



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCR 15 OF 2009

REPUBLIC.....PROSECUTOR

-VERSUS-

HENRY MUSA.....1ST ACCUSED

STANLEY GICHUNGE.....2ND ACCUSED

M'KAILIBI KAILIBI.....3RD ACCUSED

DANIEL KARATU.....4TH ACCUSED

GEDION KINGORI..... 5TH ACCUSED

RULING

1. The first to fourth accused persons namely; **HENRY MUSA, STANLEY GICHUNGE, M'KAILIBI KAILIBI** and **DANIEL KARATU** were arraigned before this court on 11th February, 2009 with 2 counts of murder contrary to section 203 as read with section 204 of the Penal Code. On 26th February, 2009 a plea was taken against each accused in which they denied the charge before Emukule, J.
2. The matter was then set for various mentions and hearing dates when nothing proceeded. On 22nd March, 2012 Mr. Motende, prosecution counsel applied for the Production Order of the 5th accused **GEDION KING'ORI** Mr. Motende explained that the prosecution intended to consolidate the case against Gedion King'ori Karwamba being Criminal Case No. 5 of 2010 with the instant case. That application was made before Apondi, J.
3. A Production Order was issued for the 5th accused on 30th April, 2012 the four accused together with the 5th accused appeared before Makau, J. however, Mr. Motende who was the prosecution counsel could not consolidate the case against the 5th accused with the instant one as the 5th accused had no defence counsel. The case was adjourned to 30th May, 2012.
4. On 30th May, 2012 the 1st to 4th accused appeared before me no mention was made of the 5th accused. The case was adjourned with a view of having hearing dates fixed by the Resident Judge.
5. On 26th June, 2012 matter was mentioned before Apondi, J and all five accused were present. However then counsels were absent. It was mentioned severally thereafter but for one or other reasons it never proceeded and 5th accused was not formerly enjoined in the case.
6. The matter finally came up for hearing on 31st January, 2013. No mention was made of

- consolidation. The matter started by 5th February, 2014 when the court ordered the prosecution to amend the information. The 5th accused had not been formerly enjoined for the case.
7. The prosecution amended the particulars of the information on 5th February, 2014. A plea was taken on the amended information to which all five accused pleaded not guilty. They also indicated that they did not wish to re-call any of the witnesses who had already testified.
 8. By 5th February, 2014 when the 5th accused took plea in this case for the first time the prosecution had called six witnesses. Clearly the 5th accused up to the point was not aware of the charges he was facing.
 9. The prosecution seem to have become aware of the fact the 5th accused had not taken a plea to the information before trial commenced when Ms. Nelima, then acting for all accused raised the issue.
 10. On 7th July, 2014 the state brought a Nolle Prosequi and applied to withdraw the charge against the 5th accused under section 82 of the Criminal Procedure Code. Prosecution Counsel explained that the step was being sought because the 5th accused had not taken plea.
 11. The application was declined by the court and the case proceeded to defence hearing.
 12. At the end of the trial I find that the 5th accused never took plea to the information in this case. To make the situation worse Criminal case No. 5 of 2010 against the 5th accused concerned a deceased Charles Mwirigi. The deceased in this case are totally different. So even the talk of consolidating criminal case No. 5 of 2010 was untenable and invalid as the two cases were not related.
 13. The accused persons were charged jointly of murder of two persons. This was a joint trial. It would have been miscarriage of justice to withdraw the case against the 5th accused with a view of trying him alone with same offence.
 14. Since this was a joint trial and the accused persons face same charges, I find that a mistrial in regard to one accused affects all accused persons. In that regard there has been a mistrial in this case.
 15. I accordingly declare this a mistrial and direct that the matter should start a fresh before a different court. In that regard the accused persons are discharged to be charged a fresh with this self same information before the vacation Judge on 6th August, 2014. In the meantime, the accused will continue to be held in custody till then.

DATED AT MERU THIS 31ST JULY, 2014

LESIIT, J

JUDGE