



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, hereinafter called 'the deceased'. The accused was arraigned 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 that day because the learned Prosecution Counsel, Ms. Catherine Mwaniki, and learned counsel 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 required the intervention of this court before the plea could be taken.

These issues raised on 26th September 2019 relate to allegations of contempt of court by the accused and her legal counsel and secondly, the issue of representation of the accused by Mr. Murgor, learned counsel, as defence counsel. It was alleged that Mr. Murgor is a public prosecutor having been so appointed by the Director of Public Prosecutions (DPP) vide Gazette Notice No. 350 dated 16th January 2019. This latter issue was raised by Mr. Ombeta. He questioned the representation of the accused by Mr. Murgor, learned counsel, as her defence counsel in this case. Mr. Ombeta told the court that Mr. Murgor was appointed on 16th January 2019 by the Director of Public Prosecution (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 response to the issue on appointment, Mr. Murgor confirmed to the court that indeed he was appointed as public prosecutor but he has since resigned vide a letter addressed to the DPP and dated 7th March 2019. On the same issue, Ms. Mwaniki asked the court to allow her more time to confirm whether the appointment of Mr. Murgor as a public prosecutor has been revoked through a gazette notice. Mr. Ombeta questioned the letter of resignation claiming that it is not conclusive and it cannot revoke a gazette notice.

On the same date, 26th September 2019, this court allowed the application for time to confirm the status of the appointment of Mr. Murgor as public prosecutor and deferred the taking of the plea pending the resolution of that issue. The matter was listed for ruling on the issue of contempt of court and for 1st October 2019 and directed Ms. Mwaniki to file an affidavit on the status of Mr. Murgor's appointment and serve the same on the defence on or before 27th September 2019. The court further directed Mr. Murgor to file and serve any response to Ms. Mwaniki's affidavit by close of business on 27th September 2019.

By the close of the day on 27th September 2019, the prosecution had not filed an affidavit as directed by the court. Mr. Murgor filed his affidavit on 30th September 2019. On 1st October 2019 when this matter was called up, Ms. Mwaniki stood up and told the court that the prosecution has not filed an affidavit. She told the court that all that they were required to do was to confirm that under Gazette Notice No. 350 of 16th January 2019, a Special Issue, Mr. Murgor and two others were appointed public prosecutors for a period of two years with effect from 15th January 2019. She confirmed this was the position. She further told the court that the gazette notice in issue has not been revoked and that the ODPP in consultation with the Office of the Attorney General was in the process of revoking it. There were no reasons given why the directions of the court to file an affidavit were not followed. All that Ms. Mwaniki told the court was that an affidavit would have stated the same position as she had submitted.

On his part Mr. Ombeta made brief comments on this issue. He told the court that he is the one who raised the issue of the appointment of Mr. Murgor as a public prosecutor and that if there is no gazette notice revoking his appointment then he needs to step aside as defence counsel until the revocation is done. Mr. Ombeta told the court that Mr. Murgor has other counsels in his office that can stand in to enable

this matter to proceed.

Mr. Murgor objected to the failure by Ms. Mwaniki and Mr. Ombeta to file affidavits. Mr. Murgor relied on his affidavit filed on 30th September 2019 and his submissions in court, which I have read and understood. I note that the affidavit also contains depositions touching on the contempt of court issue. I need to state that I have already directed the parties, by a ruling delivered on 1st October 2019, to file and serve their respective applications on the issue of contempt of court and return to court on 15th October 2019 for directions. In this ruling therefore, I will limit myself to the issues touching on the appointment of Mr. Murgor as a public prosecutor.

