



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Mutugu & 5 others (Criminal Case E014 of 2024)  
[2024] KEHC 7548 (KLR) (4 June 2024) (Directions)**

Neutral citation: [2024] KEHC 7548 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL CASE E014 OF 2024  
DO CHEPKWONY, J  
JUNE 4, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PATRICK MURATHIMI MUTUGU ..... 1<sup>ST</sup> ACCUSED**

**ELIUD NGANGA MUIRURI ..... 2<sup>ND</sup> ACCUSED**

**EDWIN MUTUGU WANJIRU ..... 3<sup>RD</sup> ACCUSED**

**MARGARET WANGUI KIBATHI ..... 4<sup>TH</sup> ACCUSED**

**SIMON MBUA WANJIKU ..... 5<sup>TH</sup> ACCUSED**

**ANNE WANJIRU ..... 6<sup>TH</sup> ACCUSED**

**DIRECTIONS**

1. According to the Charge Sheet dated 16<sup>th</sup> May, 2024, the Six (6) accused persons have been arraigned before this court whereby they are said to have jointly with others not in court, murdered Dorothy Wambui Kiaraho. The six accused persons are yet to take plea because the 1<sup>st</sup> accused is not before court and the others are awaiting mental assessment to be done/conducted on them.
2. When the matter came before court on 27<sup>th</sup> May, 2024, the prosecution counsel, Mr. Gacharia informed the court that the 1<sup>st</sup> accused person, Patrick Murathimi Mutugu resides in the United States of America. He sought for Warrant of Arrest to be issued against the said 1<sup>st</sup> accused so that he can be brought within the court's jurisdiction to face the charge against him and the other five. He also sought for the 4<sup>th</sup> and 6<sup>th</sup> accused persons to be escorted for mental assessment.
3. Mr. Omari, counsel for the 1<sup>st</sup> accused person stated that the prosecution counsel should make a formal application in respect of the Warrant of Arrest being issued against the accused and urged the court



to defer the plea to 3<sup>rd</sup> June, 2024 which the court agreed to by consent of the other counsel for the accused persons.

4. On 3<sup>rd</sup> June, 2024 when the matter came before this court, the prosecution's counsel again informed court that the 1<sup>st</sup> accused resides in the United States of America and sought for Warrant of arrest to issue. In response, Mr. Omari, counsel for the 1<sup>st</sup> accused stated that the same application had been made before Hon. Mshila, J. and the court had declined to issue the orders and directed the prosecution to make a formal application. He pointed out that this had not been done. He then urged that the prosecution should follow the law on extradition with regard to the 1<sup>st</sup> accused and court to proceed to take plea for the other accused persons.
5. Mr. Louis, counsel for the 4<sup>th</sup> accused person and Mr. Kariuki, counsel for the 5<sup>th</sup> accused person reiterated that the prosecution should follow the law and the right procedure in making any application in court.
6. The Victim's counsel, Mr. Nguring'a stated that the court has unfettered jurisdiction to give directions to a matter and opposed the position taken by the other counsel that the Warrant of Arrest cannot issue against the accused person as justice would not be served.
7. In rejoinder, Mr. Omari stated that once a court issues an order, it must be complied with unless he same is vacated or varied and that in this case, the counsel for the victim's family has not made any application to that effect. He stated that the other accused persons can proceed and take plea.

