



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 73 OF 2010

REPUBLIC.....PROSECUTOR

-VERSUS -

GEORGE KIMANI WARUIRU..... ACCUSED

RULING

This is a ruling on the defence's oral application to the effect that this case starts afresh.

The history of this case is important and will form the basis of this court's ruling of the matter having regard to the law applicable.

The first appearance in court by the accused was on 20th September 2010. The plea was taken on 27th September 2010 and a plea of “*Not guilty*” was entered. The case could not be fixed for hearing immediately because the diary for that year 2010 was full.

When the 2011 diaries were supplied the case was fixed for hearing on 3rd January 2011. The case did not take off on that day and was given afresh hearing date. The accused later gave an offer to plead to a lesser charge of manslaughter which led to several mentions awaiting the directions of the Director of Public Prosecutions (DPP). On 30th March 2011, the DPP rejected the offer of a lesser charge. The case was fixed for hearing on 5th and 6th October 2011.

The matter was heard partly by Mwilu, J who heard four (4) witnesses before being transferred to another division. This court took over the case under **Section 200** of the **Criminal Procedure Code** and has now heard three more witnesses. The defence and the prosecution agreed and the court gave directions that the case proceeds from where Judge Mwilu had reached.

The accused thereafter complained of poor communication with his advocate Mr. Masara and requested that he be allocated another counsel. Mr. Masara then requested to be discharged from the proceedings which order was granted. The current advocate Ms. Odembo took over the case on 25th February 2014.

On 13th March 2014 when the case came for mention, the counsel made this application to the effect that the case starts afresh. The first reason given was that the accused was confused during the trial and did not follow the proceedings. Ms. Odembo also said that it would be good for her if the court allowed the case to start afresh so that she can be able to conduct the defence from the start and also understand the case better.

The application was opposed by the state on grounds that it was a delaying tactic by the defence and that

the motion was not well grounded. The prosecution also indicated that it will be a challenge for them to get witnesses to testify some of whom testified several years ago.

I begin on the premise that this court is not dealing with the provisions of Section 200 of the Criminal Procedure Code where a succeeding magistrate has to explain to the accused his rights and record what he says before giving directions on how the case shall proceed. This process was done on 7th May 2012 whereas the provisions of the law were complied with.

For this application, the defence did not cite the law they were relying on to apply for the hearing to start afresh. Even assuming that the court could entertain an application of this nature and look into its merits, the court must ensure that it serves the interests of justice and that it does not hinder the expeditious disposal of the case which is a constitutional right of the accused and which this court has a duty to guard.

On the first reason that the accused was confused and could not follow the proceedings, I wish to first examine the record. The accused was represented by an able counsel Mr. Masara from the date of plea up to the stage when the 7th witness was heard. The record does not show that the accused ever complained that he was in a state of confusion not to follow the proceedings. For every witness who was heard, his advocate put across questions in cross-examination. The accused was therefore given a fair hearing by the court as required by the law. If the accused has a mental status challenge as he implies, this cannot be justified because, he was declared mentally fit to plead. Any contrary state of mind can only be established through a medical report. No medical report has been availed to show that the accused was not mentally sound during the time his case was heard. This case was heard up to this stage for a period of over two and a half years. It will not make sense for the accused to claim that he was confused throughout that period. How then does he proceed with the case if it starts *de novo*? Has that confusion now ended? These questions remain unanswered.

As for the counsel who is new on record, the only way to assist her follow the case and understand the proceedings is to provide her with typed proceedings. She has applied for typed proceedings and the court has ordered that she be supplied with the proceedings within 14 days from 13th March 2014. There would be no legal basis for a counsel who has come on record in a part-heard matter to apply for the matter to start afresh.

The merit of the application aside, this court is aware of the acute shortage of judges in the Murder Section. There are only two judges with more than 500 cases pending. The diary as a result is very congested and dates for fresh cases may not be available this calendar year.

This trial has been pending for the last three years due to different causes and it has been heard partly by two judges. I am in agreement with the prosecution that if the case were to start afresh, it would be a big challenge for them to avail witnesses.

I find that this application has no merit and I disallow it accordingly.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the **8TH** day of **APRIL, 2014** in the presence of the accused, his counsel Ms Odembo and the State Counsel Ms. Onunga.

F. N. MUCHEMI

JUDGE