In both the affidavit and the submissions in court Mr. Murgor states that the objection that he is a serving public prosecutor and therefore by virtue of a conflict of interest he cannot defend the accused has no merit. He admitted that he was appointed by the DPP as a public prosecutor for two years with effect from 15th January 2019 by the DPP vide Gazette Notice No. 350 of 16th January 2019 (*copy attached and marked PKM-3*); that after that appointment, he was assigned one case, **Supreme Court Appeal No. 8 of 2018 DPP v. Chrysanthus Okemo & 4 Others**; that a bundle of documents in respect of that file was forwarded to him vide a letter dated 6th February 2019 (*copy attached and marked PKM-5*); that he coordinated with Ms. Mwaniki on the issue of research on that file; that for two months after his appointment as public prosecutor he did not receive any prosecution briefs whilst being barred from undertaking any legal work in opposition to the DPP; that he consequently resigned from the position of public prosecutor vide a letter dated 7th March 2019 (*copy attached and marked PKM-2*) in which he set out reasons for resigning; that his resignation was to take immediate effect and therefore he ceased to be a public prosecutor with effect from 7th March 2019 and that during the period he was a public prosecutor he did not request for nor did he receive any benefit for the said appointment.

He further states that the DPP acknowledged his resignation; that he forwarded all the documents that he had received in respect of the file mentioned above back to the DPP through a letter dated 8th March 2019 (*copy attached and marked PKM-9*) and that on 11th April 2019 he received a letter from Ms. Mwaniki on behalf of the DPP acknowledging receipt of the complete bundle of documents as per his letter of 8th March 2019 (*copy of the letter dated 14th March 2019 attached and marked PKM-10*). He states that from the said correspondence it is abundantly clear that the DPP and the enter ODPP including Ms. Mwaniki was aware of his resignation as a public prosecutor. He states that his resignation is also in the public domain, the same having been broadcast and published online and in the print media. He attached several news articles on the matter which he *marked PKM-11*.

Mr. Murgor states further that, following his resignation as a public prosecutor he has, as a private practitioner, engaged in criminal work as defence counsel and has interacted with various officers from the ODPP including the DPP and Ms. Mwaniki. He cited **ACCR No. 21 of 2019, Republic vs Henry Kiplagat Rotih & Others** as one of the cases he engaged in as defence counsel. He also cited various occasions he has attended court and interacted with the officers from the ODPP as defence counsel in this case and yet no objections to his appearance as defence counsel was made. He termed the objection raised in this matter as an attempt to delay the accused's plea in this case.

Mr. Murgor termed the objection raised as a gross violation of Article 30 of the Constitution of Kenya which prohibits slavery, servitude and forced labour. He cited ***Okiya Omtatah Okoiti v Consolata Nkatha Maina & 3 Others [2018] eKLR*** (the Okiya Omtatah case) and ***Eric Cheruiyot & 7 Others v Independent Electoral and Boundaries Commission & 7 Others [2017] eKLR*** (the Eric Cheruiyot case) to support his depositions and submissions that once one resigns from an appointment, it is unilateral and does not depend on the appointing authority to revoke that appointment. Mr. Murgor in his depositions and submissions states further that the delay in taking the accused's plea is in contravention of her right to a speedy and fair trial and denial of her right to be represented by a legal counsel of her choice under Article 50 of the Constitution of Kenya.

Mr. Murgor urged that Ms. Mwaniki has not filed an affidavit and therefore her submissions are from the bar. He asked the court to find that he is properly in court as defence counsel for the accused and proceed to take the plea.

In reply Ms. Mwaniki told the court that she is not the one who raised the objection on the status of Mr. Murgor as a public prosecutor by Mr. Ombeta. She stated that due process in revoking the gazette notice must be followed and that the ODPP is not forcing Mr. Murgor to work. Mr. Ombeta in his reply stated that Mr. Murgor has not tendered evidence that he can still act as defence counsel without revocation of his appointment as public prosecutor. Indeed it is true that it is Mr. Ombeta who raised the objection but it is worth noting that the objection was also supported by Ms. Mwaniki.

I understand the singular issue for determination before me as whether Mr. Murgor's appointment as a public prosecutor still stands and therefore by virtue of that appointment he is not in a position to represent the accused in this case as her defence counsel.

