



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 18 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN ABULALA MAHERIACCUSED

RULING

1. This ruling involves a criminal case which proceeded for hearing with all parties presuming that the Accused person had taken a plea. However, that was not the case.
2. When the Accused person was arraigned in Court on 2010, parties engaged in a plea bargaining arrangement which collapsed in 2012. The matter was then fixed for hearing and witnesses testified thereafter.
3. This Court when dealing with an adjournment application by the prosecution on 20/05/2015 which was strenuously opposed by the defence noted that indeed the Accused person had not taken a plea. The Court then directed the parties to address it on the issue.
4. Mr. Ondieki, Counsel for the Accused person urged the Court to presume that a not guilty plea was entered from the conduct of the parties. He grounded his position in that witnesses in a criminal trial only testify when an Accused person denies the charge. In supporting the defence position, Mr. Oroni, Learned State Counsel further urged the Court to note that witnesses testified long time ago and the matter is one of the oldest in the station.
5. In a bid to settle the issue at hand, it is imperative to begin with a look at the law. **Section 281(1)** of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya (CPC) states that:-

“An accused person may plead not guilty, guilty or guilty subject to a plea agreement.”

Section 278 CPC further provides as follows:-

“An accused person, upon being arraigned upon an information, by pleading generally thereto to plea of ‘not guilty’ shall, without further form, be deemed to have put himself upon the coming for trial.”

Section 282 CPC states that:-

“If the accused pleads ‘not guilty’, or if a plea of ‘not guilty’, is entered in accordance with section 280, the court shall proceed to try the case.”

6. The above provisions are clear that a trial can only be held in two instances. First, is when the Accused person pleads not guilty and second, is when such a plea of not guilty is entered by the Court. In either scenarios, the prosecution starts by calling its witnesses pursuant to Section 300 CPC.
7. It is on record that several witnesses testified since the matter was instituted in Court in 2010. The Accused person has since then not been able to raise the necessary conditions for bail and has remained in custody. The prosecution at the time the present issue arose had applied for an adjournment to avail the remaining witnesses.
8. **But what about the Constitution?** In accordance with **Article 49(1)(g)**, the Accused person was to be charged or be informed of the reason for the delay or be released at the first court appearance. In this case, he was not charged but was informed that the parties were engaged in a plea bargain. The above constitutional provision was therefore complied with.

The Accused person therefore having not taken the plea awaited for the outcome of the negotiations. Unfortunately the parties did not agree. But, had the negotiations been fruitful, still **Section 137A(3)** CPC required the Accused person to take the plea before the agreement could be adopted by the Court. I see that as an effort to ensure that the Accused person’s innocence prevails until otherwise proved.

9. **Article 50(2)(e)** of the Constitution provides that:-

“(2) Every accused person has the right to a fair trial, which includes the right –

.....

.....

(e) to have the trial begin and conclude without unreasonable delay;

Article 159(2)(b) and (d) of the Constitution provides that:

“(2) In exercising judicial authority, the courts and tribunals

shall be guided by the following principles—

.....

(b) justice shall not be delayed;

.....

(d) justice shall be administered without undue regard to procedural technicalities; and

Article 2 of the Constitution declares the very Constitution as the supreme law of the land and that any law which remains inconsistent with the Constitution is void to the extent of that inconsistency.

10. Under the Constitution, Courts are called upon to expedite the dispensation of justice without regard to procedural technicalities. From the record it can be clearly noted that all parties, including all the Judges who previously handled the matter, were of the presumption that the Accused person had denied the charges hence the trial. I take note that that was the reason why

witnesses were called to testify. Whereas the act of not formally taking a plea was an omission on the part of the Court, I find, and by taking into account the circumstances of this matter, that the omission did not occasion any failure of justice to any of the parties. In the spirit of the Constitution therefore this Court finds that this is a matter in which it can be safely presumed that the Accused person denied the charge of murder and the hearing of the case ought to proceed from where it had reached. However, for avoidance of doubt and for the purposes of the record, the Accused person herein shall be called to plead to the charge.

Orders accordingly.

DELIVERED, DATED and SIGNED this 23rd day of July, 2015

A.C. MRIMA

JUDGE