



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**MISC.CRIMINAL APPLICATION NO. 417 OF 2015**

**IN THE MATTER OF : APPLICATION BY HON. DAVID MWIRARIA INVOKING THE SUPERVISORY**

**JURISDICITON OF THE HIGH COURT PRUSANT TO ARTICLE 165 (6) & (7) OF THE CONSTITUTION OF KENYA, 2010 & THE REVISIONARY JURISCICION UNDER**

**SECTION 362 OF THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF: THE CONSTITUTUION OF KENYA, 2010, ARTICLE 29(F), 43(1) (A) & 47**

**AND**

**IN THE MATTER OF: SECTION 362 OF THE CRIMINAL PROCEDURE CODE**

**AND**

**IN THE MATTER OF: RULING DELIVERED BY THE SUBORDINATE COURT ON 24<sup>TH</sup> NOVEMBER, 2015**

**ORDERING HON. DAVID MWIRARIA TO APPEAR IN COURT ON 7<sup>TH</sup> DECEMBER, 2015**

**OR FACE ARREST REGARDLESS OF HIS HEALTH STATUS**

**HON. DAVID MWIRARIA.....APPLIANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT**

**THE RESIDENT MAGISTRATES COURT**

**RULING**

By Notice of Motion dated 25<sup>th</sup> November, 2015, brought under Articles 29(f), 43(1)(d), 165 (6) & (7) of the Constitution of Kenya, 2010, Section 362 of the Criminal Procedure Code and all other enabling provisions of the Law, the Applicant prays for the following orders:

- a. **An order be issued to set aside, vacate, quash and or vary the orders given on 24<sup>th</sup> November, 2015 by Hon. F. Kombo, PM sitting at Milimani Law Courts in Anti-Corruption Case No.s 2 & 4 of 2015 – Republic v. David Mwiraria & 9 others & Republic v David Mwiraria & 7 others respectively ordering the Applicant to appear in court for purposes of taking plea on 7<sup>th</sup> December, 2015 irrespective of his health status.**
- b. **An order prohibiting the 2<sup>nd</sup> Respondent from issuing warrants of arrest against the Applicant in Anti-Corruption Case Nos. 2 & 4 of 2015 – Republic v David Mwiraria & 9 others & Republic v David Mwiraria & 7 others respectively.**
- c. **An order directing the Respondents to sever the Applicant from the charge sheet in ACC Case No.s 2 & 4 of 2015 – Republic V David Mwiraria & 9 others and Republic v David Mwiraria & 7 others respectively and to charge the Applicant separately if and when his medical condition improves and he is certified fit to stand trial by medical experts.**
- d. **Costs of this application be borne by the Respondents in any event.**

In summary, the application is premised on grounds that he Applicant is an old man aged 77 years and currently his medical condition is so poor since he is suffering from a terminal illness, reasons wherefore, he is not in a position to stand trial. The application is supported by the affidavit of Abbas Esmail, one of the advocates having the conduct of the matter on behalf of the Applicant.

On the part of the 1<sup>st</sup> Respondent, the application was opposed vide Grounds of Opposition filed by Emily Kamau, Senior Assistant Director of Public Prosecutions on 30<sup>th</sup> November, 2015. She also swore a Replying Affidavit on 30<sup>th</sup> November, 2015. The crux of both the Grounds of Opposition and the Replying Affidavit is that there is no error apparent in the order issued by Hon. F. Kombo deserving a revision. The Applicant has also not demonstrated to what extent his Constitutional rights have been violated or breached by being summoned to court to take plea. Further, the court acted within the law in issuing a warrant of arrest. In any case, the Applicant, notwithstanding that he is sick, is not so ill as not to be in a position to take plea and stand trial.

