



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 15 OF 2015 (MURDER)

REPUBLIC..... PROSECUTION

VERSUS

RICHARD MUNYI NDWIGA..... 1ST ACCUSED

BEDAN MWANIKI.....2ND ACCUSED

RULING

The accused persons face a charge of murder contrary to Section 203 as read with 204 of the Penal Code. It is alleged that on the 15/2/2015 at Gichugu village, Rianjagi sub-location in Embu County, murdered Jonathan Njue Mbogo.

The facts leading to this application are that before the accused persons were charged, the Director of Public Prosecution had applied for extension of remand period in Misc. Criminal Application No. 13 of 2015. The matter was mentioned before Embu Principal Magistrate about 4 times where the time was extended for a total period of 13 days.

On the 10th of March 2015 the prosecution told the court that investigations had been completed and that they have no evidence to charge the accused persons. The trial magistrate set free the accused persons. The accused persons claim that they were arrested shortly after being released.

On the 11th of March 2015 the accused persons were arraigned in court for a charge of murder. The matter came for plea on the 16th of March, 2015 whereas the two accused persons pleaded not guilty to the charge. The defence counsel Mr. Andande gave notice of a preliminary objection against the charges.

The accused persons were released on bond on the 16th of April 2015. This objection was heard on 27th of May, 2015. Mr. Andande raised an objection to the charge arguing that the accused persons had been set free by the honourable magistrate in the Misc. Appl. No. 13 of 2015. The prosecution had clearly told the court that they had no evidence to charge the accused persons. The court then made a ruling that the suspects were free since the prosecution had no intention of charging them. It is surprising that the accused were arrested the same night and arraigned in court the following day.

Mr. Andande argued that since the prosecution had decided not to charge the accused persons due to lack of evidence, the rights of the accused persons have been infringed by being charged in court without holding an inquest. It was further argued that Article 157 of the Constitution which gives power to the Director of Public Prosecution to institute criminal proceedings, has been abused and misused in arraigning the accused persons in court.

He objection was opposed by the prosecution. Mr. Onjoro argued that the defence counsel has not

referred the court to any provisions of the law barring the Director of Public Prosecution from charging the accused persons. The proceedings before the honourable magistrate was an application for extension of time for remand in custody. The accused persons had not been charged with any offence.

Mr. Onjoro further argued that this scenario is different from a case where accused persons are charged and discharged under Section 87 (a) of the Criminal Procedure Code. Article 157 of the Constitution empowers the Director of Public Prosecution to charge any person with any criminal offence. After the accused persons were released, the Director of Public Prosecution was at liberty to arrest and charge them with criminal offences.

It is clear from the proceeding in Misc. Appl. No.13 of 2015 that the prosecution filed it with the sole purpose of seeking for extension of time in police custody in pursuance with Article 49(f) of the constitution. The magistrate in that application is only empowered to either grant or refuse to extend the remand period.

Applications of this nature are common considering the constitution provisions that an accused person must be arraigned in court within 24 hours from the time of arrest. The investigators normally face a challenge of completing investigations within 24 hours especially in cases of murder and robbery with violence. The magistrate gave extension of time to the prosecution. At the close of the proceedings the prosecution told the court:-

“My instructions are that investigations have been completed. In view of inconsistencies in evidence the state does not have evidence to sustain a charge for murder. We shall open public inquest. We shall not charge the suspects.

A1 – No objection

A2 – No objection

Ct:- The suspects are therefore free Kenyans. The office of the DPP has indicated that it has no intention the charge them”.

The function of the magistrate in the proceedings ended when he discharged the accused persons in the miscellaneous application. The order that the magistrate is empowered to make in proceedings of this nature is to terminate the proceedings and close the file. The purpose of the miscellaneous application had been spent.

However, the comments of the magistrate that the accused persons were set free was only applicable to the proceedings before him. The DPP was at liberty to conduct further investigations and charge the accused persons with the relevant offence. Even if no further investigations were conducted, there is no legal provision barring the DPP from charging suspects who have been set free in a miscellaneous application. The ruling of the magistrate in the miscellaneous application did not affect the functions and powers of the DPP. Article 157(6) of the constitution proves that:-

The Director of Public Prosecutions shall exercise State powers of prosecution and may

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offense alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in a court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

The Director of Public Prosecutions shall not be required the consent of any person or authority for the commencement of criminal proceedings in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

It is clear from the proceedings that the accused persons have been charged in this case for the first time. It is not in dispute that the DPP told the magistrate that he had no evidence to charge the accused persons. This indication does not take away the powers of DPP in instituting criminal charges. The defence has not cited any provision of the law barring the DPP from exercising his powers in a case of this nature. The DPP does not require the consent or authority of any person in exercise of his powers.

From the foregoing, it is clear that the DPP has acted within his powers as provided for by the law. The accused persons have not shown that the DPP has abused or misused his powers in any way.

I find this objection unmerited and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Andande for Accused persons

Ms. Matere for State

Both Accused persons