



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 60 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SARAH WAIRIMU COHEN.....ACCUSED

RULING

The accused herein, Sarah Wairimu Cohen is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged in the particulars of the offence that on the night of 19th and 20th July 2019 within Nairobi County in the Republic of Kenya, the accused jointly with others not before the court murdered Tob Chichou Cohen, the deceased. The accused was presented in court for the first time on the 12th September 2019. She has appeared in court on other occasions including 26th September 2019 when she was required to take the plea in this case. However the plea was not taken because the Prosecution Counsel, Ms. Catherine Mwaniki and Mr. Cliff Ombeta representing Gabrielle Hannah Cohen-van Straten, sister to the deceased, and Dr. Bernard Cohen brother to the deceased raised certain issues that require the intervention of this court in order to address the said issues and give directions in the matter before the plea is taken.

Ms. Mwaniki asked this court to cite the accused herein and her defence counsel Mr. Philip Murgor for contempt of court. Ms. Mwaniki submitted in regard to this court's orders of 16th September 2019 requiring parties to desist from addressing the media on the investigations and evidence alleged to exist in this case. It was submitted that the accused in the presence of her counsel addressed the public during the burial of the deceased herein and attempted to threaten certain individuals whom she told that their days were numbered. Ms. Mwaniki told the court that the prosecution is in possession of a clip containing the words uttered by the accused. It was further submitted that the prosecution is in a position to present to court witnesses who were present at the time the accused made those remarks.

On his part, Mr. Ombeta questioned the representation of the accused by learned counsel Mr. Murgor as her defence counsel in this case. Mr. Ombeta told the court that Mr. Murgor was appointed on 16th January 2019 by the DPP as a public prosecutor and therefore his acting as defence counsel for the accused in this case presents a conflict of interest. Mr. Ombeta told the court that he has not come across a gazette notice revoking that appointment and therefore Mr. Murgor stands disqualified from taking up this matter in defence of the accused.

In opposing the application in respect of both issues raised, Mr. Murgor submitted that both applications should have been formally filed with supporting affidavits to enable him file affidavits in response. He submitted that allegations of contempt of the court order are serious and if proved can lead to sanctions. Mr. Murgor denied that neither he nor his client the accused disobeyed the court order of 16th September 2019. He submitted that the prosecution counsel was presenting lies to the court from the bar to the effect that the accused and her counsel disobeyed the orders of this court. He submitted that all that the accused did as the widow of the deceased was to address mourners as any widow was expected to do. He told the court that the State has not presented any evidence against the accused. He urged this court to compel the prosecution to file a formal application and serve it on the defence.

On the second issue in regard to his appointment as a public prosecutor Mr. Murgor confirmed that he was appointed as public prosecutor vide Gazette Notice No. 350 dated 15th January 2019. He submitted that he has since resigned through a letter dated 7th March 2019. He submitted that he is no longer a public prosecutor and that his letter of resignation is sufficient proof that he is no longer a public prosecutor.

In her response Ms. Mwaniki told the court that if the accused and her counsel were to be cited for contempt of court they would be sentenced. She asked the court to allow her to file the application for contempt and provide the clips to that effect. She also sought time to confirm whether there is a gazette notice revoking the gazette notice appointing Mr. Murgor as public prosecutor. On his part Mr. Ombeta told the court that the letter of resignation is not conclusive and cannot revoke the Gazette Notice. He submitted that if the appointment of Mr. Murgor has not been degazetted there are other channels including seeking the order of Mandamus to compel the degazettement or the appointment.

Following these arguments and more specifically the question surrounding the appointment of Mr. Murgor as a public prosecutor this court deferred the taking of the plea to 1st October 2019. This would allow time to sort the issue of representation of the accused by Mr. Murgor

before the plea can be taken. The deferment also allowed the court time to make this ruling.

I have considered the issues before me. The order of this court giving rise to these proceedings was granted by the court (Lessit J.) on 16th September 2019. It reads thus:

The DCI, Investigators, Prosecutors, defence and victims to desist addressing the media on the investigations and evidence alleged to exist in this case. The media also gagged from publishing details of investigations, evidence or any other information touching on this case (sic).

As admitted by both Ms. Mwaniki and Mr. Murgor, there are sanctions against any person who is cited for and found guilty of disobeying court orders once the allegations are proved. Contempt of court is a serious matter. This fact was recognized by the Court of Appeal in *Mutitika v. Baharini Farm Limited [1985] KLR 229, 234*, when it stated as follows:

“In our view, the standard of proof in contempt of court proceedings must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt.... The standard or proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

Expressing similar views as the Court of Appeal, the Supreme Court in *Republic v. Ahmad Abolfathi Mohammed & another [2018] eKLR* stated as follows:

“The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power to commit a person to jai, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.”

Guided by the above authorities and having considered the issues raised in this matter and the standard of proof required, it is my considered view that the nature of the allegations made against the accused and her defence counsel are serious and if proved could lead to incarceration or any other appropriate sanction. The result would be infringement of their rights without affording them the chance to know the evidence against them and the opportunity to prepare an appropriate response. Such serious matters should in my view be presented by way of a formal application supported by an affidavit setting out the grounds in support of the application and the arguments to be presented. It is clear to me that this fact is appreciated by Ms. Mwaniki who in her response to the submissions by Mr. Murgor asked this court to allow her time to file an application.

Without getting into the merits or demerits of the issues argued before me in respect of contempt of court allegations, it is my view that filing a formal application is the right way to go in order to ensure that the rights of all the parties involved are safeguarded. I will and do hereby allow the prosecution time to file the application. I hasten to add that this order does not affect the taking of the plea. This process of taking the plea and any orders that may flow therefrom in my view does not prejudice the contempt of court proceedings once the application is filed. The prosecutor is allowed time, to be specified in court, to file and serve all the parties with the application on the issue of contempt of court. The defence is allowed time after the application has been served, to file and serve any responses. The victims through Mr. Ombeta are also allowed time to file any responses if necessary. Directions in regard to the time each party is allowed and when this application shall be heard will be given after this ruling is delivered in court and other issues touching on this case have been addressed.

In respect to the issue of the appointment of Mr. Murgor as a public prosecutor, I defer this matter until I have had time to consider the affidavits filed by both sides as directed by this court on 26th September 2019. Orders shall issue accordingly.

Dated, signed and dated this 2nd September 2019.

S. N. Mutuku

Judge