The application was canvassed before me on 30<sup>th</sup> November, 2015. Learned Counsel Mr. Ismail and Mr. Muite submitted on behalf of the Applicant whilst learned state counsel Mr. Mutuku and Ms. Kamau represented the 1<sup>st</sup> Respondent. On behalf of the Applicant, Mr. Ismail urged the court to invoke its supervisory jurisdiction over the subordinate courts under Article 165(6) and (7) of the Constitution in revising and setting aside the order of Hon. F. Kombo, PM issued on 24<sup>th</sup> November, 2015. Specifically, he submitted that the Applicant was unable to attend court on the date the warrant of arrest was issued because he was too ill to go to court and subsequently was admitted to The Karen Hospital and his absence in court was therefore justified. He submitted that this fact was brought to the attention of the trial court and by consent of the DPP's counsel, parties agreed that the Applicant be examined by a team of doctors with a view of assessing whether he was in a position to stand trial. A team of Doctors from Kenyatta National Hospital (KNH) was constituted and with a majority opinion of three, the Applicant was found not fit to stand trial. The dissenting doctor acknowledged that the Applicant had serious health issues but was fit to stand trial. Mr. Ismail urged the court to look at the entire history of the Applicant's health which demonstrated that he was too sick to stand trial. He referred the court to the **Cambridge Law Journal Volume 27 issue No. 1 of April, 1969 at Page 49**. It was a case of the office of Attorney

General in which the writer observed that the decision on when to prosecute should be determined by various factors, one of which is whether the respondent/accused is too ill to stand his trial without great risk to his health or even to his life. Having regard to this in mind, Mr. Ismail told the court that the family of the Applicant was apprehensive that if the Applicant is dragged to court, it may compromise his life.

Learned state counsel Mr. Mutuku in his submissions opposed the application. He stated that the same was incompetent and bad in law because no order was sought for revision in the body of the Notice of Motion. Besides, as for prayer number (b), the court was within the law to issue a warrant of arrest upon the non attendance in court of the Applicant. With respect to prayer number (c), this court would only make a revisionary order if, in the first instance, the lower court had been moved for separation of charges and had declined to do so. The court was referred to a ruling in the case of **Jean Wanjiru Mwangi v Republic (2014) eKLR, Criminal Revision No. 1 of 2014** which set out the factors the court must consider in exercising its powers of revision.

On the medical issues obtaining to the Applicant, Mr. Mutuku did concede that the Applicant was sick but not to the extent that he was incapable of understanding the charge and taking the plea. He would also be in a position to follow proceedings within the guidelines given by the doctors who examined and treated him. For that reason, it was possible for the court to arrange a comfortable and suitable environment in which the Applicant can take his plea and stand trial. On issuance of the warrant, Mr. Mutuku informed the court that as at now, the same was not in force because the Applicant is required to attend court on 7<sup>th</sup> December, 2015. He informed the court that the Applicant was discharged from hospital on 28<sup>th</sup> November, 2015. He was advised by the doctor to rest and by 7<sup>th</sup> December, 2015, he should have rested enough as to enable him to be in attendance in court. As such, he prevailed on the counsel for the Applicant to avail him in court in the most humane way possible for purposes of proceedings for that day. Finally, he informed the court that the trial dates were set for the months of February and March 2016, during which time, it is hoped that the Applicant will have recovered to stand the full trial.

In rejoinder, Senior Counsel Mr. Muite urged the court that in evaluating the circumstances of this application, the court should consider the injustice that is likely to be occasioned in the delay in the trial if the court were to await the full recuperation of the Applicant who is terminally ill. He told the court that the stage at which the Applicant's illness had reached is such that it is only by the miracle of God that he will attain full recovery. He is suffering from metastatic aggressive cancer which has currently caused blindness to one eye. He also has a hip problem and he is suffering from Asthma. He pleaded with the court to note that the issue for concern was not whether the Applicant was in a position to take the plea but whether his health allowed him to take the plea without seriously threatening his health. The availing of the Applicant to court in a humane way was not an option. This was because currently, the Applicant is suffering from a urinary problem in which case he will not be in a position to sit in a public place like court, thus violating his human dignity. Moreover, he suffers from immobility due to the hip problem. It was therefore only fair that the trial be separated so that the Applicant is severed from the charge sheet. If by the intervention of God he recovers, the prosecution witnesses would be recalled for purposes of either adducing evidence afresh or for further cross-examination. In this respect, the court was referred to a Supporting Affidavit sworn by Makena Mwiraria, a biological daughter to the Applicant on 30<sup>th</sup> November, 2015. She deposed that the Ethics and Anti-Corruption Investigation Officers interviewed the Applicant in a motor vehicle because he was not in a position to get in their office and sit down for interrogation.