I have read the affidavit by Mr. Murgor. I have read the submission by all the parties in this matter and have understood the same. I note that Ms. Mwaniki did not file an affidavit as directed by this court. All her submissions were made from the bar a fact that led to the objections by Mr. Murgor. Mr. Ombeta too spoke from the bar although I note that the order of this court did not direct him to file an affidavit. It was Ms. Mwaniki who sought time to confirm whether the gazette notice appointing Mr. Murgor as public prosecution had been revoked and this explains the silence of this court's order in directing Mr. Ombeta to file an affidavit.

From the outset, it is clear to me that it is not in dispute that Mr. Murgor was appointed as a public prosecutor for two years with effect from 15th January 2019. This is a fact that is admitted by all the parties. There is also a copy of Special Issue of Gazette Notice No. 350 dated 16th January 2019 to prove this. Mr. Ombeta and Ms. Mwaniki contend that Mr. Murgor is still a public prosecutor and as such he cannot represent the accused persons as defence counsel as this leads to a conflict of interest. Mr. Murgor on the other hand contends that he resigned as public prosecutor effective 7th March 2019 and that he is no longer a public prosecutor as argued. He argues that he is properly before the court as defence counsel for the accused in this matter. This dispute leads to the issue before me: whether Mr. Murgor, while still a public prosecutor as contented by Mr. Ombeta and Ms. Mwaniki, can still purport to act as a defence counsel for the accused in this case. The two learned counsel buttressed their contentions on the lack of evidence of revocation of the appointment of Mr. Murgor as public prosecutor.

It is also clear to me that there is no dispute that Mr. Murgor tendered a letter of resignation as public prosecutor. The letter of resignation was accepted and receipt of the same acknowledged. This is not denied by the prosecution and Mr. Ombeta. The only contention on the issue being that the letter of resignation cannot override a gazette notice revoking the appointment in issue. In the words of Mr. Ombeta, the letter of resignation is not conclusive proof that Mr. Murgor is no longer a public prosecutor.

I note further that it is not denied that Mr. Murgor continues to attend courts in criminal matters as a defence counsel. There are no submissions from Ms. Mwaniki or Mr. Ombeta countering the submissions by Mr. Murgor's that he has been attending court as defence counsel in other criminal matters and also in this matter. It is noteworthy that there is no evidence was presented to this court showing any objection raised against Mr. Murgor's standing as defence counsel in this matter in this court or in other courts from the time he first appeared as defence counsel up to 26th September 2019 when this objection was raised. It was not denied that Mr. Murgor, in his capacity as defence counsel in various criminal matters, has interacted with the ODPP in general and Ms. Mwaniki in particular. The fact that Mr. Murgor has been representing clients charged with criminal matters as defence counsel is known to the ODPP. This was after the letter of resignation.

It is also clear to me that there is no dispute that Mr. Murgor, upon resigning as a public prosecutor returned all the documents relating to the case assigned to him and this was acknowledged vide the letter dated 14th March 2019 marked PKM-10. This fact has not denied by Ms. Mwaniki.

Mr. Murgor claimed that the objection raised in this case was calculated to delay the plea taking in this matter and as such it contravenes accused's right to fair trial as provided under Article 50 of the Constitution of Kenya. He also claimed that by arguing that he is still a public prosecutor and denying him the chance to represent clients against the DPP is in violation of his rights under Article 30 of the Constitution of Kenya. Article 30 provides that:

(1) A person shall not be held in slavery or servitude

(2) A person shall not be required to perform forced labour.

Article 50 of the Constitution of Kenya guarantees an accused person the right to fair trial. This right includes ***the right to be presumed innocent until the contrary is proved; to be informed of the charge, with sufficient detail to answer to it; to have the trial begin and conclude without unreasonable delay; to choose, and be represented by, an advocate, and to be informed of this right promptly*** (emphasis added). I need to point out that the rights under Article 30 and 50 of the Constitution of Kenya cannot be limited by dint of Article 25 of the Constitution of Kenya.