### **Determination**

8. Having listened to all counsel in their arguments for and against the application by the prosecution for Warrant of Arrest to issue against the 1<sup>st</sup> accused person, Patrick Murathimi Mutugu, who is said to be a resident of the United States of America, I find the issue for determination is whether or not the said application is meritable.
9. It is trite that under the Constitution, the court has a fundamental duty to protect the rights of all the parties in a criminal trial. In this case, the 1<sup>st</sup> accused, jointly with others before and others not before court are alleged to have murdered the deceased, Dorothy Wambui Kiaraho, on the night of 14<sup>th</sup> and 15<sup>th</sup> February, 2024. The 2<sup>nd</sup> to 6<sup>th</sup> accused persons were arrested and arraigned in court on 16<sup>th</sup> May, 2024. The 1<sup>st</sup> accused is said to be in the United States of America, that is outside this country's jurisdiction. The prosecution then sought for a Warrant of Arrest to issue against the 1<sup>st</sup> accused person before plea can be taken.
10. Counsel for the accused persons opposed the application and urged that the prosecution make an appropriate application before the proper court to secure the attendance of the 1<sup>st</sup> accused in court.
11. It is important to note that when a person, who resides outside this country is suspected of committing an offence and is to be charged before court, several legal processes come into play. However, in considering the legal processes to apply in such circumstances, the principle of equality before the law, and fair trial should never be last sought of. The integral duty of courts is to uphold the rule of law. And how do they do this? By observing, recognising, respecting, protecting and promoting and fulfilling human rights and fundamental freedoms of persons who appear before them as expressed in the Bill of Rights so as to preserve their dignity and promote social justice.
12. Article 27 of the Constitution provides for equality and freedom from discrimination as follows:-  
[27]. Equality and freedom from discrimination



1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
  2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
13. Article 28 provides:-  
[28]. Human dignity
- “Every person has inherent dignity and the right to have that dignity respected and protected.”
14. Article 29 provides for Freedom and Security of the person as follows:-  
[29]. Freedom and security of the person
- Every person has the right to freedom and security of the person, which includes the right not to be—
- a. deprived of freedom arbitrarily or without just cause;
15. Article 49 of the Constitution provides for the rights of arrested persons:-  
[49]. Rights of arrested persons
1. An arrested person has the right—
    - a. to be informed promptly, in language that the person understands, of—
      - i. the reason for the arrest;
      - ii. the right to remain silent; and
      - iii. the consequences of not remaining silent;
    - b. to remain silent;
    - c. to communicate with an advocate, and other persons whose assistance is necessary;
    - d. not to be compelled to make any confession or admission that could be used in evidence against the person;
    - e. to be held separately from persons who are serving a sentence;
    - f. to be brought before a court as soon as reasonably possible, but not later than—
      - i. twenty-four hours after being arrested; or
      - ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
    - g. at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and
    - h. to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.
16. Article 50 of the Constitution states:-  
[50]. Fair hearing



1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
2. Every accused person has the right to a fair trial, which includes the right—
  - a. to be presumed innocent until the contrary is proved;
  - b. to be informed of the charge, with sufficient detail to answer it;
  - c. to have adequate time and facilities to prepare a defence;
  - d. to a public trial before a court established under this Constitution;
  - e. to have the trial begin and conclude without unreasonable delay;
  - f. to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
  - g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
  - h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - i. to remain silent, and not to testify during the proceedings;
  - j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
  - k. to adduce and challenge evidence;
  - l. to refuse to give self-incriminating evidence;
  - m. to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
  - n. not to be convicted for an act or omission that at the time it was committed or omitted was not—
    - i. an offence in Kenya; or
    - ii. a crime under international law;
  - o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
  - p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
17. From the above cited provisions, it is more than clear that the *Constitution* of Kenya, 2010 confers privileges and protection of a suspect, arrested or accused person, unless the conduct of such person makes it impossible for the law (trial) to take its course.