I have considered the respective submissions. I will first address the issue of whether the application is competent and good in Law. The submission of the counsel for the 1<sup>st</sup> Respondent was that the orders issued on 24<sup>th</sup> November, 2014 were within the law and since the warrant of arrest had been suspended until 7<sup>th</sup> December, 2015, there was no order capable of being revised. This court is donated the power of revision by **Section 362 of the Criminal Procedure Code** which provides that the court can call for and examine the proceedings of the magistrates' court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings of any such subordinate court.

Although it is not quite possible to read the handwriting of Hon. F. Kombo PM, from the submissions of both parties, the proceedings of 24<sup>th</sup> November, 2015, emanated from what transpired in court on the previous day. On 23<sup>rd</sup> November, 2015 when the matter was for mention, the Applicant was absent in court. His counsel Ismail informed the court that he was admitted in hospital. He did not have any medical documents to demonstrate that. The court accordingly issued a warrant of arrest but suspended the same for 24 hours awaiting a medical report to be availed on the next day, 24<sup>th</sup> November, 2015. On the 24<sup>th</sup> Mr. Ismail presented before the court a detailed report from The Karen Hospital dated 23<sup>rd</sup> November, 2015. The same showed that the Applicant had been hospitalized on 20<sup>th</sup> November, 2015. The court being satisfied that indeed the Applicant did not deliberately fail to come to court further suspended the warrant of arrest to 7<sup>th</sup> December, 2015. That meant that if the Applicant does not avail himself in court on 7<sup>th</sup> December, 2015 the warrant of arrest would automatically be executed. The case for the Applicant being that the Applicant is too ill to present himself to court on 7<sup>th</sup> December, 2015 implies that unless the warrant of arrest is entirely cancelled, the Applicant is likely to be arrested. There is therefore the need to ensure that the warrant of arrest is cancelled by setting aside the order issued by the learned magistrate on 24<sup>th</sup> November, 2015. In that regard, I hold that prayer number (a) is properly before the court. Prayers (b) and (c) in my view are also properly before the court pursuant to the supervisory jurisdiction of this court over the subordinate court under Article 165 (6) and (7) of the Constitution.

Having made the above observation, it behooves me to determine whether the prayers sought are merited. No doubt the Applicant is sick. Even before this application was filed, the trial court had been presented with medical reports indicating that his illness barred him from variously attending the court. The application herein was precipitated by the 1<sup>st</sup> Respondent's insistence that the Applicant was deliberately refusing to go to court. In fact, the same sentiment was expressed by learned counsel Mr. Mutuku before me. He submitted that the matter had been placed for mention even before the Applicant had been admitted at The Karen Hospital. That it was not until a warrant of arrest was issued that the Applicant appears to have checked into the hospital.

