



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KERICHO**

**Criminal Case No. 5 of 2003**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FRANCIS WAWERU NJUKI.....ACCUSED**

**RULING**

On the 21<sup>st</sup> February 2006 I dismissed this case against the Accused and acquitted him relying on my previous ruling in this Court's ***Criminal Case No. 28 of 2003, Republic – versus – Paul Kibuchi Muriithi*** which was similar to this case and I held that case was improper and unmaintainable. I promised to give further reasons for the dismissal of this case and that is what this ruling is about. I intend to be brief.

Firstly, committal proceedings in this case took place on or before 4<sup>th</sup> December 2002, the case having been filed and the Accused arraigned in court on 28<sup>th</sup> January 2002, prior to the repeal of provisions of the Criminal Procedure Code relating to Committal Proceedings through Act No. 5 of 2003 which became effective on 25<sup>th</sup> July 2003 without retrospective effect. This case is therefore before this court as a case brought in the High Court in accordance with the now repealed provisions of the Criminal Procedure Code, part V111, and be handled as such.

Secondly, nowhere in the committal proceedings is it shown that the original charge sheet filed on 28<sup>th</sup> January 2002 was being substituted or amended. The end result being the existence of one information sheet and two charge sheets the information sheet and one charge sheet having a different date of the offence from the date on the other charge sheet. That inconsistency ought to be resolved in favour of the accused.

Thirdly, the High Court has no jurisdiction to set aside, quash or otherwise alter a committing Magistrate's Committal order and section 382 of the Criminal Procedure Code is not applicable.

Fourthly, the first difficult issue before the court is whether it is lawful for the Accused person to be tried in this case before this court on the basis of an information or a charge alleging that he committed murder on 1<sup>st</sup> January 2002 when the accused in this matter was committed to this court for trial for murder alleged to have been committed on 1<sup>st</sup> December 2002 or 1<sup>st</sup> December 2001.

The second difficult issue is whether it is lawful for the Accused person to be tried in this case before this court for the murder of Gedion Muriithi Njuki when the Accused in this matter was committed to this court for trial for the murder of Gedion Muriithi Mutugi.

Fifthly, if the trial in this matter proceeds on the basis of the allegation that the offence was committed on

1<sup>st</sup> January 2002 and that the victim of the alleged murder was Gedion Muriithi Njuki, the trial may be a nullity.

Under subsection (2) or subsection (3) of Section 232, the committing magistrate was required to act on his own framed or adopted charge or information. He did not have to use or to wait for a charge or information from the Prosecution or the Attorney General's Chambers once the charge by which the Accused person was taken to that magistrate's court was in the court's case file before the committing magistrate and other committal documents have been filed.

In practical terms, it was not mandatory that every document mentioned in subsection (2) of Section 231 be in a committal bundle presented to the court. It all depended on what was available to the Prosecution and how the Prosecution decided to handle the case and that was the normal practice. If, for example, the Prosecution felt that the charge they had filed on 28<sup>th</sup> January, 2002 was sufficient since it already formed part of committal proceedings or committal record, and that therefore there was no need to include a copy of the same charge sheet or an information in the committal documents or committal bundles which were filed on 6<sup>th</sup> November 2002, that was up to the Prosecution. But committal proceedings would still progress as it did on 4<sup>th</sup> December 2002, the charge being used being the one dated 25<sup>th</sup> January 2002 with the committing magistrate having power, either to frame another charge of his own under subsection (2) or, under subsection (3) to frame one in same terms as the charge filed by the prosecution dated 28<sup>th</sup> January 2002 (adaption), or to amend that charge if a question of amendment arose.

The magistrate having complied with section 232, would then proceed under section 234 to commit the accused person for trial before the High Court, the charge the magistrate has framed forming the basis of the allegation against the accused person in the High Court although Section 84 (now repealed) read together with Section 253 (now repealed) and Section 274 of the Criminal Procedure Code would seem to contradict that position. Section 84 (1) stated:

*“.....the Attorney General may exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney General for England may exhibit informations on behalf of the Crown in the High Court of Justice in England.”*

Subsection (2) added:

***“Proceedings may be taken upon an information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney General for England, so far as circumstances of the case and the practice and procedure of the High Court will admit.”***

Subsection (3) concluded:

*“The High Court may make rules for carrying into effect the provisions of this Section.”*

I was not able to see the rules subsection (3) is talking about, but Section 137 seems to come in handy to deal with the situation. This section sets out how a charge or information should be framed.

