



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO.4 OF 2019

PROSECUTOR.....REPUBLIC

VERSUS

LABAN NYAATA SAMUEL.....1ST ACCUSED

NANCY BOCHERE SAMUEL.....2ND ACCUSED

AND

CRIMINAL CASE NO. 31 OF 2019

PROSECUTOR.....REPUBLIC

VERSUS

DANIEL MOGAKA ONDIMU.....ACCUSED

RULING

1. By an information dated the 5th February 2019 **Laban Nyaata Samuel** 1st accused person and **Nancy Bochere Samuel** 2nd accused person in Criminal case no. 4 of 2019 are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that, “on the night of 23rd and 24th September 2018 at Mariba Nyamecheo sub-location, Nyamecheo location in Kenyenyia sub- County within Kisii County, jointly with another not before the court murdered Alvinah Nyabuari Moracha.

2. **Daniel Mogaka Ondimu** the accused in criminal case no. 31 of 2019 was arraigned in court on the 15th August 2019 on a charge of murder contrary to section 203 as read with section 204 of the Penal code. The particulars of the offence are that, “on the night 23rd and 24th day of September 2018, at Mariba village in Kenyenyia Sub-County within Kisii County, jointly with others already before court, murdered Alvinah Nyabuari Moracha. The accused Daniel Mogaka Ondimu denied the charge and is awaiting a hearing date.

3. 4 witnesses have testified in Criminal case no. 4 of 2019. The witnesses were heard between the 3rd of April 2019 and 28th May 2019. The accused in Criminal case no. 31 of 2019 Daniel Mogaka Ondimu was arrested and brought to court in August 2019.

4. The prosecution by an oral application in court on the 18th September 2019 sought to have the criminal case no. 4 of 2019 and 31 of 2019 consolidated for hearing. This application was opposed by the defence counsels for the 1st and 2nd accused in Criminal case no. 4 of 2019 and 31 of 2019.

5. Mr. Otieno for the Director of Public Prosecution (the DPP) submitted that the deceased in both cases is the same, the witnesses too and that they are ready to start the case de novo. That consolidating the two cases will not prejudice the accused persons, the witnesses will be recalled to testify. That there is no need to continue with criminal case no 4 of 2019 and then recall the witnesses for criminal case no. 31 of 2019. That even if criminal case no 4 of 2019 is at an advance stage there will be no prejudice caused against the accused persons. That consolidating the case will be convenient to the parties and the court.

6. Mr. Obure for the 1st and 2nd accused persons in criminal case no. 4 of 2019 submitted that they oppose the application for consolidation for the following reasons; in criminal case no 4 of 2019 4 witnesses have testified, the case is midstream with only 3 witnesses left. The 1st and 2nd accused persons in case no. 4 of 2019 stand to be prejudiced as they will be subjected to the same process again, there will be double

jeopardy in the case of the accused persons in criminal case no 4 of 2019. That the prosecution case should proceed with criminal case no. 31 of 2019 as it. That during the trial in criminal case no. 4 of 2019 the prosecution had to be given time to get their expert witnesses. That the court should consider the circumstance of criminal case no. 4 of 2019 and decline the application for consolidation.

7. Mr. Wesonga for the accused in criminal case no. 31 of 2019 too opposed the application for consolidation of criminal case no 4 of 2019 with 31 of 2019. It was submitted that the prosecution have not given them the statements and documents in criminal case no 4 of 2019 to enable them consider the statement. That 4 witnesses have already testified in criminal case no. 4 of 2019. That in the event the application is granted then the case should start de novo.

8. There is no dispute that the deceased is **Alvinah Nyaburi Moracha** and that it is alleged that the accused persons in criminal case no. 4 of 2019 and the accused in 31 of 2019 murdered her. It is also not in dispute that 4 witnesses have testified in case no. 4 of 2019.

9. I have considered the prosecution's application and the objections raised. Justice Majanja heard the 4 witnesses in criminal case no. 4 of 2019. On the 28.5. 2019 he indicated that he is leaving the station and that the proceedings be typed for directions on the 11.6.2019. On the 11.6. 2018 I directed that the matter be heard before Justice Majanja on the 14.6.2019 for further hearing. The matter was placed before Justice Majanja on the 13.6.2019, 1.7.2019 and 19.7.2019. On the 19.7.2019 Justice Majanja indicated that in the absence of witnesses, and since he was leaving the station he was the view that the matter be adjourned to the 18.9.2019 for direction/ further hearing.

10. This matter was listed for direction on the 18.9.2019. Before I could comply with the provisions of section 200 of the Criminal Procedure Rules, the Prosecution made the application for consolidation the subject of this ruling.

11. In the present application, what the Director of Public Prosecutions seeks is an order seeking to consolidate the two criminal cases criminal case no 4 of 2019 and 31 of 2019. Respondents. From the submission made by the Director of Public Prosecutions and from a perusal of the charge sheets in the respective cases it is clear that the accused persons are facing a charge of murder of one Alvinah Nyabuari Moracha. The accused persons have been brought to court at different times but the charges brought against relate to the murder of one Alvinah Nyabuari Moracha.

12. Section 135(1) of the Criminal Procedure Code provides as follows:

“Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are found on the same facts, or form or are part of a series of offences of the same or similar character.”

13. The DPP has stated that they wish to start the case de novo and that the witnesses will be the same. That there will be prejudice if the case is started de novo, the court time will not be wasted and that it will be convenient to all the parties. I note that 4 witnesses have testified in criminal case no. 4 of 2019. The case is yet to be finalised. Justice Majanja who was hearing the matter has since left the station. The accused persons have been charged in relation to the same charge. The witnesses who will testify are the same. The exhibits that will be relied on are the same. While it is conceded that 4 witnesses have testified in criminal case no 4 of 2019 the interest of justice demands that a criminal case arising from the same facts or the same series of facts or transactions should be heard and determined by one court. This court is unable to agree with the submission made on behalf of the accused persons that they will be prejudiced and will suffer double jeopardy. The two cases were brought to court this year 2019. They are recent matters. The court diary for murder trials has dates in the month of October 2019. This case will be heard in the month of October this year. In my view having the criminal cases facing the accused persons heard in one case will expedite their trial. The accused persons will not be prejudiced by the consolidation.

14. In the premises therefore, this court grants the prosecution's application to consolidate **Criminal Case no 4 of 2019** and **Criminal Case no.31 of 2019**. The charges shall be consolidated in criminal case no. 4 of 2019. The accused persons shall take fresh plea in the proposed consolidated charge sheet presented in that case. The charges facing the Respondents shall be heard by one trial court. It is so ordered.

Dated signed and delivered at Kisii this 19th day of September 2019

R.E.OUGO

JUDGE

In the presence of;

1st Accused Laban .N. Samuel

2nd Accused Nancy .B. Samuel

Daniel Mogaka Ondimu Accused in Criminal case no. 31 of 2019

Mr. Otieno Senior State Counsel Office of the DPP

Mr. For 1st Accused

Mr. For 2nd Accused

Mr. For Daniel Mogaka

Mr. Omwoyo Court clerk