Based on the medical records presented before this court, I entirely disagree with Mr. Mutuku. It is important I demonstrate this fact. Annexed to the Supporting Affidavit are, a medical report from Doctor Louis S. Wessels dated 15<sup>th</sup> August, 2013 which indicates that the Applicant had been treated by him since the year 2006 with a history of a large metastatic lesion of his skull which had been treated successfully with excision and cranioplasty on 25<sup>th</sup> May, 2006. Another medical report is from PathCare dated 15<sup>th</sup> August, 2013 with similar observations. A laboratory test from DiagnoLabs dated 18<sup>th</sup> June, 2013 further confirmed the illness. There is also a discharge summary from American Oncology Institute which spells out a CT Simulation the Applicant underwent between 18<sup>th</sup> and 19<sup>th</sup> March, 2014. A Radiology examination was conducted at Aga Khan University Hospital for bone scan on 24<sup>th</sup> November, 2014. Diagnosis showed the patient was known to have CA prostate with skull metastases. From Citizens Hospital is a discharge summary showing that the Applicant had undergone right femur reconstruction on 14<sup>th</sup> January, 2015. Another medical report is from Karen Hospital signed by Prof. L.N. Gakuu dated 16<sup>th</sup> March, 2015 clearly outlining various general illnesses for which the Applicant was treated including; Hypertension, Cancer of the prostate, Liver dysfunction, brain cancer, hip fracture, bronchial asthma and poor left eye vision. He had been admitted in the hospital on 4<sup>th</sup> March, 2015 as attested by a Discharge Form attached thereof. Prof. Peter. L. W. Ndaguatha has written two medical reports dated 17<sup>th</sup> July 2013 and 22<sup>nd</sup> June 2015 respectively which are in consonance with Prof. Gakuu's report.

From the above history, I now revert to the contentious medical report written by the four doctors of KNH following a proposal by the DPP that the Applicant be examined by a team of government doctors so as to assess whether or not he was in a position to stand trial. The same is dated 15<sup>th</sup> July, 2015. He was examined by the following doctors;

Dr. Eliud Njuguna-Chairperson

Prof. N.O. Abinya -Member

Dr. Willy Otele – Member

Dr. Ann Waweru – Secretary

The team of doctors wrote in detail the history of the Applicant's illness, his current status and medication. Of the four doctors, Dr. Njuguna, Otele and Waweru concluded that the Applicant has severe physical limitations that may not allow him to endure even moderate activity or same body position for long. Further that it is unlikely he will endure any sessions lasting more than 30 -60 minutes. In a dissenting opinion, Dr. Abinya observed that although the Applicant has serious health issues, functionally, he is fit to stand trial. Part of what the team of doctors relied on was a report dated 23<sup>rd</sup> November, 2015 from The Karen Hospital written by Doctors A.K. Gikonyo, D. Kanyeki, Irungu Shango, Hellen Nguchu and D.K. Gikonyo. Of course the Applicant has severally been treated at The Karen Hospital which was in a better position to give a detailed history of his illness. The latter's medical report is heavily detailed outlining the clinical presentations of the Applicant. Some of them being too confidential, notwithstanding that the report is part of the court's record, I hesitate to include them in this ruling.

With the above medical analysis in mind, I am unable to fathom how learned counsel Mr. Mutuku with his team would conclude that the Applicant was feigning illness with the purpose of not attending court. Clearly when he was admitted to The Karen Hospital on 20<sup>th</sup> November, 2015, he incurred a Hospital Bill of more than Kshs. 400,000/=. The same is annexed to the Supporting Affidavit of Makena Mwiraria sworn on 30<sup>th</sup> November, 2015. My view is that no reasonable person would waste such large amounts of money for a show. In any case, the history of the Applicant's illness speaks for itself. It dates back to the year 2006 and the symptoms presenting as at date reflect the diagnosis made in the year 2006.

As at the time the application was canvassed, the Applicant had been discharged from The Karen Hospital on 28<sup>th</sup> November, 2015 and as submitted by his counsel, he was given days to rest. From the latest medical report from The Karen Hospital, his mobility is very limited. The cancer having turned metastatic, has moved to the brain causing the blindness in the left eye. It is slowly spreading to other parts of the body but as a human being, my hope is that it does not spread any further and that he will sail through the path of full recovery.

