Republic v Mackenzie alias Mtumishi alias Nabii alias Papaa (Criminal Case E003 of 2024) [2024] KEHC 5792 (KLR) (17 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CASE E003 OF 2024

M THANDE, J

MAY 17, 2024

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

PAUL NTHENGE MACKENZIE ALIAS MTUMISHI ALIAS NABII ALIAS PAPAA ..... ACCUSED

RULING

1. All the 31 Accused persons herein have been charged with a total of 191 counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. The Accused persons were arraigned in Court on 6.2.24 for the purpose of taking plea. All of them save the 4th Accused took plea and denied all the charges. The 4th Accused was not fit to plead. His plea taking was deferred pending his undergoing mental health treatment and confirmation that he was fit to plead.

2. The subject of this ruling is a preliminary objection dated 6.2.24 filed by the 1st, 2nd, 4th and 9th Accused persons. The objections raised are that:

    1. The charge sheet is defective in several respects by contravening the provisions of Section 134 of the Criminal Procedure Code (Cap. 75) Laws of Kenya.

    2. The number of counts numbering 191 in the charge sheet are oppressive and contrary to *the Constitution* (sic) Rights of the accused persons in particular article 50(2), (c), (e).

    3. The number of charges complained of will subject the accused persons to delayed determination of the case and in contravention of the principles of fair hearing as is enshrined in article 50 of *the constitution* of Kenya and other constitutional provisions.

3. It is the Accused persons' case that the charge sheet running into 298 pages and containing 191 charges of murder of known and unknown persons is defective and overloaded.

4. On the charge sheet being defective, the Accused submitted that the Director of Public Prosecutions (DPP) must in the discharge of his mandate under Article 157 of *the Constitution*, ensure that the criminal process is not abused. The DPP must thus draw charges against accused persons which accord with the facts, reflect the offence and conform to the provisions of Section 134 of the Criminal Procedure Code (CPC). They submitted that the charges are ambiguous, speculative and confusing. In particular, that in all the counts the Accused face, there is no specific date, month or year when the offences were committed if at all. In some of the counts, there are no names, age or gender of the victim, to enable the Accused come up with a proper defence. Further that all 31 accused persons are charged with the murder of the same individual in every count over a period spanning 3 years. The Accused further submitted that in the charge sheet, all counts refer to an unknown date between January 2021 and September 2023 at Shakahola area in Malindi sub-county within Kilifi county jointly murdered unknown female identified as ..... or unknown child of unknown sex, etc.

5. The Accused thus asserted that the ambiguity in the charge sheet will make it difficult for the Accused to mount a defence, more so, should they want to tender a defence of alibi, where they will be expected to explain where they were in a specific year, month, day and time when the offences were allegedly committed. They emphasised that accused persons are innocent until proven guilty and are not expected to fill in the gaps of the prosecution case.

6. The Accused further submitted that Section 137 of the Criminal Procedure Code requires that a charge be set out in a manner as to make it sufficiently clear to the Accused of the facts of the offence and the time it was committed. This allows an accused person to address his mind as to how he may or may not be connected with the offence. The charges as drawn with unknown victims either by name, age or gender are prejudicial to them and thus contravene their right to a fair trial as guaranteed under Article 50(2)(b) of *the Constitution*, which requires that they be informed of the charge with sufficient detail to answer it.

7. For the Prosecution, it was submitted that contrary to the Accused's claim, the information is in line with Section 134 of the CPC and meets all the requirements thereof. The information contains the respective statements of the specific offences with which the Accused are charged, and that the particulars thereof are as sufficient as necessary to give reasonable information as to the nature of the offence charged. The Prosecution contends that each of the 191 counts to which the Accused pleaded contains a statement that each of them is charged with murder contrary to section 203 as read with Section 2014 of the Penal Code, Cap 63 Laws of Kenya. The counts also contain the particulars which inform the Accused that on an unlknown date between January 2021 and September 2023 at Shakahola area in Malindi sub-county within Kilifi county, jointly murdered the victims identified in each of the counts. To support this position, reliance was placed on the case of Peter Ngure Mwangi v Republic [2014] eKLR.

8. Section 134 of the Criminal Procedure Act provides:

> 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.

9. The law is that a charge or information shall be sufficient if it contains first, a statement of the specific offence or offences facing an accused person. Second particulars as may be necessary for giving reasonable information as to the nature of the offence. It follows then that a charge or information that does not contain the foregoing shall be defective.

