



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE E057 OF 2021**

**PROSECUTOR.....REPUBLIC**

**VERSUS**

**DANIEL MUSAU.....1<sup>ST</sup> ACCUSED**

**ROBERT MWANGI KIBORORO.....2<sup>ND</sup> ACCUSED**

**RULING**

The 2 accused **DANIEL MUSAU** and **ROBERT MWANGI KIBORORO** have been arraigned before the court with a charge of murder contrary to section 203 as read with section 204 of the Penal Code. They were scheduled to plead to the charge. However, before the charges could be read out to them, the 2 accused filed an application in court dated 23.8.2021. The substantive prayers in the said application are as follows:-

i) ***THAT*** this court do defer the taking of plea herein or any other proceedings in this matter and direct the officer of the Director of Public Prosecutions to conduct further investigations as to whether the 2 applicants are culpable of the offence of murder sought to be preferred against them.

ii) ***THAT*** this court be pleased to release the applicants on reasonable bond terms pending the completions of investigations by the office of the Director of Public Prosecution.

iii) ***THAT*** this court be pleased to quash the decision by the ODPP to charge the applicants with the offence of murder and discharge the applicants unconditionally.

This application was heard on 30.8.2021 Mr. Dohald O. Owang, appeared for the applicant while Ms. Kimani, learned counsel, appeared for the state. Learned counsel, Mrs. Mbugua, on the other hand appeared for IPOA.

It was submitted by the applicants counsel that the investigations done by IPOA in this matter were not conclusive as same were contrary to statements given by the accuseds. That on the material night of 3.5.2020, a total of 7 police officers had been on patrol. That the team were divided into 3 groups, with each group taking different routes. That the applicants took route C, whereas the body was recovered in an area not patrolled by the 2 applicants. It was also submitted that the prosecution relied on an uncorroborated evidence of a witness who only described the killers as a short and a tall man, whereas of the 7, there were more that 1 short and 1 tall men. Counsel therefore wondered how the prosecution settled on the 2 accuseds.

Relying on Article 47 on fair trial, counsel submitted that there is no evidence that the DPP visited the scene to confirm if it is applicants who patrolled the area where the body was found. He relied on the case of ***Republic versus Omar Mwinzi Musimba, Cr. Rev. 12/2017 (Msa) (2017)eKLR.***

Ms. Kimani for the stated oppose this application on grounds that the investigations were carried out and completed, and that the issues raised are for the trial itself. That it is IPOA which has the mandate to investigate which they duly carried out, before forwarding the file to the ODPP for review and directions. That the DPP has independently reviewed the file as is required by the law and is satisfied that there is sufficient evidence for charging the 2 applicants.

Counsel went further that under Article 165(6) gives this court supervisory powers over subordinate courts, and not the ODPP. While relying on Malindi, Petition No. E002/2020, Ezekiel A. Omollo Versus DPP and 2 others, decision in which a similar application was dismissed, counsel maintained that the application totally lacks in merit and is an abuse of the process of the court and ought to be dismissed.

Mrs. Mbugua for IPOA supported the submissions of the state only adding that the ODPP is not an investigative agency and so the orders sought cannot issue. That investigations were done and the police officers, including the 2 accuseds wrote their statements, and that the issues raised herein are issues the applicant would raise as their defences during trial.

Mr. Owang responded that the issue of propriety ought to be addressed conclusively, and that whereas the ODPP is not an investigative agency, it must ensure proper investigations, and that this court has the constitutional mandate to direct the ODPP to tie the loose ends.

I have considered the submissions of the 3 learned counsel for the parties. To me, this application raises the question of whether this court has the power and jurisdiction to order the Director of Public Prosecution to carry out further investigations on a matter on which he has exercised his constitutional mandate to review and come to the conclusion that the charges as proposed be preferred against the applicants.

Article 157(10) of the constitution guarantees the independence of the office of Director of Public Prosecution thus,

“The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the directions or control of any person or authority.

The effect of the above constitutional declaration is to safeguard the independence of the office of Director of Public Prosecution in the discharging of its functions. The constitution however, gives a rider to this at sub-article II that

**“In exercising the powers conferred by this article, he Director of Public Prosecutions shall have regard to the Public Interest, the interests of administration of Justice and the need to prevent an avoid abuse of the legal process.”**

These are obviously the standards that the constitution places on the Director of Public Prosecution as he or she exercises the constitutional mandate.

In our instant case, there is no dispute that this case was investigated by the IPOA. Witnesses were interviewed. Specifically, statements were taken of various persons including the 2 accused. The investigative agency (IPOA) then dutifully forwarded the file to the Director of Public Prosecution for perusal and advise. Before the court, it was submitted that the Director of Public Prosecution, in carrying out its mandate, independently reviewed the evidence, and being satisfied with the evidence presented, made a decision to have the 2 applicants charged with the offence of murder.

The applicants have not challenged the fact that indeed a crime, possibly murder, was committed. They have not challenged the fact that IPOA carried out the investigations, took witness statements and forwarded the file to the Director of Public Prosecutions. They have also not challenged the fact that the Director of Public Prosecutions acted on the matter as required by Article 157(10) and (11) above, i.e active independently, in public interest, interests of administration of justice, and need to prevent abuse of the legal process.

The application of the applicants, are on the other hand, based on the following grounds:-

***i) That the investigations are carried out were inconclusive.***

***ii) That there is no sufficient evidence against the applicants since the body of the deceased was recovered in an area that the applicants had not patrolled. Also that there is no proper identification of the 2 applicants neither physical or by way of identification parade.***

With respect the above grounds on which this application is based, are clearly matters of evidence that would be left for the trial stage. Delivery into whether the evidence gathered against the applicants would result in a conviction or not, at this stage, would be tantamount to inviting the court to considered the evidence even before the trial commences.

This application, on the face of it is also brought under sections 275 and 276 of the Criminal Procedure Code. The applicants have however, not shown any defect on the filed information that would attract an amendment of the same. The information presented before the court has also not been challenged on the basis of not disclosing any offence. Neither has there been a claim on previous conviction on the same charge.

I have otherwise perused the decision in ***Republic Versus Omar Mwinzi Musimba (2017)eKLR***, relied on by the applicant. I find the same persuasive in its entirety. However, the same is distinguishable from our present case in so far as the claim therein was of abuse of the criminal process for an offence that ought to have been pursued under the Election Offences Act, 2016. The said situation does not relate to our instant case.

Turning on to the prayers sought in the application, the issue that comes up is whether the orders sought can issue as prayed. The main substantive prayers (2) seeks orders that the DPP be ordered to conduct further investigations into this matter. The constitutional powers of the Director of Public Prosecution are spelt out under Article 157(6) of the constitution. Investigations are not one such constitution responsibility of the Director of Public Prosecutions. To that extent, orders sought in prayer 2 of the application are misplaced and cannot issue.

This court is therefore not convinced that the application of the applicants dated 23.8.2021 has any merits. The same is accordingly dismissed.

**D. O. OGEMBO**

**JUDGE**

**3.9.2021.**

**Court:**

Ruling read out in open court (on line) in presence of the 2 accuseds, Mr. Owang for the accuseds, Mr. Mbugua for IPOA and Ms. Kimani for the state.

**D. O. OGEMBO**

**JUDGE**

**3.9.2021.**