18. It is required that once a person is arrested, he/she is supposed to be informed in detail of the reason of his/her arrest as soon as is reasonably practicable and in a language that he/she understands and the nature of the offence for which he is to be charged.
19. Also, these privileges and protection stipulated under Article 50(2) of the Constitution cannot be exercised judiciously where a person is yet to be arrested or resides outside the jurisdiction of a court. An accused person has to be present during the trial process unless his conduct is such that makes it impossible for the trial to proceed.
20. With all these in mind, it is evident that in this case, the 1<sup>st</sup> accused person is said to be residing in a country outside this court's jurisdiction, more specifically the United States of America, hence proceeding with a trial process against him in his absence would be tantamount to discriminating against him and denying him a right to fair hearing as guaranteed under Articles 27 and 50 of the Constitution.
21. The prosecution has sought for a Warrant of Arrest to issue against the 1<sup>st</sup> accused person who is in America. Warrant of Arrest is part of a trial process against a person suspected or accused of committing an offence and is an adverse order. In view of the rights accorded to an accused or suspected person by the Constitution of this country, the said warrants cannot issue and be enforced as against the said accused in the manner the prosecution states. If the prosecution wishes to have the 1<sup>st</sup> accused person arraigned and presented before this court to face the envisaged trial alongside the other accused persons already before the court, the clear and proper procedure to do this lies in the prosecution initiating the process of extradition.
22. Extradition is defined in the Halsbury's Laws of England, 4<sup>th</sup> Edition Vol.18 at page 74 Paragraph 201 thus:-

“Extradition is the formal surrender by one country to another, based on reciprocal arrangements partly judicial and partly administrative, of an individual accused or convicted of a serious offence committed outside the territory of the extraditing country and within the jurisdiction of the requesting country which being competent by its own law to try and punish him, demands the fugitive surrender”.
23. The prosecution is therefore urged to follow the proper procedure as provides for in law in having the 1<sup>st</sup> accused person arraigned before this court to face trial. In the case of Jaldesa Tuke Dabelo IEBC & Another[2015]eKLR, the Court held that:-

“Rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prosecution by an Act of Parliament that procedure should strictly be followed”.
24. It therefore follows that if the prosecution's desire is to have the 1<sup>st</sup> accused person prosecuted before this Court, they have to make a formal application for extradition of the 1<sup>st</sup> accused person. It is trite that in Kenya an application for extradition can be made under two systems of Extradition Laws;
  - i. Extradition (Contiguous and Foreign Countries) Act, Chapter 70 of the Laws of Kenya. This Act governs extradition requests from both Contiguous (neighbouring) and Foreign countries. It provides guidelines on how extradition warrants issued by Magistrates can be executed within Kenya.



- ii. *Extradition (Common Wealth Countries) Act*, Chapter 77 of the Laws of Kenya. This law deal with extradition requests from Common Wealth countries. It outlines the procedures for extradition, including the issuance of arrest warrants and the execution of such warrants within Kenya.
25. Therefore, the 1<sup>st</sup> accused person can only be availed before this Court for prosecution once the State successfully conducts extradition proceedings which began with seeking Letters of Arrest, and not before this Court, but before the Magistrate’s Court as the proper forum.
26. As for the other accused persons who have been jointly charged with the 1<sup>st</sup> accused person (in absentia), who were arraigned before court on 16<sup>th</sup> May, 2024, this Court notes that they are yet to take plea. Again, as provided for under Article 50(2) of the *Constitution*, they have a right to fair trial which includes being presumed innocent until the contrary is proved and being informed of the charge against them with sufficient information to enable them answer to it. Since they are present before court, this Court finds no reason why the prosecution cannot commence the trial process against them. This Court is restrained from imagining that the prosecution could be extending to begin the said process once the 1<sup>st</sup> accused person is arraigned before this Court. That would be most unfortunate.
27. As it is, it is already unconstitutional to continue detaining them without informing them of the charge against them so they can respond.
28. This Court therefore declines to grant the prosecution the Warrant of Arrest against the 1<sup>st</sup> accused person and proceeds to direct that:-
  - a. The prosecution makes an appropriate and formal application in the proper forum in respect of the 1<sup>st</sup> accused for him to be availed before this Court for prosecution.
  - b. Subject to mental assessment being confirmed for each accused persons present before court, the prosecution to proceed, prepare and file a Charge Sheet for them to take plea.
  - c. The prosecution be at liberty to join the 1<sup>st</sup> accused person in this matter if the extradition process succeeds within reasonable time.

It is so ordered.

**RULING ON DIRECTIONS DELIVERED, DATED AND SIGNED THIS 4TH DAY OF JUNE..., 2024.**

**D. O. CHEPKWONY**

**JUDGE**