10. In the case of Bernard Ombuna v Republic [2019] eKLR the Court of Appeal laid the test for a defective charge as follows:

> 15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here?

The Court went on to state:

> 16. Looking at the record and the evidence as a whole we cannot say that the appellant did not understand the nature of the charges against him. It is quite clear from his cross examination questions to the prosecution witnesses that he understood he was accused of having inappropriate sexual contact with NNA and that there was no penetration. Therefore, in as much as the particulars did not disclose the offences he was charged with or coincide with the evidence to the extent that there was no penetration on NNA, in our view, did not render the charge sheet fatally defective. We say so because it is clear from the evidence that the appellant had inappropriate sexual contact with NNA and to hold otherwise simply because the particulars in the charge sheet were defective would be an affront to justice. Our position is reinforced by the following sentiments of the Supreme Court of India in the Willie (William) Slaney case:

"We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form.

To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent."

11. And in the Peter Ngure Mwangi case (supra) the Court of Appeal considered a claim that the charge in question was defective and rendered itself thus:

> On the issue of a defective charge sheet, there are two limbs to it. The first one deals with the issue as to whether the charge sheet is indeed defective, whereas the second one deals with the issue as to whether even if a charge sheet is defective, that defect is curable or not. This Court considered the ingredients necessary in a charge sheet and stated as follows in the case of ISAAC OMAMBIA V REPUBLIC, [1995] eKLR:
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> "In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: 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."

12. The learned Judges went on to state:

> Further guidance is found in the case of PETER SABEM LEITU V R, CR.A NO. 482 OF 2007 (UR) where this Court held thus:

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

13. A careful reading of the information as drawn clearly shows that first, the Accused are charged with the offence of murder. Second, the particulars indicate the period within which the offences were allegedly committed. Third, the particulars indicate the victim of the alleged offence by name or by reference. The mere fact that the period in question spans from January 2021 to September 2023, or that some of the alleged victims have not been identified by name, does not in my view render the charge defective. The details in each count contain sufficient detail to enable answer the same. When the information was read to the Accused they all responded by pleading not guilty. This is indicative that the Accused are sufficiently aware of and understand the charges they face and the nature thereof.

14. The law allows joinder of counts in a charge or information under Section 135 of the CPC which provides:

> 1. Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.
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> 2. Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

15. The charges herein are of murder and are founded on the same facts. Further, the information contains a description of each count in a separate paragraph. Accordingly, the law in this regard has been complied with.

16. The charges as drawn comply with Article 50(20(b) and nothing has been placed before the Court to demonstrate that the Accused do not understand the nature of the charges against them or that they are confused thereby as alleged. As such, they will be in a position to mount an appropriate defence. This being the case, the charges as drawn and the particulars as set out in the information will not occasion any prejudice to the Accused. In any event, it will be upon the Prosecution, at the end of the day, to place evidence before the Court to demonstrate the culpability of the Accused. My finding therefore is that the objection on this ground fails.

17. I now turn to the claim that the information is overloaded. It was submitted for the Accused that the prosecution will be expected to lead evidence on each and every one of the 191 counts giving particulars of the deceased persons, when and how they died and the participation of each one of the Accused. The calling of evidence by the prosecution for every deceased victim and production of expert reports including post mortem and DNA results and the defence by all the Accused and recording of evidence by the Judge, will be tedious and exhaustive in all respects and a waste of time. Further, that no matter how many convictions attained, the result will be the same. The Accused further submitted that in our jurisdiction the number of counts recommended in a single charge sheet by our superior courts is 12. To buttress this submission, the Accused cited the case of Peter Ochieng v Republic [1985] eKLR in which the Court of Appeal recommended a maximum of 12 counts in a charge sheet.

18. Additionally, the Accused submitted that in the case of Eliphaz Riungu v Republic [1997] eKLR the court emphasized the importance of a fair hearing by expediting hearing in criminal cases. They wondered how long it would take to hear 191 counts in a 298 page charge sheet with 31 accused persons, and what public interest will be served by having long and ardours proceedings which will be confusing to all parties. Their view is that going by the public pronouncements by senior government officers in both mainstream and social media, the overloaded charge sheet is intended to the intention of the prosecution is to punish the Accused indefinitely notwithstanding the presumption of their innocence until proven guilty and to make their defence very difficult so that if at the end they are found innocent, they will have been punished. They urged that the prosecution be compelled to elect no more than 10 counts to proceed with.

