



Gachi alias Bucher & 6 others v Republic (Miscellaneous Criminal Application E354 of 2024) [2024] KEHC 16699 (KLR) (Crim) (19 November 2024) (Ruling)

Neutral citation: [2024] KEHC 16699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E354 OF 2024
AM MUTETI, J
NOVEMBER 19, 2024**

BETWEEN

**RAPHAEL KIMANI GACHI ALIAS KIM BUCHER 1ST APPLICANT
ERICK MUYERA ISABWA ALIAS CHAIRMAN 2ND APPLICANT
MUSTAFA KIMANI ANYONYI ALIAS MUSTO 3RD APPLICANT
STEVEN ASIIVA LIPAPU ALIAS CHOKRE 4TH APPLICANT
MARGRET WACIORI NJERI 5TH APPLICANT
SIMON GISHAMBA WAMBUGU 6TH APPLICANT
JANE WANJIRU KAMAU ALIAS SHIRO 7TH APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. The applicants by way of certificate of urgency sought to have this court intervene in the trial court proceedings by invoking Article 165 (6) & (7) of the *Constitution* as read together with Section 164 of the *Criminal Procedure Code* and have the court arrest the judgment of the Lower court on the grounds that:-
 - i. That the intended delivery of Judgment in respect to CR. No. 479 of 2015(on 22/10/2024) by Hon. Onyina is outrageous as section 296(1)(2) and 297 (1) and (2) were declared unconstitutional by a superior court that has wide inherent powers (*Katiba Institute v National Assembly* E036/024)



- ii. That the applicants are apprehensive that they will not get an impartial and fair trial as they have not been accorded an opportunity by the trial Magistrate to tender their individual defences.
 - iii. That the trial Magistrate is biased in the manner that he is conducting the Proceedings; by virtue of giving a Judgment date without hearing and recording the defences of the Applicants hence making the trial flawed as it has failed to meet the tenets of a fair trial in terms of Article 25 (c) and 50 (2)(k) of the Constitution in that the trial court failed to allow the Applicants to adduce exonerating evidence by denying them a chance to adduce and tender evidence.
 - iv. That the trial court sudden, hasty and arbitrary decision to deliver the intended Judgment without recording or testing the veracity of the Applicant's defences, erodes the Presumptions of Innocence that is guaranteed by dint of Article 50(2)(a) of the Constitution.
 - v. That the Appellant's right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, will be adversely affected by the arbitrary decision of the trial court Magistrate to set a Judgment date without cogent reasons for not factoring in the Applicant defences.
 - vi. That the trial court denial to offer the appellant an audience for them to tender their defences is a direct impediment to access to justice as codified in Article 48 of the Constitution.
 - vii. That the Appellants are not in a mission of Pre-empting the Judgment that is about to be delivered to their disadvantage as the process has procedural gaps.
 - viii. That the prosecution side has not supplied the Applicants with typed Proceedings despite being requested to avail the same, hence making the Applicants legally unprepared to prepare their defences effectively.
2. The application is supported by the affidavit of Raphael Kimani Gachi alias Kim Bucher on behalf of the applicants.
 3. The thrust of the application is that the trial court did not allow the applicants sufficient opportunity to tender their defence to the judge therefore they are likely to be prejudiced and their right to a fair trial breached if the court proceeds to deliver the judgment.
 4. Following the application the court called for the lower court record, examined the same besides considering the submissions made by the first applicant on behalf of all the applicants as well as the submissions made by professor Nandwa who appeared for the 7th accused.
 5. The state filed an affidavit sworn by Mr. Momanyi prosecution counsel who is the prosecutor in the lower court.
 6. According to the applicants on 16th September 2024 the matter came up for defence hearing and counsel for the 1st, 3rd and 4th accused sought to challenge the charge before the court. The trial court however insisted that the matter was coming up for defence hearing and ordered the applicants to proceed and tender their defence.
 7. The applicants declined to tender their defences and the court went ahead to reserve the matter for judgement.
 8. Professor Nandwa for the 7th accused submitted before this court that his client was not party to the move by the applicants to have the judgment arrested . he went further to submit that the applicants were out to delay the matter and indicated to this court that this is not the first time that this particular applicants have come to the high court seeking to stay the proceedings in the lower court. Counsel



observed that it is clear that this applicants are disinterested in having the matter concluded thus the instant application is part of the wider scheme by applicants to frustrate the hearing.

9. The state on its part through Mr. Momanyi counsel for the prosecution has urged the court to decline the application and order that the matter proceeds to its logical conclusion. Counsel for the prosecution urged the court to scrutinize the lower court record and make a finding that the move by applicant is calculated at delaying the conclusion of the trial. The prosecution maintains this court should be inclined to grant the application considering the totality of the facts in the matter.
10. I have anxiously perused and noted that this matter is one of the oldest pending cases in our law courts today having been commenced in the year 2015. A life was lost in this matter in circumstances that are the subject of the trial in the lower court.
11. The deceased's family continue to wait at the door of justice to know who was responsible for the senseless killing of their kin. The trial therefore must be allowed to proceed to its logical end in the interest of justice.
12. The application by the applicants appears to have been presented out of desperation by the applicants who are keen to delay the day of judgment.
13. The right to defend oneself in a criminal matter is central to a fair trial. Indeed if the applicant had presented material before this court to persuade me that the trial court declined to grant them that opportunity, this court would have hesitated in intervening and halting the trial. However, a reading of the notes by the learned Honorable magistrate taken on the date the matter was scheduled for defence hearing discloses that the applicants had the opportunity to tender their defence but they chose not to do so. In the circumstances the trial court was entitled to proceed and schedule the matter for judgment since a court cannot compel an accused person to tender a defence if he does not wish to do so.
14. The power of this court to supervise the lower court under Article 165 of the Constitution is not meant to allow the High Court to micromanage trials in the magistrates court. Section 211 of the Criminal Procedure Code requires that the trial court informs the accused person of his right to give a defence and once that right is explained to them, the decision to whether or not to tender a defence lies exclusively with the accused person.
15. It is therefore clear that the court's duty once discharged in that regard and the accused persons elects not to tender a defence, the court is at liberty to proceed with the matter and deliver judgment after considering the evidence on record and determining whether or not the charges against the accused have been sufficiently proved.
16. It should be noted that the accused person enjoys the right to remain silent so that where an accused person chooses not to tender evidence the court would proceed nevertheless to render a decision in the matter
17. The trial court's duty to establish whether the prosecution's case has been proved beyond a reasonable doubt is not lessened by the fact that the accused has not tendered defence.
18. In view of the above, having examined the record of the lower court, this court is not inclined to agree with the applicant's that they are unlikely to get a fair hearing before the trial magistrate.
19. Notably, the applicants have failed to demonstrate to this court that the magistrate is biased against them and it is not clear how they intend to proceed with the matter if this court were to arrest the judgment.



20. The doctrine of finality requires that litigation must come to an end at some point. The trial cannot be held in abeyance sine die.
21. The applicants still retain their right of appeal against the decision of the learned Honorable magistrate should the judgment be against them or better still they can elect to apply for the reopening of the defence case before the trial court. See *Johnstone Korir v Republic* [2022] eKLR
22. . The instant application is therefore misconceived as it has no merit and is hereby dismissed.
23. The lower court file shall therefore be returned to the lower court for the proceedings to continue to its logical conclusion.
24. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF NOVEMBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Muhindi for state

Prof Nandwa for Interested Party

Applicants 1st, 2nd, 3rd, 4th, 5th, & 7th Present