Under Section 84, it was the Attorney General to exhibit the information and not a magistrate. Section 253 made it mandatory that:

*“An information drawn up for the purpose of committal proceedings shall be in the name of and signed by or on behalf of the Attorney General.”*

Section 274 seems to make it mandatory that a trial in the High Court be upon an information as the Section avoids completely mentioning a charge. It states:

***“The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court sees cause otherwise to order, and the information shall be read over to***

**him by the Registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court and the accused person shall be required to plead instantly thereto, unless where the accused person is entitled to service of a copy of the information, he objects to the want of service, and the court finds that he has not been duly served therewith.”**

Unless Section 274 is taking the term “information” to include the term a “charge”, now that Sections 84 and 253 have been repealed, what becomes of Section 274? The only difference between “a charge” and “an information” is in form and procedure so that while a charge may be signed by the Attorney General, a police officer or a magistrate, an information must be in the name of and be signed by the Attorney General. In substance and effect, however, “a charge” is the same as “an information” as each is an accusation against the accused person and Section 134 which says what should be contained in “a charge” or “an information” makes no difference. It states:

**“Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”**

The aforesaid contradiction introduced by sections 84, 253 and 274 did not matter where committal documents filed under Section 231 included “an information”. But that contradiction causes a serious question of law where the committal documents filed under Section 231 did not include “an information” and as a result the Prosecution wishes to include such “an information” during the trial in the High Court especially where the “information” sought to be introduced is different from the “charge” used to commit the Accused for trial before the High Court in material form such as the date of the alleged offence and the Prosecution insists that it is the date mentioned in the “information” that has to remain.

That question would still be there even if the document sought to be introduced were a charge sheet, provided the date of the offence as stated in the charge sheet is different from the date of the offence as stated in the charge sheet used by the committing court to commit the Accused for trial before the High Court.

Thus the issue before us in this matter is not whether the trial of the Accused person should proceed on the basis of “an information” or on the basis of “a charge”. If that were the issue this court would have had no problem resolving the issue. The difference between “an information” and “a charge” being only in form and procedure, I would have had no problem allowing an amendment under Section 275 or any other enabling provisions of the law.

I did refer to the two difficult issues in this matter. The learned State Counsel was not willing to have the date in the “information” amended to read 1<sup>st</sup> December 2002 and there is a standing question whether that date should be 1<sup>st</sup> December 2001. Section 137 (1) states as follows:

*“137. The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code:-*

**(f) Subject to any other Provisions of this Section, it shall be sufficient to describe a place, time, thing, matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing matter, act or omission referred to;”**

I should emphasise:

**“so as to indicate with reasonable clearness the .....time .....referred to;”**

The charge against the Accused person before the committing court ought to have indicated with reasonable clearness that the offence alleged against him was committed either on 1<sup>st</sup> December 2002 or

on 1<sup>st</sup> December 2001. That charge, however, indicated with reasonable clearness that the person alleged murdered was Gedion Muriithi Mutugi. That is the charge which was read over and explained to the Accused person by the committing magistrate on 28<sup>th</sup> January 2002 and 4<sup>th</sup> December 2002 and that is the charge upon which the Accused person was committed to this court, under section 234 (now repealed) of the Criminal Procedure Code, for trial. Had the committing magistrate seen any reason to discharge the Accused person under Section 233 (now repealed) subsection (1) or had the Prosecution seen fit to withdraw the case under section (2), that is the charge from which the Accused person would have been discharged. For the four years the Accused person has been in custody, that is the charge he has understood to be holding him there.

This is not an ordinary trial where the Accused was arrested and taken straight away before the High Court for trial. This is a trial emanating from Committal Proceedings and the Accused has therefore to be tried before this court for the exact offence he was committed to this court for trial. The date of the offence is an essential ingredient of the alleged offence and where two charges or two informations are presented before the court each giving a different date as the date on which the same offence is alleged to have taken place, in law, the two charges are alleging two different offences. In law the two informations are alleging two different offences. The position is similar where two informations are alleging the murder of two different persons or two charge sheets are alleging the murder of two different persons though by the same accused person, on same date at same place.

It will therefore be wrong of this court to try the Accused person on an offence alleged committed on 1<sup>st</sup> January 2002 when the accused was not committed for trial before this court on that offence. Similarly it will be wrong to try him for murdering Gedion Muriithi Njuki when the accused was committed for the murder of Gedion Muriithi Mutugi. Since the prosecution on 4<sup>th</sup> December 2002 had the opportunity to withdraw the charge now before this court under Section 232 (2) of the Criminal Procedure Code in order to bring the charge they are bringing now, but did not do it; had the opportunity to have the charge in court then amended on that day, but did not do it; and as I have no legal authority to force the Prosecution prosecute this case on the basis of the charge alleging that the offence was committed on 1<sup>st</sup> December 2002 or on 1<sup>st</sup> December 2001 and that the person murdered was Gedion Muriithi Mutugi, and also do not have legal authority to set aside the magistrate's committing order so that I proceed with the trial as if there were no committal proceedings and therefore use the information with the date 1<sup>st</sup> January 2002 without any legal problem, the case before me now against the Accused person alleging the offence was committed on 1<sup>st</sup> January 2002 and that the victim was Gedion Muriithi Njuki becomes improper, unlawful and unmaintainable. Otherwise, and also bearing in mind the Accused has been in remand for four or more years now, we will be acting in contravention of Section 77 (1) of the current Constitution of Kenya which states:

***“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time.....”***

That section is in chapter V of the Constitution which makes provisions for the protection of fundamental rights and freedoms of the individual.

Those are the reasons why I dismissed the prosecution's case and acquitted the Accused person.

Dated this 9<sup>th</sup> day of March 2006.

**J. M. KHAMONI**

**JUDGE**