I have read and understood the authorities cited by Mr. Murgor. The ***Okiya Omtatah*** case (supra) concerns three Commissions of the Independent Electoral and Boundaries Commission (IEBC) who, on 16th April 2018 addressed a press conference publicly announcing their resignation from the IEBC with immediate effect. The three commissioners also sent notices of resignation to the President as required under Section 7A (1) (b) of the IEBC Act. The three commissioners returned to office to resume duties despite their resignation giving rise to this case. The three commissioners held the view that although they had publicly announced their resignation and notified the President as required by the law they were still commissioners because it was up to the President to actualize their resignation by publishing vacancies in the offices of the three commissioners in a Gazette Notice.

In determining that matter the judge (Mwita J.) observed as follows:

It is plain from the reading of the constitutional text, that there is no provision for a commissioner's resignation. The Constitution speaks of removal from office which means that the action to remove a commissioner is third party driven as opposed to self-desire to leave. That cannot, however, mean that a commissioner who desires to leave cannot resign because the constitution does not allow it. In my respectful view, a commissioner just like any other person has a constitutional right to leave the commission if he wishes and no one can stop him. To leave employment is a right to make a choice and therefore a constitutional right that cannot be limited as it is not legally possible to force one to keep a job he or she does not wish to. And as the Supreme Court observed in *John Harun Mwau & 2 others v IEBC & 2 others*[2017] eKLR that no one could be forced to participate in an election he had lost interest in, in the same vein, there is no way a commissioner can be forced to remain in office if there is no longer such motivation simply because there is no constitutional provisions for resigning from office.

The court in the ***Okiya Omtatah*** case went on to state that:

Furthermore from the reading of the statute, the President does not have discretion whether or not to accept the resignation. He is only notified by the commissioner of his resignation and the President's mandate is to initiate the rest of the process by declaring a vacancy which leads to the process of recruitment of replacement (s). In that respect, therefore, it is my finding, and I so hold, that resignation of a commissioner is immediate upon notifying the President in writing, of the resignation. Publication of the vacancy in the gazette is a formal step and has no bearing on the actual act of resignation.

In the same vein, the court (Marete J) in ***Eric Cheruiyot case*** (supra) was of the view that ***resignation is a unilateral act that does not require acceptance.***

I have given this matter much thought and consideration. I find that I am persuaded by the authorities cited. Although in the ***Okiya Omtatah*** case the issue before the court was based on a statute providing the manner in which removal from office should be undertaken, I find the same principle in that case relevant and applicable in this case. The reasoning of the courts in both cases is of persuasive value to this court. My view is that no person should be forced to remain in office once they have chosen to resign from that office. I agree with Mr. Murgor that his resignation as contained in the letter dated 7th March 2019 was immediate upon submitting to the appointing authority the letter of resignation dated 7th March 2019 which letter was received and that receipt acknowledged. It is my finding, and I so hold, that the appointing

authority did not have discretion in the matter.

Publication of a gazette notice revoking the appointment of Mr. Murgor as a public prosecutor in my considered view is a formal step by the appointing authority and that step has no bearing on the actual act of resignation of Mr. Murgor. As submitted by Mr. Murgor, which submissions I agree with, the publication in the Kenya Gazette is meant to notify the public but not to change the fact that he has resigned.

Consequently, the objection raised by Mr. Ombeta and supported by Ms. Mwaniki is hereby rejected. I find that Mr. Murgor is properly before this court as a defence counsel for the accused person in this case. I find that his representation of the accused person in this case does not raise a conflict of interest on his part since his resignation as public prosecutor is effective from the time the letter of resignation dated 7th March 2019 was received and acknowledged by the ODPP. I make orders accordingly.

Dated, signed and delivered today the 3rd day of October 2019.

S. N. Mutuku

Judge