



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 17 OF 2013

FREDRICK NJENGA NJUGUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Accused is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. On 13th February 2013, the accused person pleaded not guilty to the charges. By an Application dated 22nd April 2013, the Applicant sought to be released on bail. The Application was subsequently heard and dismissed in a Ruling dated 27th August 2013 and the matter set down for hearing.
2. On 4th November 2013, when the matter was set to proceed for hearing, the prosecution stated it had four witnesses and was ready to proceed with the trial. At this point **Mr. Gomba**, learned counsel for the accused raised an objection to the effect that the witnesses that the prosecution was referring to were in fact witnesses for the defence. He objected to their being called to testify for the prosecution. Secondly, counsel raised an objection that the Director of Public Prosecutions was abusing the prosecutorial power in charging the accused.
3. The Court directed the parties to file substantive submissions on the issues raised and to address the court on the same. In the meantime the commencement of the trial was put on hold. The defence subsequently filed submissions while the prosecution filed an affidavit sworn by the Investigating officer.
4. I heard the submissions of the parties on 25th November 2013. Mr. Gomba highlighted his written submissions dated 11th November 2013 and the averments in the Affidavits of Paul Murage Kimani, Margaret Njoki Njuguna, and James Mutonga Njuguna all sworn on 17th October 2013. He submitted that the witnesses did not wish to testify for the prosecution and they cannot be compelled to be prosecution witnesses. Counsel added that the witnesses were being compelled to act contrary to their belief in contravention of the provisions of **Article 32(4)** of the **Constitution**.
5. To buttress this position, Counsel submitted that one of the witnesses, Hilda Njoki even stood bail for the accused. He relied on **Section 128** of the **Evidence Act** and **Section 144** of the **Criminal Procedure Code**, arguing that only the Court and not the prosecution has the power to issue witness summons. He added that the prosecution ought to apply to the court for witness summons and also seek the leave of the Court for the witnesses to be declared hostile. He relied on the case of **Peter Leo Agweli Onalo v Eliakim Ludeki & 2 Others High Court at Nairobi, Election Petition No. 1 of 2013 [2006] eKLR**.
6. In further submissions, counsel stated that the prosecution was abusing the process of the court by seeking to prosecute the accused person. He referred to a letter by one Prosecution Counsel to

Karuri Police Station dated 10th January 2013 stating that was no sufficient evidence to commence prosecution against the accused.

7. In opposing submissions, **Ms. Onunga**, the learned Prosecution Counsel referred the court to the Replying Affidavit of **No. 53278 PC Nyanganesi** sworn on 22nd November 2013.
8. She submitted that the witnesses in question recorded their statements with the police willingly and without coercion. Subsequently, on 12th October 2013, the State was served with the affidavits sworn by the witnesses stating that they were defence witnesses. She submitted that the issue before court did not concern the compelling of witnesses since the prosecution had not even applied for witness summons, thus, **Section 128** of the **Evidence Act** was not relevant. On the innocence or otherwise of the accused person, counsel submitted that this was the purview of the court to determine. She urged the Court to allow the witnesses to give evidence, adding that the defence would not be prejudiced if the witnesses testified for the prosecution.
9. Defence counsel wishes the court to rule on whether the prosecution can compel witnesses who do not wish to testify on its behalf and to find that the court process is being abused by the DPP in mounting the prosecution. The learned Prosecution Counsel on the other hand disagrees that these were the issues before the court. According to her, the issue was whether the defence can be allowed to obstruct the course of justice by denying the prosecution an opportunity to present its case before court through witnesses who gave their statements willingly to the police. I address all three issues below.

Whether the prosecution's act of initiating these proceedings amounts to an abuse of the process of the court

10. The accused person is of the view that the prosecution is abusing the court process by initiating these proceedings. From the submission of defence counsel, this assertion is based on a letter dated 10th January 2013 signed by one by G.W. Gichuhi, for the Director of Public Prosecutions and addressed to Karuri Police Station. The letter reads in part as follows:

"... there is no prima facie evidence to warrant prosecution of the accused person for the offence of murder. The circumstances leading to the death are not clear and none of the witnesses state they saw the accused set fire to the deceased home. ...Crucial statements have not as yet been recorded due to unavailability of witnesses and it's imperative that these statements be recorded in order to bring a clear picture of what happened on that day. At this point, we are unable to charge the accused persons with the offence of arson or murder as there is no direct evidence linking him to the offence herein. In view of the above, you are hereby directed to bond the accused persons to assist with their investigations. In the meantime, further investigations should be conducted on the areas below..."

Defence counsel argues that the DPP abused his powers by going ahead to charge the accused notwithstanding his own finding that there was insufficient evidence.

11. **Article 157** of the Constitution establishes the office of the DPP and confers on the DPP the state powers of prosecution. Under sub- Article (10), the DPP shall not require the consent of any person or authority to commence criminal proceedings. He is not also subject to the direction or control of any person or authority. **Article 157(11)**, however enjoins the prosecution to uphold the interests of justice, in the following terms:

"In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

This obligation is similarly echoed under **Section 4** of the **Office of the Director of Public Prosecutions Act, No. 2 of 2013**.

12. From the above, it is apparent to me that prosecutorial power must be exercised in a judicious way and should not be abused. The court would indeed intervene where it is shown that the power was

being abused, exercised arbitrarily, oppressively, or in a manner contrary to public policy. This was the holding in **Githunguri V. Republic (1986) KLR 1**. See also **Macharia & Another v Attorney General & Another (2001) KLR 448**.