19. For the Prosecution, it was denied that the information is overloaded. What matters, they argued, is not the numerical number of counts but the impracticality in managing the trial and the inconvenience and embarrassment likely to be caused to the defence of the prosecution. Further that the decision as to the number of counts in the present constitutional dispensation is vested in the DPP under Article 157 of *the Constitution*.

20. The Court is aware that there is no legal provision in our laws that sets the maximum number of counts with which an accused person may be charged in a charge sheet or information. There is however useful guidance in case law.

21. In the oft cited case of case of Peter Ochieng v Republic [1985] eKLR the Court of Appeal considered an appeal where the appellant had been subjected to an overloaded charge sheet of 44 counts and stated:

> There is one other matter to which we should refer. It is undesireable to charge an accused person with so many counts in one charge sheet. That alone may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts, upon which it wishes it to proceed. Usually, though not invariably, no more than twelve counts should be laid in one charge sheet. The others can be withdrawn under section 87 (a) of the Criminal Procedure Code (cap 75), which will entitle the prosecution to bring them again if necessary. The Court of Criminal Appeal in England had had occasion to comment as follows on an overloaded indictment:
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> "The court has on many occasions pointed out how undesirable it is that a large number of counts should be contained in one indictment. Where prisoners are on trial and have a variety of offences alleged against them, the prosecution ought to be put on their election and compelled to proceed on a certain number only. Quite a reasonable number of counts can be proceeded on, say, three, four, five or six, and then, if there is no conviction on any of those, counsel for the prosecution can consider whether he will proceed with any other counts in the indictment. If there is a conviction, the other counts can remain on the file and need not necessarily be dealt with unless this court should for any reason quash the conviction and order the others to be tried. But it is undesirable that as many counts as were tried together in this case should be tried together, though the court desires to say that, in its opinion, the Chairman dealt with the case admirably. It was a pity an application was not made to him for separate trial, or perhaps if he had a longer experience as Chairman he might have said at once that he would not try all these counts together. Certainly Judges have tried large number of counts together, and so have Quarter Sessions, but it is not a thing to be encouraged and I hope it will not happen again that as many counts as were tried together in this case will be tried at the same time. It is quite possible to split the indictment up and put some counts in another indictment. It may increase the cost to some small amount, but any

small increase of that sort is nothing compared with the danger there may be of not having a fair trial". (See R v Hudson and Hagan [1952] 36 CAR 94 at p 95)

In the more recent case of R v Novac & Others [1977] 65 C A R 107 at p 118 the Court of Appeal said:

"We cannot conclude this judgment without pointing out that, in our opinion, most of the difficulties which have bedevilled this trial, and which have led in the end to the quashing of all convictions except on the conspiracy and related counts, arose directly out of the overloading of the indictment. How much worse the difficulties would have been if the case had proceeded to trial on the original indictment, containing 38 counts, does not bear contemplation. But even in its reduced form the indictment of 19 counts against four defendants resulted, as is now plain, in a trial of quite unnecessary length and complexity."

22. Flowing from the cited case, it can be readily seen that charging an accused person with many counts in one charge sheet is frowned upon. This is because of the potential prejudice that may be occasioned to such accused person. The Court of Appeal stated that in such circumstances, the prosecution should put to its election at the inception of the trial, as to the counts upon which it wishes it to proceed. The Court recommended that no more than 12 counts should be laid in one charge sheet.

23. And in the case of Eliphaz Riungu v Republic [1997] eKLR, O'kubasu and Owuor, JJ (as they then were) considered an overloaded charge and stated:

Then in Novac [1977] 65 C.A.R. 107 the Court criticised the overloading of the indictment which contained 19 counts (out of an original 38) against four defendants and which led to a long end complex trial taking in all 47 working days which put an immense burden on judge and jury. In its judgment the court started at pp.118 and 119

"Quite apart from the question whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wide and mere important question has to be asked whether in such a case the interests of justice were likely to be better served by one very long trial, or by one moderately long and four short separate trials."

The court in the above case was of the view that whatever advantages are expected to accrue from one long trial they were heavily outweighed by the disadvantages.

