



**Republic v Teteror (Criminal Case 2 of 2017) [2023] KEHC 18592 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18592 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL CASE 2 OF 2017  
AK NDUNG'U, J  
JUNE 15, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**MERERI TETEROR ..... ACCUSED**

**RULING**

1. What is before this court for determination is a Notice of Motion application dated October 25, 2022 by the Prosecutor brought under Article 50(2)(f) of the Constitution, section 38 of the Penal Code, section 206 of the Criminal Procedure Code and Section 9(1)(b) of the Victim Protection Act seeking for the following orders;
  - i. That the court be pleased to allow the hearing and/or proceedings against the accused person to proceed in his absentia.
  - ii. That further to order 1 above, warrants of arrest against the Accused person to remain in force.
  - iii. That an order be issued that upon apprehension of the Accused person at any time in future, if he shall have been convicted, the sentence to commence from such date of apprehension.
  - iv. Such other orders as this court may find fit and just to grant.
2. The application is supported by an affidavit sworn by Jackson Motende, the Assistant Director of Public Prosecution. The brief overview of the matter is that the Accused herein MERERI TETEROR jointly with others was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The prosecution entered a nolle prosequi for his co-accused who were discharged by this court on June 13, 2018. It was alleged in the information that on March 5, 2017 at Sosian Ranch in Laikipia West Sub County within Laikipia County, with others not before court murdered Tristan Voorspuy.



3. The Accused person pleaded not guilty to the charge and trial commenced on September 17, 2018 and the prosecution closed its case on April 27, 2021 after calling a total of 12 witnesses. On May 6, 2021, Waweru J delivered his ruling on a case to answer and the Accused person opted to give a sworn defence. However, on October 18, 2021, the prosecution informed the court that on September 25, 2021, the Accused herein together with others had escaped lawful custody.
4. The prosecution deponed that the prison authorities made efforts to apprehend him to no avail and it is now over a year since the Accused escaped. Counsel deponed that by escaping from lawful custody, the Accused waived his right to be present during the hearing of his case and it would be contrary to the letter of the law for the case to collapse on account of the Accused's conduct for that would amount to him earning freedom by defeating the course of justice. The counsel further deponed that Article 50(2)(f) of the Constitution empowers this court to proceed with the matter in absence of the Accused person.
5. Learned counsel for the Accused filed a replying affidavit dated October 27, 2022. Counsel faulted the prosecution for failing to call Josphat Ng'ethe Ndung'u to testify. It is urged that he was a crucial witness to the prosecution's case and since he was not called, the case against the Accused person was baseless for there was nothing to connect the Accused to the death of the Deceased. Counsel urged this court to discharge him from representing the Accused person for lack of instructions to proceed with the matter from the Accused person.
6. The prosecution counsel filed written submissions. Reliance was placed on Article 50(2)(f), the English case of *Regina vs Jones (2003) I ACI* to emphasize that an Accused person's right to be present during trial can be vitiated by his own conduct especially willingly absencing oneself from trial. Counsel opined that if the trial is terminated because the Accused absconded trial, the victim will be left without remedy and this would mean that the Accused walks free simply by absencing himself. Section 206(4) of the Criminal Procedure Code is faulted for only stating that where the Accused is charged with a felony, warrant of arrest should be issued against that Accused but does not state whether the case should proceed. Reliance was placed on the case of *Aggrey Mbai Injaga v Republic (2014) eKLR* and *Republic vs Galma Abagaro Shano(2017) eKLR* where the Accused escaped when he was placed on his defence and the court held that by absencing himself, the Accused had abrogated his Constitutional right to be present during trial.
7. It is further submitted that the Judge in Galma Abagaro Shano case (supra) held that section 206 of the Criminal Procedure Code must be read in the context of Article 50(2) of the Constitution which makes no distinction between a felony and a misdemeanour. Therefore, whether an accused is facing a misdemeanour or a felony, absencing himself during trial that he was aware of is taken to be a waiver to be present and the hearing may therefore proceed in his absence.
8. I have carefully considered the prosecution's application. Generally, what the prosecution is seeking is to proceed with the matter in absentia of the Accused person who escaped lawful custody. The prosecution contention is that by his conduct, the Accused herein waived his right to be present during trial.
9. From the reading of statutory provisions, in particular our Criminal Procedure Code, it is clear that the presence of the Accused can be dispensed with in certain instances. For example, section 99(1) of the Criminal procedure Code provides that;

' Subject to the following provisions of this section, whenever a magistrate issues a summons in respect of an offence other than a felony, he may if he sees reason to do so, and shall when the offence with which the accused is charged is punishable only by fine, or only by fine



or imprisonment not exceeding three months, or by fine and such imprisonment, dispense with the personal attendance of the accused, if the accused pleads guilty in writing or appears by an advocate.'

10. The above section simply implies that where an accused pleads guilty in writing or appears by counsel, the court is required to dispense with his appearance if the offence is one which is punishable with fine only or imprisonment for not more than 3 months. It however, preclude felonies.
11. The second instance is under section 206(1) and (2) of the Criminal Procedure Code. Here the court is empowered to proceed with the trial if the Accused does not appear at the hearing or further hearing in a case where he is not charged with a felony. In fact, the law says the court may proceed as if the Accused was present. It states that;
  - (1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.
  - (2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.
12. The above section however refers to misdemeanor offences. Section 206(4) relates to felonies and it states that;

'(4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.'
13. In essence, section 206(4) does not permit trial in absentia of an Accused person who is charged with a felony unlike section 206(1) which permits trial to continue in absentia of the Accused person if he is charged with a misdemeanour.
14. The questions that arise is whether there are other situations not expressly covered by the statute that could arise but necessitate a trial in absentia. Section 194 of the Criminal procedure Code provides that evidence should be taken in presence of the Accused or when his personal attendance has been dispensed with. Essentially it states;

' Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).'
15. Section 194 is not limiting when it says or when his personal attendance has been dispensed with. To me this implies that there are other situations which might arise and necessitate dispensing with presence of Accused and this can be dealt with in this section notwithstanding whether offences charged are felonies or misdemeanours. Furthermore, there is Article 50(2)(f) of the [Constitution](#) which provides;
  - (2) Every accused person has the right to a fair trial, which includes the right—
  - (f) To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed'



16. Our courts have interpreted this Article to mean that trial can proceed in absence of an Accused person who absconds court by his wilful conduct. In [\*Republic v Galma Abagaro Shano \[2017\] eKLR\*](#) the learned Judge held that;

'This court has in a detailed manner determined and ruled that this trial would proceed in the absence of the accused who has waived his right to a fair trial in regard to being present during the trial by absconding and removing himself from the jurisdiction of this court. This court has in its ruling delivered on April 24, 2017 addressed the provisions of Section 206 of the Criminal Procedure Code and Article 50 (2) (f) of the Penal Code. Article 50 (2) (f) provides that: 'Every accused person has the right to a fair trial, which includes the right to be present when being tried unless the conduct of the accused person makes it impossible for the fair trial to proceed.' This court took the view that Section 206 (1) of the Criminal Procedure Code is inconsistent with Article 50 (2) (f) of the [\*Constitution\*](#) in so far as it allows the court to proceed with the hearing of a case against an accused person who fails to turn up in court in cases where the accused is charged with a misdemeanor and not a felony. My view is that the [\*Constitution\*](#) of Kenya, being the supreme law of the land does not differentiate the offences be they felonies or misdemeanors. Under the [\*Constitution\*](#), every person has a right to a fair trial, which includes the right to be present when being tried unless the conduct of the accused person makes it impossible for the fair trial to proceed. My understanding of this provision is that all the persons who appear before the court charged with either felonies or misdemeanours enjoy equal right to a fair trial which includes the right to be present when being tried unless their conduct makes it impossible for the court to continue with the trial. It was my view that where an accused person, irrespective of the charge he/she is facing, absconds, then he has waived his/her right to be present when being tried and the court therefore can proceed to hear and conclude the trial in his/her absence and even convict and sentence him. This court determined that it would consider the evidence of the prosecution, in the absence of the accused, and decide whether it proved beyond reasonable doubt that the accused caused the unlawful death of the deceased and that in so causing that death the accused had malice aforethought.'

17. In [\*Republic v Joshua Chacha Moronge \[2019\] eKLR\*](#), the learned judge held that;

' The aim of a criminal trial is to expeditiously accord justice to all parties. An accused person found guilty of an offence ought to be accordingly sentenced in line with the law otherwise one must be acquitted forthwith. It is that balance which a trial aims to achieve. Therefore, in a case where one of the parties makes the trial unable to proceed then such a party visits an injustice to the other. That being so, a Court of law is fully enabled to deal with such instances. On one hand if the delay is occasioned by the prosecution the Court has powers to even compel the hearing to proceed. On the other hand, if the delay is occasioned by the accused person Article 50(2)(f) of the [\*Constitution\*](#) comes to play. For a Court to take refuge in Article 50(2)(f) of the [\*Constitution\*](#) and proceed on with a trial in the absence of an accused person the Court must first be satisfied that such inability to proceed with the trial is caused by the deliberate conduct of the accused person. That therefore means if the Court forms the opinion that the delay is not caused by any deliberate conduct on the part of the accused person then the trial cannot legally proceed in the absence of the accused person. To retrace any of the findings, a Court must carefully consider the particular circumstances of the case. In view of the foregone I now find and hold that Article 50(2)(f) of [\*Constitution\*](#)



perfectly comes to play in this case and order that the trial shall proceed the absence of the accused person notwithstanding.'

18. In the US, *United States v Tortora, 464 F 2d 1202, 1210 (2d Cir)*, the court held that;

' Indeed, we would add that this discretion should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant. Whether the trial will proceed will depend upon the trial judge's determination of a complex of issues. He must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, again particularly in multiple-defendant trials where the evidence is often overlapping and more than one trial might keep the Government's witnesses in substantial jeopardy.'

19. An old persuasive authority on the matter is found in the case of *Price v State, 36 Miss 531 (1858)*. In this case Price's Felony conviction was affirmed although he was absent from the courtroom when the jury returned the verdict. Price was present in court during the trial until the case was submitted to the jury. The Court reasoned;

' He was present in court when the trial was commenced, and when the case was put to the jury; and though under recognizance of bail before that time, for his appearance to answer the charge brought against him, he was no longer at liberty, but was in custody of the law. If he afterwards withdrew from the court, or escaped, so as not to be present at the return of the verdict, it is by his own unlawful act, of which he should not be permitted to take advantage. His absence must be considered, at least, as a waiver of his right to be present; and his own illegal act should not be permitted to thwart the process of the law to his advantage.'

20. In the instant case, the Accused person was present throughout the prosecution case. He however escaped from lawful custody when he was placed on his defence. The Accused is not in court due to his own fault of escaping from lawful custody and has thus waived his constitutional right to be present in court.

21. In light of the foregoing, I make a finding that the prosecution's application is meritable. Same is allowed. This trial shall proceed in the absence of the Accused should he not present himself at the trial or he be otherwise apprehended.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS 15TH DAY OF JUNE 2023**

**A. K. NDUNG'U**

**JUDGE**

