutors in terms of **section 89 (5) of the Criminal Procedure Code** or an advocate who is appointed for a specific case under **section 89 (2) of the Criminal Procedure Code**.

6. In the light of the foregoing matters I allow the withdrawal of the charge against Nicasio Muriuki Njeru (the 2nd accused), Gerald Gikunju Mugo (the 4th accused), Dennis Kariuki Njoka (the 5th Accused), Humphrey Mugendi (the 6th accused) and Erasto Njoka Kiura (the 7th accused). They are all ordered released from prison unless otherwise held on other lawful warrants.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **30th** day of **JUNE 2016**

In the presence of Ms Mbae for the State and Ms Muriuki for the first and second accused persons and also holding brief for Mr. Chomba for the 3rd, 5th and 7th accused persons and Mr. Andande for the 4th, 5th and 7th accused persons

Court clerk Njue

J.M BWONWONGA

JUDGE

30.06.16