



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 7 OF 2014

REPUBLIC.....RESPONDENT

V E R S U S

JASON MURIIRA ITHULA.....APPLICANT

RULING

The Applicant, Jason Muriira Ithula, filed this Miscellaneous Application dated 12.2.2014 based on the following grounds: that he was charged in the lower court at Meru on 11.3.2014 with the offence of threatening through telecommunication system; that the case before the lower court is the same as the one he had been charged with in Criminal Case 15/2011 before the High Court; that on 6.3.2014, the State Counsel had the phone with the sim card in which the message was sent and the safaricom data as exhibits in the High Court at Meru; that his Constitutional right has been infringed because the exhibit used in the high court, is the same one to be used in the lower court; and that the lower court should be stopped from proceeding with the case against him.

In his submissions in court, the applicant said that the High Court considered a similar case where the same exhibits were used in two cases and J. Majanja held that it was an abuse of the court process.

The application was opposed and Mr. Mulochi, Learned Counsel for the State submitted that the complainant in Criminal Case No. 15/2011 is not the same as 414/2014, because Criminal Case No. 15/2011 is a murder case which was presided over by J. Lesiit. In Criminal Case No. 414/2014, the complainant is the deceased's wife and they are separate matters that should not be confused; Counsel also urged that the accused did not clarify how his rights have been infringed.

I have both files before me **Criminal Case No. 15/2011** and **Criminal Case No. 414/2014**. In **Criminal Case No. 15/2011** the applicant and another were charged with murder of Joseph Kailemia on 22.8.2009. J. Lesiit heard the case and convicted them of the offence of murder contrary to section 203 of the Penal Code and the judgment was read by this court on 6.2.2015. As a result, the applicant was sentenced to death under section 203 of the Penal code.

In **Criminal Case No. 414/2014** the applicant faces a charge of improper use of licensed telecommunication contrary to section 29(A) of the Kenya Communication Act, in that on 17/9/2013 at Meru G. K. Prison by means of a licensed communication system. He sent a threat message from mobile No. 0724715415 which read in part “**umesahau vile tulifanya bwana yako, chungu next ni wewe**” the mobile No. 0715694656 of Eunice Kinya Kailemia. The said Eunice is the wife of the deceased in Criminal Case No. 15/2011.

First of all, contrary to the applicant's contention, the charge in 414/2014 is not similar to the murder case No. 15/2011. The latter offence is alleged to have been committed during the pendency of Criminal Case No. 15/2011. The fact that the complainant in Criminal Case No. 414/2014 is a witness in Criminal Case No. 15/2011 does not make the offence the same. In any event, a person can commit an offence during the pendency of another and that cannot prevent the prosecution from preferring other charges for a subsequent offence. In Criminal Case No. 414/2014, the onus will be upon the prosecution to prove that it is the applicant who sent threats to the complainant's phone. It is not for this court to go through the proceedings in Criminal Case No 15/2011 to determine whether or not the offence was committed.

By alleging that the cell phone line was never used, the appellant wants this court to determine what is before the trial court, but that is not the jurisdiction of this court. The applicant alleged breach of his rights and it was upon the applicant to demonstrate which rights and how these rights have been breached. The fact that an exhibit was produced in one case and

is for use in another case does not per se, infringe on his right; if the cases are related. If the exhibits are not relevant in Criminal Case No. 414/2014, the applicant should raise the objection before the trial court. Criminal Case 414 of 2014 is a case before an independent and competent court and the applicant should let that court determine the case on the merits. This court can only enquire into infringements of the applicant's rights. I find there has been no demonstration of breach or likely breach of any right. In fact the applicant has not alluded to any right that has been or is likely to be breached.

As regards the case that the applicant sought to rely on allegedly determined by J. Majanja, he did not give to the court the full citation of the case and I it was not possible to consider it. Even if I were to consider the case, it would only be of persuasive value having been determined by a court of concurrent jurisdiction.

In the end, I find that the application lacks merit and is hereby dismissed. Criminal No. 414/2014 pending before CMs court do proceed to hearing and determination by that court. The applicant should be produced before that Chief Magistrate on 17/3/2015 for further orders.

DATED AT MERU THIS 13TH DAY OF MARCH, 2015

R. P. V. WENDOH

JUDGE

Coram R. P. V. Wendoh

Kirimi/Jane court assistant

Mr. K. Mugo for State

Applicant in person present.