



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL APPLICATION NO. 627 OF 2004**

**GODFREY MADENGWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

This is an application for stay of proceedings before the trial court, pending the hearing and determination of an appeal by the applicant. The application is expressed to have been brought pursuant to section 3(3) of the Criminal Procedure Code. The said section reads as follows:

**“Notwithstanding anything in this Code, the High Court may, subject to the provisions of any law for the time being in force, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise that jurisdiction according to the course of procedure and practice observed by and before the High Court of Justice in England at the date of coming into operation of this Code.”**

By invoking this statutory provision, I understand the applicant to be saying that there is no express provision in the Code, which provides a remedy for the situation he is faced with. He is therefore saying that he will call upon the procedure and practice observed before the High Court of Justice in England, as at 1st August 1930, when the Code came into operation.

What is the situation facing the applicant herein?

He is an accused person in Criminal Case No. 3088 of 2004, which is pending before the Chief Magistrate’s Court, Kibera. In that case there are two accused persons, including the applicant.

Whilst the applicant is charged with the offence of **NEGLECT TO PREVENT A FELONY**, contrary to section 392 of the Penal Code; his coaccused Robert Mburu Mwaura is facing charges for **ROBBERY WITH VIOLENCE**, contrary to section 296(2) of the Penal Code. The said Robert Mburu Mwaura is also charged with two counts of **RAPE**, contrary to section 140 of the Penal Code.

At the commencement of the trial, the applicant asked the learned trial magistrate to separate the charges, so that he could be tried separately. However, his said application was dismissed. He has lodged an appeal against the dismissal, and in the meantime, he is now asking that his trial before the trial court be stayed. In his view, the appeal has a high chance of success.

It is submitted that if the trial is not stayed, the applicant will be embarrassed, for he will be tried alongside the 1st accused, who is facing very serious charges.

The application is opposed. Learned State Counsel, Mr. Ogetii submitted that section 3(3) of the Criminal Procedure Code has no application to this matter. He pointed out that on the day when the

applicant sought to separate the charges, the prosecution was ready to proceed with the case, and had three witnesses ready in court. By making the application for separation of the charges, the applicant caused the adjournment of the case.

The net result is that while the applicant who is out on bail continues to pursue his appeal, his co-accused remains in custody. Looked at from that perspective, it would appear that the applicant is being very selfish. But then again, I must make it clear that it is the applicant's right to apply to this court for the enforcement of that which he perceives to be his legal right. He cannot and must not be labelled selfish or be castigated for bringing this application, simply because he was out on bail, while his co-accused was in custody. It is not the applicant's fault that the co-accused is in custody. The sole reason why the co-accused is in custody is due to the operation of the law, which stipulates that he cannot be granted bail if he is facing the kind of charges that he has been charged with.

But the question is, how does section 3(3) of the Criminal Procedure Code come into play?

The applicant's counsel, Mr. Kinyanjui advocate did not enlighten the court on that aspect of the matter. He said that he was calling upon the court's inherent power. I am afraid that that is not good enough.

S. 135(1) of the Criminal Procedure Code stipulates that any offences, whether felonies or misdemeanours, may be charged in the same charge or information, if the offences are founded on the same facts, or form, or are part of a series of offences of the same or a similar character. By S. 135(3) the court is given the discretion to separate the charges. That discretion may be exercised if the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge, or if the court is satisfied that for any other reason it is desirable to direct that the person be tried separately.

The trial court was well conversant with the foregoing legal provisions, as at the time the applicant requested for the charges to be separated. I have perused the record of the proceedings before the learned trial Magistrate, and am satisfied that she took into consideration the said legal provisions, when she decided not to separate the charges. However, now is not the time to say whether by so deciding, the trial magistrate was wrong or right. That must await the appeal.

Meanwhile, if this court does not stay the proceedings, the applicant says he will be embarrassed, and his appeal will be rendered nugatory. First, I must confess that I cannot fathom how the trial of the applicant would embarrass the applicant, when he is clearly facing one single charge, which is separate from the charges facing his co-accused.

But then again, if the appeal were to succeed, and the High Court were to direct that the charges facing the applicant be tried separately, the trial court's time would have been wasted, if in the meantime, the trial was allowed to proceed. To that extent, I see the rationale in staying the proceedings. I do so, not because to do otherwise would either embarrass the applicant or render his appeal nugatory. The reason I am inclined to stay the trial is to save the trial court's time, just in case the appeal were to succeed.

On the other hand, I am conscious of the fact that the applicant's coaccused is in custody. Any delays in his trial is prejudicial to his legal interests. Therefore, being mindful of the provisions of section 72(5) of the Constitution of Kenya, I hereby direct that the applicant's appeal be heard and determined on a priority basis.

In order to facilitate the observance of the orders herein, this Ruling should be placed on the Appeal file, so that the same may be set down for hearing soonest. In the meantime, the hearing of Criminal Case No. 3088 of 2004 is hereby stayed, pending the hearing and determination of the applicant's Appeal.

Dated at Nairobi this 29 day of November 2004

**FRED A. OCHIENG**

**AG. JUDGE**

**FURTHER ORDERS**

This matter will be mentioned on 6.12.04, to enable this court ascertain the status of the applicant's Appeal. For the avoidance of doubt, the court reserves the right to review this Ruling, if it becomes necessary to do so, with a view to safeguarding the Constitutional rights of the applicant's coaccused.

**FRED A OCHIENG**

**AG. JUDGE**