



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 24 OF 2018

EDDLIED MANDI JILANI.....1ST APPLICANT

MAKONDE RUWA BUNI.....2ND APPLICANT

NGIRA KARISA CHARO.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON WHETHER TO EXPUNGE EVIDENCE OF PW 3

1. On 22/1/2020 this Court delivered a Ruling under Section 137 (J) (2) of the Criminal Procedure Code, and ordered that the trial of this matter will proceed in this Court notwithstanding that the fact that the 3rd Accused had reneged on the plea agreement under which he was to be a prosecution witness. This court directed that in the interest of time the matter would proceed in this Court.
2. On 19/1/2021 when the matter was due for hearing Mr. Kemo the learned prosecutor applied to have all the proceedings herein relating to the 3rd Accused person, expunged, submitting that those proceedings would be prejudicial to the 3rd Accused given that the proceedings are in the nature of admissions. The application is premised on the presumption that all parties are innocent.
3. The application was also supported by Ms. Nabwana, learned Counsel for the 3rd Accused. Mr. Magolo, learned Counsel for the 1st Accused objected to the said application. Counsel submitted that every aspect of proceedings herein must form part of the record, and no part of the proceedings can be expunged since that would be prejudicial to other accused persons.
4. Mr. Wamotsa, learned Counsel for the 2nd Accused agreed with Mr. Magolo's submissions, adding that the only option is for the Director of Public Prosecutions to recall PW 1 and PW 2, and that there was no need for proceedings to start de novo.

Determination

5. I have looked at the record in this matter. The hearing started on 16/1/2019 and on that day two witnesses testified – **PW 1 - Abbas Mohammed Sheikh** and **PW 2 - Abdulahi Omar Sheikh**. These two witnesses testified before the 3rd Accused purported to enter a plea bargain with the prosecutor. In fact during the hearing the 3rd Accused was represented by Ms. Oyier, learned Counsel who fully participated in the trial. At that time there was no evidence that the 3rd Accused was to be prosecution witness. So the evidence of PW 1 and PW 2 cannot be prejudicial to the 3rd Accused person.
6. However, his evidence upon agreeing to a bargain plea, if allowed to stand, would be prejudicial to the 3rd Accused, and so that there seems to be a fair trial, and presumption of innocence, the 3rd Accused evidence should be and are hereby expunged.
7. Having expunged the evidence of the 3rd Accused, it is also my view that I should, as the Judge who heard that evidence, recuse myself from this matter so that a fresh Judge who has not heard the evidence of the 3rd Accused can assume the trial herein. This is in line with the concept of presumption of innocence, and fair trial.
8. Although I have expunged only evidence of the 3rd Accused person, all the accused still have their rights to recall witnesses under Section 200 of the Criminal Procedure Code since this matter will now be heard by another Judge.
9. In the upshot I make orders as follows:

(i) All evidence herein given by the 3rd Accused Ngira Karisa Charo is hereby expunged from record.

(ii) I hereby recuse myself from the hearing of this matter.

(iii) Henceforth this matter will be heard and determined by Hon. Lady Justice Ann Ong'injo.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 4th day of February, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Magolo Jr. for 1st Accused

Ms. Nabwana holding brief Mr. Wamotsa for 2nd Accused

Ms. Nabwana for 3rd Accused

Mr. Fedha holding brief Mr. Kemo for DPP

Mr. Gitau for Family

Ms. Peris Court Assistant