13. In the present objection, I have not found any evidence of abuse of the prosecutorial power. The letter referred to by the defence appears to me to be normal correspondence between the DPP's office and the police investigators. The letter simply asks the police to conduct further investigation in specific areas outlined. I see no expression of any ill motive or illegality in such a directive. Although the prosecutor in this case did not explain to the court what followed after the said letter, the court would hesitate to conclude that there was insufficient evidence to charge the accused until the prosecution presents all the evidence it has in its possession. A trial Court ought not to be quick to terminate criminal proceedings before it has had the chance to consider the evidence in question. In the light of this, I find that the accused person has not demonstrated that the prosecution by commencing the proceedings is either abusing its powers or abusing the process of the court. This ground of objection therefore fails.

Whether the prosecution can compel witnesses to testify.

14. On the second issue, defence counsel argued that the prosecution has no power to compel witnesses to testify. Counsel also stated that compelling the witnesses to be prosecution witnesses is contrary to their right under **Article 32(4)** of the **Constitution**. The Article reads:-

“A person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion.”

15. On the outset, I find reliance on this provision irrelevant to the matter at hand. The matter in question concerns an inquiry into the commission of an offence, a matter to be determined on the basis of evidence presented in court and the applicable law. The Article quoted provides for the protection of the right to belief and religion. It has to do with matters of faith and religious practice. It has no relation whatsoever to the criminal proceedings in question.
16. Further, Counsel cited **Section 128** of the **Evidence Act** that provides for compellability of witnesses. It reads as follows:

“A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness.....”

17. Closely related to the above provision is **Section 144 (1)** of the **Criminal Procedure Code** that was also relied on by the accused. It provides that:

“If it is made to appear that material evidence can be given by or is in the possession of a person who will not voluntarily attend to give it or will not voluntarily produce it, a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.”

18. I find the invocation of both **Section 144 (1)** of the **CPC** and **Section 128** of the **Evidence Act** premature at this stage. The court has not been requested by either party to issue summons to compel the attendance of any witness. I am also clear in my mind that the power to compel witnesses lies with the court and that the court can and does issue summons to witnesses whenever it is necessary.

19. In urging the application, defence Counsel further relied on the case of **Peter Leo Agweli Onalo v Eliakim Ludeki & 2 Others High Court at Nairobi, Election Petition No. 1 of 2013 [2006] eKLR**. The case cited is clearly distinguishable from the present case. Firstly, the case was an election petition while this is a criminal trial. Secondly, the proceedings in that case had

- commenced and it was obvious to the court that the witness in question was clearly a witness for the respondent because of the security duties he had undertaken for the 1st respondent. There is no similar scenario in this case.
20. In the present case, all that is required of the witnesses is to tell the court what they saw or know about the charge before court. Their truthful testimony may implicate the accused or may very well exonerate him. In this regard, the averment in the affidavits of the witnesses to the effect that they did not wish to implicate the accused is misguided.
21. The issue of calling of witnesses in this case is also closely tied to the prosecution's decision to institute criminal proceedings. As per **Article 157(10) of the Constitution** "*The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.*"

These powers are reiterated under **Section 6 of the Office of the Director of Public Prosecutions Act, No. 2 of 2013.**

22. In instituting criminal proceedings, the DPP in the same limb exercises discretion on what evidence to present in court including the witnesses to call. See ***R v Russell-Jones [1995] 3 All ER 239.***
23. It was submitted that the prosecution does not have the power to compel a witnesses and **Section 144 of the Criminal Procedure Code** was cited in this respect. I have already stated that this is the correct interpretation of the law. The power however, concerns the attendance of an identifiable witness considered as material by a party. This, in my view, is not applicable at this stage of the proceedings. I find it preemptive for Counsel for the accused to suggest that the prosecution ought to apply for witness summons and seek the leave of the Court for the witnesses to be declared hostile. There is no sound basis for this hasty pursuit since the proceedings have not reached a stage where such powers of Court can be invoked. In line with the constitutional mandate and power given to the Director of Public Prosecutions to conduct criminal prosecutions, he must retain the discretion to identify and call witnesses without undue interference by the court particularly where there is no demonstration of abuse of the court process as is the case in this objection.
24. Lastly, I am obliged by the issues arising in this case to comment on the duty of a witness in a criminal trial process. The witnesses in question deponed in their respective Affidavits that in recording their statements, they did not intend to incriminate the accused. The process of instituting criminal proceedings is preceded by investigations into the alleged crime. To undertake its mandate, the police service is also vested with powers. According to **Section 52 (1) of the National Police Service Act, 2011**, "***a police officer may require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.***"
25. The rationale for the above is that it is for the interests of public policy that crimes are investigated and prosecuted. With this in mind, it is not the place of the witnesses to determine that the information they present to the police concerning investigations into a crime amount to incriminating a person suspected of committing a crime. The powers of the police in investigating crime, when exercised within the limits of the law and for the purposes provided for, do not merely rest on the free will of a person to provide or fail to provide the necessary information.
26. For the foregoing reasons, I dismiss the objection raised by defence counsel regarding the witnesses and order
27. That the trial proceeds in accordance with the substantive and procedural law.

Ruling Signed, Dated and Delivered in open court this 27th day of March 2014.

R.LAGAT-KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Applicant

.....: For the applicant

.....: For the State/respondent