That said though, I will focus my determination based on the report of the team of four doctors from KNH. It encompasses a summary of the journey of the medical history that the Applicant has sailed through and settled with his current health status. Undoubtedly, the Applicant is seriously ill but he is able to withstand with full concentration any sessions lasting between 30 and 60 minutes. That then discounts the contention that he cannot withstand court proceedings for as short as 30 minutes. As observed in the **Cambridge Law Journal** (supra) prosecution of an accused would be completely halted where the accused is so sick that he cannot endure any court sessions, however short. But as the doctors opined, the Applicant can endure short court sessions. Taking of plea is a session that takes a very short duration and can be as short as between 10 and 15 minutes. Bearing in mind that he has not taken plea in both Anti-Corruption cases No. 2 & 4 of 2015, the most prudent and humane thing to do is to make as comfortable as possible a court session in which he can exclusively take the plea. I would be minded of his mobility and urinary problems which for now may compromise his human dignity if he were to move to open court to take the plea. After all, he was discharged from hospital only six days ago. Under **Section 13 (1) of the Magistrates' Court Act, Cap 10 Laws of Kenya**, a Magistrates' Courts can be constituted at any place within its jurisdiction. The same provides as follows;

*"A magistrates' court may be held at any place within the local limits of its jurisdiction, but it shall, so far as is practicable be held at the place or places where it is regularly or customarily held:*

*Provided that a district magistrate's court may in any particular case, with the written consent of the Chief Justice, sit at a specified place outside the local limits of its jurisdiction, and consent*

***purporting to be signed by the Chief Justice shall be presumed to be signed by him until the contrary is shown.”***

With the above provision in mind, and more so having regard to the health dignity that the Applicant must be accorded, I will direct that the plea be taken at the place he is currently residing. I am however, disinclined at this early stage to order to sever his name from the charges because of the following reasons:

- a. The hearing dates are set for February and March, 2016. By then, the health condition of the Applicant's may have changed.
- b. Matters of health are controlled by the divine power of God. In as much as the Applicant's counsel submitted that the Applicant is unlikely to recover, all human beings live by hope. And with the intervention of God, our prayers are that he will experience the full recovery. We cannot predict what his health status is likely to be by the date of the hearing. The trial court will make an assessment of the prevailing circumstances and direct whether or not the Applicant would stand trial.
- c. The circumstances obtaining with the Applicant are not solely synonymous with this case. Pleas and evidence have been taken before in hospital where circumstances dictated that the accused persons and witnesses are unable to attend court sessions. As such, depending on the status of the Applicant as at the hearing date, the trial magistrate will direct the manner in which evidence may be taken, with or without the presence of the Applicant.
- d. A trial can proceed without necessarily severing the name of an accused from the charge sheet. That would happen where the court is of the opinion that notwithstanding the absence of one of the accused person he may later join in the trial when circumstances allow it and the court then addresses the gaps occasioned by the prior absence of the accused.

With the above in mind, I make the following orders:

1. The orders of the learned trial magistrate F. Kombo, Principal Magistrate issued in ACC No. 2 & 4 of 2015 on 24<sup>th</sup> November, 2015 be and are hereby set aside and substituted with an order that the warrant of arrest issued against the Applicant and is likely to be executed on 7<sup>th</sup> December, 2015 be and is hereby cancelled.
2. The learned trial magistrate is directed to arrange with counsel for the Applicant within 10 days from the date of today, on giving notice to the Applicant to proceed and take his plea at the location he will be, in a suitable and humane environment whether in hospital or at home.
3. The learned trial magistrate is directed that on the hearing date, to make an assessment of the Applicant's ability to attend court for trial based on his medical condition or as the case may be, direct whether the hearing may commence his absence notwithstanding. The trial court files submitted to this court shall be forthwith remitted back to the Magistrate's Court for purposes of proceedings of 7<sup>th</sup> December, 2015.
4. Each party shall bear its own cost of this application.

**DATED and DELIVERED this 24<sup>TH</sup> day of NOVEMBER, 2015.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

In the presence of:

1. *Miss Ngunju holding brief for Mr. Mute for the Applicant.*

2. *Mr. Mutuku and Mule for the 1<sup>st</sup> Respondent.*