



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C.R. MISC 6 OF 2015

GABRIEL KARIMI NJARAMBA -----APPLICANT

VERSUS

REPUBLIC -----RESPONDENT

RULING

1. Section 136 of The Criminal Procedure Code Sets out the instances when two or more Accused Persons can be joined in one charge. The provisions of that section and its interpretation will determine the outcome of The Applicant's Notice of Motion dated 31st March 2015 in which the substantive orders sought are:

3) That this Honourable court be pleased to exercise its supervisory jurisdiction and order a review of the Orders of the Chief Magistrates Court, Busia issued on 19th March 2015 consolidating Busia Cr. Case No. 2297 of 2014, Republic -vs Gabriel Karimi Njaramba with Busia CM Cr. Case no. 2334 of 2014, Republic – vs –Gabriel Karimi Njaramba & 2Others.

4) That this Honourable Court be pleased to substitute the said order above mentioned with an order that the 2 matters be deconsolidated and heard separately.

2. The road to this Application is short and straightforward. The Applicant herein was charged in Busia CMCR Case No. 2297/14 (**Republic Vs Gabriel Karimi Njarambi**) with the offence of Stealing by Servant contrary to section 281 of The Penal Code. The particulars of the offence being that:

“On the 11th day of October 2014 at Equity Bank Busia Branch, Busia Township within Busia County being an employee of Equity Bank Busia Branch jointly with others not before the Court stole cash Kshs. 2 million the property of Equity Bank Busia Branch which came in his possession by virtue of their employment.”

3. This Court is told that two witnesses had testified in that matter but on 19th April 2015 it was consolidated with Busia Criminal Case 2334/14 (**Republic vs Gabriel Karime & 2 others**) and the Accused Persons, now three, were required to answer to fresh charges. In Count, Gabriel Karime, Eick Makokha and John Macharia Wambugu were charged with stealing by Servant contrary to Section 281 of the Penal Code. It being alleged that :

“On the 11th day of October 2014 at Equity Bank Busia Branch, Busia Township within Busia County being employees of Equity Bank Busia Branch jointly stole cash Kshs. 2

million the property of Equity Bank Busia Branch which came in their possession by virtue of their employment.”

In Count 2, Erick Makokha and John Macharia Wambugu were charged with the offence of Neglect to prevent a felony contrary to section 392 of the Penal Code. The particulars of offence being:-

“On the 11th day of October, 2014 at Equity Bank Busia Branch, Busia Township within Busia County being employees of Equity Bank Busia Branch knowing that GABRIEL KARIME NJARAMBA designed to steal cash Kshs. 2 million the property of Equity Bank failed to use all reasonable cause to prevent the theft.”

4. The complaint by the Applicant is that his two Co-accused are potential witnesses against him and are likely to give incriminating evidence against him. That for this reason it would be unfair, unconstitutional, and oppressive for them to be joined in the same charge.
5. The Provisions of Section 136 of The Criminal Procedure Code are as follows:-

“The following persons may be joined in one charge or information and may be tried together –

- a. **persons accused of the same offence committed in the course of the same transaction;**
- b. **persons accused of an offence and persons accused of abetment, or of an attempt to commit the offence;**
- c. **persons accused of more offences than one of the same kind (that is to say, offences punishable with the same amount of punishment under the same section of the penal Code or of any other Act or law) omitted by them jointly within a period of twelve months;**
- d. **persons accused of different offences committed in the course of the same transaction;**
- e. **persons accused of an offence under Chapter XXIV to XXX, inclusive, of the Penal Code (Cap 63)), and persons accused of receiving or retaining property, possession of which is alleged to have been transferred by an offence committed by the first-named persons, or of abetment of or attempting to commit either of the last-named offences;**
- f. **persons accused of an offence relating to counterfeit coin under Chapter XXXVI of the Penal Code, and persons accused of another offence under that Chapter relating to the same coin, or of abetment of or attempting to commit any such offence.”**

In respect to count 1, there is no contention that all the three Accused Persons are accused of the same offence committed in the course of the same transaction. The DPP cannot be faulted for joining the three Accused Persons in that one charge.

6. As to Count 2, the Persons facing this charge are only Erick Makokha and John Macharia Wambugu. They are the Co-accused to the Applicant. This is the controversial charge and it helps to reproduce the particulars of the offence:-

“Particulars: (2) ERICK MAKOKHA, (3) JOHN MACHARIA WAMBUNGU : On the 11th day of October, 2014 at Equity Bank Busia Branch, Busia Township within Busia County being employees of Equity Bank Busia Branch knowing that GABRIEL KARIME NJARAMBA designed to steal cash Kshs. 2 million the property of Equity Bank failed to use all reasonable cause to prevent the theft.”

Evidently, from the particulars, although the offence is different, it is alleged to have been committed in the course of the same transaction as that in Count 1. The date of the offence is the same, the complainant is one and the amount stolen is the same. The neglect alleged is said to have enabled the Applicant to steal. Under the Provisions of Section 136(d) it would be permissible that Count 2 faced by the 2 Co-accused Persons be joined to Count 1 in one charge. The rationale for joinder of charges, as correctly pointed out by Mr. Owiti for the State, is that it saves on time and resources to have the two offences tried together. In addition it avoids a

multiplicity of cases.

7. I understood the Applicant to be apprehensive that the Co-Accused are potential witnesses and are likely to give incriminating evidence against him. And that would affect his Constitutional Right to a fair trial. This apprehension is however without any legal basis because **“it is well established that where an accused person gives evidence that is adverse to a co-accused, the co-accused has a right of cross-examination” (Mattaka vs Republic [1971] EA 495 at page 502).** That right extends to a right of the Co-accused to confront, in cross-examination, any adverse evidence given by any witness of an Accused Person.
8. The Application before me is therefore without merit. I must however note that if indeed some witnesses had testified before the consolidation order was made, then the Trial must start the matter de novo. Although the State Counsel argued that this was a natural consequence of the order for consolidation, it was desirable for the Learned Trial Magistrate to make an explicit Order and Direction to that effect. I otherwise do hereby dismiss the Application dated 31st March 2015.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 26TH DAY OF JUNE 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

OILE.....COURT CLERK

MIANO.....FOR THE APPLICANT

OWITI.....FOR THE RESPONDENT