REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO. 1 OF 2016

REPUBLIC…….....PROSECUTOR

VERSUS

MUNEH WANJIKU IKIGU ……..... ACCUSED

JUDGMENT

INTRODUCTION

1. What should a conscientious and public-spirited Prosecutor do when she has, in her hands the following circumstances: an accused person in custody charged with a serious charge (in this case, murder), a good theory of the case, viable evidence, but seemingly unassailable difficulties tracing the witnesses needed to prosecute the ca se? That is the question presented in this case.

2. The brief facts are as follows. The Accused Person ("Muneh") was first presented in Court on 27/09/2011 charged with a single count of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence appearing in the Information sheet are that the Accused Person is alleged to have murdered Francis Nyoike Macharia on 11/09/2011 at Kiandutu Slums in Thika Township within Kiambu County.

3. For a variety of reasons – including the absence of a Defence counsel – plea was not taken until 19/10/11 when a plea of not guilty was entered. The hearing was scheduled for 13/02/2011 and 14/02/2011. On that day, however, Mr. Keengwe informed the Court that there was some confusion about the date. The result was that the hearing was rescheduled to 30/07 and 31/07/2012. However, a bail hearing was scheduled in-between and a ruling on that was eventually given on 18/07/2012. On that same day, the Court used the opportunity to take the case out of the schedule for 30-31/07/2012 and, instead, fixed a hearing date for 21/01 – 22/01/2013. As fate would have it, Justice Ombija was not sitting on those dates so the matter was re-scheduled. After a few mention – some of which Mr. Keengwe was unable to attend – the matter was fixed for hearing again on 06/11 – 07/11/2013.

4. On 06/11/2013, the Prosecution applied for an adjournment because it did not have witnesses in court. The case was rescheduled to 12/03 – 13/03/2014. On those dates, the Prosecution reported that it was having trouble locating the witnesses in the case and pleaded for more time. A mention date of 08/05/2014 was fixed at which the Prosecution reported its continued difficulty to trace any witnesses in the case. A new hearing date of 31/07/2014 was granted. Unfortunately, the trial court was not sitting on that date so a further mention date of 30/09/2014 was given. Eventually, after a number of other mentions, a new hearing date of 02/02/2015 was given. As fate would have it, the judge before whom it was listed was on leave on that day. After a few more mentions, the case was listed for hearing on 29/06/2015. Again, the Prosecution had no witnesses and applied for an adjournment. It was granted amidst robust opposition by the Defence.

5. On 27/07/2015, the new date assigned to the case, the Prosecution did not, again, have any witnesses in court. They asked for an adjournment for that reason as well as for the reason that the matter had not been put in the cause list even though the date had been given in court. The court, again, acquiesced to the prayer and rescheduled the hearing to 25/11 – 26/11/2015. On the 25/11/2015, Mr. Keengwe was unwell. Even then the Prosecutor informed the Court that they had not been able to trace the witnesses in the case. Hearing was set for 23/05 – 25/05/2016. When these dates arrived, though, a High Court had been established in Kiambu and the Honourable Lady Justice Lesiit ordered the case to be transferred to this Court.

6. The case was first placed before me on 20/06/2016 when I scheduled a status conference for 23/06/2016. On the latter date, hearing was scheduled for 12/07 – 13/07/2016. On 12/07/2016, Ms. Maari, the Prosecutor who now had conduct of the matter informed the court that the Prosecution was having great difficulties in tracing the witnesses. She represented from the bar that both the Accused Person and the deceased and his family used to live in an informal settlement called Kiandutu in Thika. The family members of the deceased were to be the witnesses in the case. Ms. Maari represented that the Investigating Officer has never been able to trace the witnesses after the first few months following the witnesses. Apparently, they moved away from the Kiandutu and they cannot be traced. Their phone numbers seem to have changed since they no longer pick up the phones through the numbers the Investigation Officer had. Ms. Maari indicated that in the absence of witnesses, she would be applying for a withdrawal of the charges. I directed the Prosecution to have the Investigating Officer file an affidavit detailing the efforts made to trace the witnesses. She duly filed an affidavit on 12/07/2016. I rescheduled the matter to 20/07/2016 and eventually to 27/07/2016.

