



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

REVISION NO. 30 OF 2015

REPUBLIC

VERSUS

ALEX NGARA MURIMI.....1ST RESPONDENT

CATHERINE GATHIGIA

alias MAMA MURIMI.....2ND RESPONDENT

RULING

By a letter dated 13th May, 2015, the Director of Public Prosecutions sought for a revision of a ruling delivered in Karatina Principal Magistrates' Court Criminal Case No. 77 of 2014 in which Catherine Gathiga alias Mama Murimi and one Alex King'ong'o are the accused.

In the criminal case, the accused persons were charged with the offence of trafficking in narcotic drugs contrary to **section 4(a)** of the **Narcotic Drugs and Psychotropic Substance Control Act Cap 245 Laws of Kenya**.

According to the particulars of the offence, on 6th February, 2014 at Jambo estate area in Karatina township in Mathira East District within Nyeri county jointly with others not before court, the accused persons were found trafficking in narcotics to wit 266 kilograms and 38 rolls, 30.2 grams of cannabis whose estimate value was Kshs. 5.3 Million.

The record shows that the accused persons entered a plea of not guilty on 7th February, 2014 after which the case proceeded to hearing. In the course of the trial the court directed that the case be mentioned alongside **Criminal Case No. 935 of 2014** for directions on the two cases.

In **Criminal Case No. 935 of 2014**, one Alex Ngara Murimi, was also charged with the offence of trafficking in narcotic drugs contrary to **section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act, Cap 245 Laws of Kenya**.

According to the particulars of the offence on 6th February, 2014 at Jambo estate area in Karatina Township in Mathira East District within Nyeri County the accused jointly with others already before court were found trafficking in narcotic drugs to wit 266 kilograms and 38 rolls (30.2 grams) of cannabis whose estimated value was Kshs. 5,300,000/=.

The accused person in this particular case took plea on 3rd December, 2014 and on that date the

prosecutor sought the case to be heard on 3rd February, 2015 when he was to seek to consolidate it with Criminal case No. 77 of 2014.

Indeed on 3rd February, 2015, when this matter came up for hearing in court, the prosecutor sought to have the file called out together with Criminal case No. 77 of 2014; he applied for consolidation of the two files mainly on the grounds that the offences against the accused persons were similar in the sense that they were committed in similar circumstances at the same place and time. Because of these similarities the same prosecution witnesses were testifying in the two cases. The prosecutor informed the court that the only difference between them was that the accused in **Criminal Case No. 935 of 2014** was arrested much later after the trial of the accused in **Criminal Case No. 77 of 2014** had commenced.

In response to this application, counsel for the accused left it to court for its directions but applied to have a copy of the charge sheet and witness statements, apparently in **Criminal Case No. 935 of 2014** if the court was not inclined to consolidate the two cases.

In its ruling the court said:-

“The court has perused the court file No. 77 of 2014 and notes that the charge sheet of Criminal 77/2014 and that of Criminal 935/14 raise the same issues (subject matter, place of occurrence of the crime, date, quality which in essence make the application for consolidation valid. The court is however concerned that in criminal case file no. 77/14, the same is partly heard and Criminal Case 935/14 is essentially a fresh matter and a consolidation order will in effect mean that the matter starts “de novo” an issue the court would want to consult my senior Hon. Musyoka. Matter to be mentioned before Hon. Musyoka on Wednesday 11/2/15 for guidance and directions.”

When the case was mentioned before the principal magistrate, Hon. D.N. Musyoka, on 11th February, 2015 nothing was said about the “guidance and directions” which the resident magistrate, Hon. S. Mwayuli had earlier sought. The record shows that learned principal magistrate directed the case to be heard on 21st April, 2015.

The record of the proceedings of 11th February, 2015 in **Criminal Case No. 935 of 2014** was a little clearer; after considering the application for consolidation and the opposition thereto by the defence counsel, the learned magistrate ruled:-

“This file No. 77 of 2014 to continue being heard in Court No. 2 and the other file No. 935 of 2014. Hearing of this file on 21.4.2014.”

From this statement it was assumed that the learned magistrate simply rejected the application for consolidation and it is upon this assumption that the learned prosecutor sought revision of this order rejecting the application for consolidation and directing that the two cases be heard separately.

As correctly established by the learned resident magistrate, Hon. S Mwayuli the charge sheet, the offences against the accused persons in **Criminal Case No. 77 of 2014** and in **Criminal Case No. 935 of 2014** were committed in the same transaction. According to the particulars of the offences stated in the respective charges sheets, the accused persons in the two cases were jointly found trafficking in narcotic drugs of the same description, weight and value at Jambo estate in Karatina Township in Mathira East District within Nyeri County on 6th February, 2014.

The two accused persons in **Criminal Case No. 77 of 2014** were arrested and arraigned in court first. It is apparent from the charge sheet that when they were charged the prosecution was clear that they were not the only ones who are alleged to have been involved in this crime and that is why it was clear in the particulars of the offences the accused committed the offence “jointly with others not before court”.

The charge sheet in respect of the accused person in **Criminal Case No. 935 of 2014** is consistent in this

respect with the charge sheet in **Criminal Case No. 77 of 2014**; it is clear in this latest charge sheet that the accused committed the offence “jointly with others already before court.”

Since the accused persons are alleged to have committed the offence in the same transaction, there is no reason why they could not be charged and tried together. **Section 136** of the Criminal Procedure Code expressly provides the circumstances under which two or more accused persons may be joined in one charge or information and among those circumstances is where the offence for which the accused persons have been charged with was committed in the course of the same transaction; it says:-

136. Joinder of two or more accused in one charge or information

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) committed 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 Chapters XXVI 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.**

If the learned magistrates had consulted **section 136 (a)** of the **Criminal Procedure Code**, they would not only have found the legal basis for consolidating the two cases but they would also have appreciated the reason and the merits in the prosecutors’ application to have the accused persons tried jointly. It did not matter that the trial in **Criminal Case No. 77 of 2014** had taken off and, as far as I can gather from the record, the first witness in that case had testified while the second one was due for cross-examination when the application for consolidation was made. It was not too late to have the two cases consolidated and certainly this should not have been the reason to reject the application for consolidation.

For the reasons I have stated and in exercise of the powers conferred upon this court under **section 364 (1) (b)** of the **Criminal Procedure Code**, I hereby reverse the order by the learned magistrate (Hon. D Musyoka) made on 11th February, 2015 and in its place I direct as follows:-

1. Karatina **Senior Principal Magistrate’s Court Criminal Case numbers 77 of 2014 and 935 of 2014** be consolidated;
2. Accordingly, the accused persons in criminal cases referred to in (1) above be charged and tried together;
3. This ruling shall be filed and form part of the record in the two criminal cases referred to in (1) above.

It is so ordered.

Signed and dated this 28th day of September, 2015

Ngaah Jairus

JUDGE