Pausing here for a moment it would appear that the authorities already cited are against an overloaded indictment. Coming back home we refer to the case of Peter Ochieng v. Republic [1982-88] 1 KAR 832 in which the appellant had been charged with 44 counts. The Court of Appeal observed that it was undesirable to charge an accused person with numerous counts in one charge sheet which could lead to embarrassment and prejudice to the defence, confusion in the presentation of the prosecution and in the decision of the court. The Court of Appeal went on to observe that prosecution should limit the counts in a charge sheet to only twelve while the remainder be withdrawn but to be revived should it be necessary.

24. As can be seen from the cited Novac case, the court faulted the prosecution for overloading the indictment which contained 19 counts against 4 defendants, which led to a long and complex trial lasting 47 working days. This put an immense burden on both judge and jury. The learned Judges went on to state:

Recording of evidence even in respect of the first twenty counts will take a considerable length of time. As this taking of evidence in respect of the 90 counts continues, the applicant

(Eliphaz Riungu) is expected to patiently sit in the dock waiting for his turn to listen to the evidence in the last three counts. We think that public interest demands that whatever goes on in a criminal trial should be in the interest of justice. And *the constitution* which is the mother of all laws clearly states that the accused shall be afforded a fair hearing within reasonable time. Justice demands that the guilt be appropriately punished and the innocent be let free. A long trial which is likely to lead into confusion of prosecution case as to result into acquittal of the guilty is certainly not in interest of public interest and justice.

25. From the cited cases, it is quite evident that there is consensus that it is undesirable to have too many counts in a charge sheet. Overloading an information militates against the public interest and the interests of justice.

26. This Court vividly recalls the length of time it took just to read out all the 191 charges during plea taking by the Accused. It took 2 court assistants helping each other. One can only imagine how long it will take for evidence to be adduced against each of the 31 Accused, and recorded in respect of all the 191 charges. It will be virtually impractical to manage the trial which is likely to be prolonged. The convolution of the matter will also be of unimaginable proportions. An overloaded charge will clearly occasion delay in the conclusion of the trial. This will lead a violation of the right of the Accused to a fair hearing as guaranteed under Article 50(2) of *the Constitution* and in particular the right to an expedited hearing as guaranteed in Clause (2)(e) which provides:

> (2) Every accused person has the right to a fair trial, which includes the right—
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> (e) to have the trial begin and conclude without unreasonable delay;

27. The right to an expedited trial is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict. Accordingly, this Court must ensure that the right of the Accused in this regard is protected throughout the trial.

28. Similarly, this Court has an obligation in this as in all other trials, to serve the interests of justice. Like the learned Judges said in the Eliphaz Riungu, case (supra), engaging in a long trial which is likely to lead to confusion of the prosecution case, will certainly not be in the public interest or justice. Additionally, the impracticality of managing such a trial and the inconvenience and embarrassment likely to be caused to the defence and the prosecution, and dare I say the Court, cannot be ignored or disregarded.

29. Having one very long trial will be extremely burdensome not only to the Court, but also to the prosecution as well as the defence. Indeed, the question that assails the mind of the Court is, what will the judgment in a case with 31 accused persons facing 191 counts even look like? The reasonable thing to do in the interests of all concerned, is for the Prosecution to withdraw some counts in the information and remain with a number that is manageable. The withdrawn charges may thereafter be revived should it be found to be necessary. The interests of justice will be better served this way.

30. The Court is aware that the decision to charge and the number of counts in a charge sheet or information lies with the DPP. Article 157(1) of *the Constitution* establishes the Office of the DPP. Clause (6) thereof and Section 5(1)(a) and (b) of the *Office of the Director of Public Prosecutions Act* provide for the powers to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered.

31. The office of the DPP is an independent constitutional office which is not subject to the control, direction and influence of any other person. Under Article 157(10) and Section (6) of the Act, the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings

and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. The independence of that office is however not absolute. Article 157(11) requires the holder of the office to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process in exercising the powers conferred by *the Constitution* and the Act.

32. As has been observed in this ruling, proceeding with the trial of the Accused herein with the information that contains 191 counts of murder is not in the public interest or the interests of the administration of justice. The expectations of Article 157(11) have thus not been met. In the premises, this Court under Article 165(3)(d)(ii) has the jurisdiction to interrogate the exercise by the DPP of his mandate in this matter, and the power to intervene.

33. In the end and in view of the foregoing, I do concur with the defence that the charge sheet containing 191 counts is clearly overloaded. I accordingly direct the Prosecution to file an amended information with reduced counts not exceeding 12.

DATED SIGNED and DELIVERED in MALINDI this 17th day of May 2024

M. THANDE

JUDGE