APPLICATION TO WITHDRAW THE CHARGES

7. When the matter was called on 27/07/2016, Ms. Maari made an application to withdraw the case. She framed her request as one under section 87 of the Criminal Procedure Code. She referenced the affidavit of the Investigating Officer, Cpl Esther Kombo who had detailed the efforts she had taken to trace the witnesses without success. In the circumstances, Ms. Maari felt that the only avenue open was to withdraw the charges.

8. Mr. Keengwe objected to the application as framed. His position was that in substance the application was one under section 82 of the Criminal Procedure Code since this was a matter before the High Court and not a subordinate Court. It was, in essence, an application to enter a *nolle prosequi*. He objected to that because he feared that the effect would be to only withdraw the case temporarily so that the Prosecution can bring the matter at any time in the future. Mr. Keengwe felt that this would be oppressive to the Accused Person. He felt that what the Prosecution was setting up was a scenario whereby the Accused Person will have the case hanging over her permanently because the case could be re-introduced at any time. In other words, Mr. Keengwe argued, all the Prosecution was asking for was an indeterminate adjournment of the case.

9. Mr. Keengwe argued that the Defence has always been ready to proceed with the case but for close to five years the Prosecution has not been able to trace witnesses. He was of the view that no further adjournment should be given to the Prosecution. Instead, the Prosecution should be required to prosecute its case so that the Defence can make its submission of no case to answer. Referring to two decisions by the High Court (***R vs Enock Wekesa & Another****[2010] eKLR* and ***Moses Miheso Lipeya*****v R***[2010] eKLR*), Mr. Keengwe urged me to direct the prosecution to proceed with its case so that it can submit on a no case to answer directed verdict.

10. Mr. Keengwe based his arguments on the need to accord the Accused Person her fair trial rights especially her rights to an expeditious trial. Reminding the Court that the Accused has been in custody awaiting trial for close to five years, Mr. Keengwe argued that fair trial rights must dictate that the case must come to an end now. Complementarily, Mr. Keengwe argued that while he appreciated that the Director of Public Prosecutions (DPP) had state powers of prosecution which includes the right to withdraw charges before judgment, that power must be exercised judiciously and without being oppressive.

11. In reply, Ms. Maari indicated that the DPP had no intentions of ever bringing any further charges against the Accused Person. Interestingly, she indicated that she was "closing" her case. She stated:

> We do not intend to bring [future] charges. We are closing the case. This is not a *nolle prosequi*. We want to close the case.

12. Taking that a cue, Mr. Keengwe then submitted for directed verdict that the Accused has no case to answer since no evidence whatsoever was placed before the Court to warrant a finding that a prima facie case had been established against the Accused Person. He, therefore, submitted that I should rule that there was no case to answer and acquit the Accused Person.

ANALYSIS

13. I reserved ruling because I wanted to appropriately phrase the issue in the event that this case spawns a geneology of misunderstood judicial practice. There is the question on what the correct procedure should be, in such cases. Ms. Maari's original application was expressed as founded under section 87 of the CPC. Mr. Keengwe's response was that she was, in fact, attempting to come under section 82 of the CPC. Her rebuttal was that she simply trying to "close" her case and not enter a *nolle prosequi*. In my view, the charges that the Accused Person is facing a serious enough to warrant a brief analysis of the correct procedure and appropriate factors to be considered when making a determination in cases such as this one.

14. Mr. Keengwe is right that section 87 of the CPC only applies to the magistrate's court by its own text. He is also right that section 82 of the CPC permits the DPP to withdraw cases in the High Court through a *nolle prosequi* but that this power must now be exercised in accordance with the strictures suggested in Article 157(11) of the Constitution. The bottom line is that the power to withdraw cases must, under the Kenya Constitution, 2010, be exercised with due "regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the court process." One can say that Article 157(11) dealt a death knell to the practice of using *nolle prosequi* as a political tool to reward political friends and oppressive political enemies. The power to initiate or withdraw cases can no longer be used whimsically and arbitrarily as a tool to oppress individuals or achieve goals other than those in the administration of justice. This, to my mind, was the holding in the two cases cited to me by Mr. Keengwe.

15. It is, of course, an intense factual inquiry to determine when the power to withdraw is being used oppressively

16. In the present case, the Prosecution had the choice to either attempt to withdraw under section 82 as appropriately interpreted in light of Article 157 of the Constitution or to do what Mr. Keengwe wanted it to do: elect to call no further evidence and close its case. The legal consequences of either choice differ: in the case of withdrawal, the Prosecution can, theoretically, bring the charges afresh – and this is the apprehension that Mr. Keengwe has. In the second scenario, this step results in a not guilty verdict and the Accused would be able to plead *autrefois acquit* in relation to any subsequent reinstatement of charges. Naturally, Mr. Keengwe prefers this second step.

