



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Crim Appli 198 of 2007**

**PETER ONYANGO ABAYO..... APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

**RULING**

This is an application by Notice of Motion dated 15.3.07. It is filed by a person charged with a criminal offence, in a murder case, Crim. Case No. 16 of 2007. In that other case, a plea of *Not Guilty* was recorded by *Apondi, J* on 13/3/07, on the basis of an information lodged by the Attorney-General.

Two days later the instant application was filed – for the quashing of the charge information – for reasons linked to the provisions of the Constitution – ss.72(3)(b) and (c); 77(1)(g); and to the Criminal Procedure Code (Cap.75), ss. 3(3), 36, 37 and 276.

Essentially it is being asserted that prior to the lodgement of the murder charge certain things had taken place, under the watch of the Police, which violated the rights of the accused and which, therefore, were illegal – things which then tainted the resulting charge, and the prosecution on the basis of the charge information.

The applicant is, in effect, stating that the intended trial is an illegal one, and the charge information should at this early stage be nullified.

The basic principle for resolving such a question is lodged in past decisions of the Court of Appeal, notably: *Dr. Odhiambo Olel v. Rep.* Crim Appeal No. 54 of 1989; and *Albanus Mwasia Mutua v. Rep.*, Crim App. No. 120 of 2004; and the principle is that an objection of the kind now being raised, must be placed before the Court at the earliest opportunity.

I think both *Mr. Agina* for the applicant, and *Mr. Makura* for the State, are quite well in agreement on that principle.

Only one question remains unresolved: before which Court should the objection be raised – before the trial Court seized of the substantive matter, or before a different Court such as this one, which deals only with criminal applications?

Going by a meritorious precedent cited by learned counsel *Mr. Agina*, Nyeri High Court Cr. Case No. 2 of 2007, *Republic v. Moses Nderitu Ndumia*, the Judge seized of the substantive trial is a suitable judicial

officer to hear and dispose of the matter. Is any other Judge also equally suitable?

Learned counsel **Mr. Makura** urges that the trial Court in Crim. Case No.16/07 is the proper one to entertain this question – and so the instant application ought to have come before that Court.

I did not understand **Mr. Agina** to be objecting to the principle raised by **Mr. Makura**, save that he thought the instant application is also quite properly before this Court.

Even if **Mr. Agana's** thinking on this point were right, I think, for good judicial practice, conflicting jurisdictions should be rectified as much as possible, to enable the High Court to speak with one voice, as one single institution of dispute settlement under the Constitution. A practice ought to be recognised which prefers the wise and the practical course, that invests the jurisdiction for a particular purpose, in one recognised Court within the High Court set-up.

I would consider that the wise and the practical course, is to elevate the practice noted in Nyeri High Court Case No. 2 of 2007 to a level of principle. The most appropriate Court to resolve the initial question as to whether a trial is destined to be illegal, owing to perceived infractions of the law at the investigations stage, is, I would hold, the *trial Court* seized of the substantive case.

So in this case, the trial Court hearing the murder case in Criminal Case No. 16/2007 is the one which should proceed to determine the instant application. Depending on the outcome of that determination, the Court would then either nullify the Attorney-General's information, or proceed to conduct a hearing.

On the basis of that principle I will now direct and order as follows:

1. The Notice of Motion of 15/3/07 shall be listed for mention before **Apondi, J** on 6/6/07.
2. Directions to be given on the said application, and on the hearing of Criminal Case No. 16 of 2007.

**Orders accordingly.**

**DATED** and **DELIVERED** at Nairobi this 30<sup>th</sup> day of May, 2007.

**J.B. OJWANG**

**JUDGE**