17. It was not entirely clear what step Ms. Maari wanted to take because he used language associated with the first – "withdrawal" – in the first instance but upgraded it to language associated with the second – "closing the case" – when responding to Mr. Keengwe's observations. When Mr. Keengwe made his submission for directed verdict that the Accused has no case to answer, Ms. Maari did not respond which made it clear she was proceeding under the second scenario.

18. I think she was right in that decision. While the DPP can, in certain circumstances, choose to proceed under section 382 of the CPC as read in light of Article 157 of the Constitution, such withdrawal can only be permitted by the Court when it is not oppressive to the Accused Person. The length of time an Accused has faced a trial especially if such an Accused Person has been in custody is one of the factors that the Court (and the DPP) looks at in making a determination whether it is in keeping with the just

interests of the administration of justice to apply for a withdrawal or an acquittal. Of course, such withdrawal will not be permitted when the DPP is acting maliciously or in bad faith or is otherwise abusing the court process. However, none of these situations is alleged or proved here.

19. In cases, such as the present one, where there is no reasonable likelihood of re-commencing proceedings or of tracing witnesses or where there is no reasonable likelihood of obtaining a conviction due to lack of available evidence (for example where a crucial piece of evidence the State hoped to rely on is ruled inadmissible in a motion *inlimine*), then the correct procedure is the one to proceed with the case, call no witnesses and request an acquittal or let the Court reach a directed verdict of acquittal. This may also be the appropriate thing to do where there has been a significant adverse ruling against the State or the evidence available has been become so manifestly unreliable that there is no reasonable likelihood that the Accused could be convicted.

20. In the present case, as catalogued above, the Prosecution requested no less than seven hearing dates spread over a four-year period. At each of those hearing dates, despite reasonable efforts reported by the Prosecution during those hearing dates and now detailed in the Affidavit of Cpl Esther Kombo, no witnesses were available. The circumstances are that the alleged murder happened at an informal settlement called Kiandutu in Thika where both the Accused Person and the deceased used to live. The family of the deceased, members of which were the key witnesses in the case, also lived in the same settlement. Soon after the case was recorded and plea taken, the Investigating Officer was unable to trace the witnesses any more. She tried to contact them through the mobile phone numbers they had recorded with her to no avail. She visited where they used to live in Kiandutu and even enlisted the help of the area Chief and elders in a bid to locate them. All these efforts were fruitless. The witnesses seem to have disappeared into thin area. The importance of the address of the intended witnesses is that many people tend to live in informal settlements only ephemerally. Many times, also, the neighbours would not have any contacts of each other beyond the physical contacts they have each day. As was the case here, therefore, once the deceased's family relocated, it became impossible to trace them.

21. It has now been four years and ten months since the incident took place and since the Accused Person took plea. She has been in custody since then. Four years and ten months is a long time to be in custody awaiting trial. Four years and ten months is a long time to attempt to trace witnesses. Indeed, it would seem that the chances of locating the witnesses diminish with the passage of time. In the circumstances, the Prosecutor is right in not seeking to continue with the criminal trial. Four years and ten months is a long time set against the fair trial rights guaranteed in Article 50(2)(e) of the Constitution. Four years and ten months are an especially long time to spend in custody if there is no timeline for trial because there is no indication of if and when the witnesses might be located. Four years and ten months is enough time for the Prosecution – and the Court -- to conclude that there is no reasonable likelihood that the prosecution will ever be able to trace the witnesses or present any evidence in the case which could lead reasonably lead to a conviction.

DISPOSITION AND ORDERS

22. In the circumstances, therefore, the Court shall consider the Prosecution as having been compelled by the circumstances to call no witnesses and, therefore, to close its case without presenting any evidence. In that case, the submissions by Mr. Keengwe are surely correct that there is no evidence whatsoever to warrant any other verdict other than one that there is no case to answer. I, therefore, so hold: a case is not made out against the Accused Person sufficiently to require her to be put on her defence. Consequently, I dismiss the murder charge and case facing the Accused Person under section 210 of the Criminal Procedure Code. She shall forthwith be acquitted unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Kiambu this 29th day of July, 2016.

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JOEL NGUGI

JUDGE