



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 60 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SARAH WAIRIMU KAMOTHO.....ACCUSED

RULING

This ruling relates to the application by the prosecution to consolidate this case, being High Court Criminal Case No. 60 of 2019, with High Court Criminal Case No. 65 of 2019. In the latter case the accused is Peter Njoroge Karanja Alias PK. Both cases relate to the death of Tob Chichou Cohen which is alleged to have occurred on the night of 19th and 20th July 2019 within Nairobi County. The accused person in this case was brought to court for the first time on 12th September 2019 but the plea was not taken until 3rd October 2019 as the record of proceedings in this case will show. In High Court Criminal Case No. 65 of 2019 the accused therein, Peter Njoroge Karanja alias PK was arraigned in this court for the first time on 3rd October 2019 but the plea was not taken on that date because the accused had not been assessed to determine his mental capacity to take the plea. The plea was taken on 11th October 2019. Subsequent to the taking of the plea in both cases each accused was released on bail/bond.

The prosecution, through Ms. Catherine Mwaniki, Learned Prosecution Counsel has moved this court to consolidate both charges into one case. It was submitted that both cases arose from the same facts; that the deceased is the same; that the particulars of the offence are the same; that the date of death is the same and that the scene of crime and the witnesses are the same. This application and the submissions relate to both files High Court Criminal Case No. 60 and No. 65 of 2019.

Mr. Muteti, Learned Prosecution Counsel and Mr. Ombeta Learned Counsel for the Cohen Family supported the application for consolidation.

The application was opposed in both files. In criminal Case No. 60 of 2019 Mr. Murgor, Learned Counsel for the accused submitted that the defence was opposed to the application for consolidation of the two files because the accused person does not know the facts of this case. He submitted that from the time the accused was arrested and arraigned in court the prosecution has not supplied the defence with the list of witnesses and their statements to enable the accused know the facts what evidence she is facing. Mr. Murgor submitted that it is only the information giving the statement of the offence and the particulars of the offence. He submitted that these are not facts of the case or the evidence. He submitted that the Constitution of Kenya requires that by the time the accused is brought to court the investigations ought to be complete and evidence availed to the accused and therefore the prosecution has failed to act as mandated by the Constitution. He submitted that it has been two months since the accused was brought to court yet the facts and evidence have not been supplied to the defence in contravention of the Constitution. Counsel pointed out that the consolidated information states that the evidence including documentary evidence that the prosecution intends to adduce at the trial will be provided. He submitted that despite the defence efforts to seek to be supplied with the evidence this has not been done by the prosecution which is in contravention of the law.

Mr. Mburu, Learned Counsel for the accused in High Court Criminal Case No. 65 of 2019 also opposed the application to consolidate the two files. He associated himself with the submissions of Mr. Murgor. He further submitted that the Prosecution owes the accused a duty to make him know what is being consolidated. He submitted that the accused does not know the witnesses or the scene of crime; that the defence does not have the facts of the case and that the prosecution has not shown what prejudice they will suffer if statements are supplied to the defence. He urged this court to order the prosecution to supply defence with statements of witnesses.

I have considered the issues raised in both the application by the prosecution to consolidate the two cases and the objections by the defence in both cases to that application for consolidation. As stated by both defence counsel, consolidation of cases is a procedural matter.

I have read section 135 of the Criminal Procedure Code. It provides as follows:

135. (1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character. (Emphasis added).

I have also read section 136 of the Criminal Procedure Code that provides in (a) as follows, that:

136. The following persons may be joined in one charge or information and may be tried together-

(a) persons accused of the same offence committed in the course of the same transaction:

With these provisions in mind I have read the information in each of the two files sought to be consolidated. They are similar word for word except the names of the accused persons. They relate to the same dates of the alleged offence, the same place (scene), the same offence and the same victim of the alleged offence. They also state that the offence was committed with other persons not before the court. I have compared these copies of information in each file with the intended information for consolidation. It proposes to charge the two accused persons together for the same offence allegedly committed on the same date at the same place with the victim of that offence being the same. I find that the intended information consolidating the two cases satisfies the provisions of Section 135 of the Criminal Procedure Code.

To satisfy myself that the accused persons will not be prejudiced by the proposed consolidation, I have read Article 50 of the Constitution that guarantees the rights to an accused person. It guarantees an accused, among others, the right to be informed of the charge, with sufficient detail to answer it (50(b)) and to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence (50 (j)). My understanding of these provisions, specifically (j) is that this evidence must be provided to the defence before it is presented in court in order to enable an accused person to know the evidence against him/her and to adequately prepare for his/her defence. In my view the evidence must not necessarily be provided before taking the plea. Of course that would be the ideal situation in my. But it is also in order to take the plea as soon as the accused is arraigned in court care being taken to ensure that the information or the charge sheet contains all the particulars necessary to ensure that an accused person understands what he/she is charged with in order to answer to the charge even before evidence in support of that charge has been availed. The most important thing being that the court has a duty of care to ensure that the accused person suffers no prejudice.

The requirement to have the accused answer to the charge he/she is facing as soon as possible is also provided for under Section 274 of the Criminal Procedure Code which states as following:

274. The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court sees cause otherwise to order, and the information shall be read over to him by the Registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court, and the accused person shall be required to plead instantly thereto, unless, where the accused person is entitled to service of a copy of the information, he objects to the want of service, and the court finds that he has not been duly served therewith.

It is my considered view and I so hold that the application by the prosecution to consolidate High Court Criminal Cases No. 60 of 2019 and 65 of 2019 is in order and is based on the law. I hereby allow the same.

Having said that I wish to strongly caution the prosecution that the delay in providing the two accused persons through their legal counsel with the list of witnesses and the necessary statements and the evidence the prosecution will be relying on in this case is in contravention of the law. We are in a legal dispensation that allows disclosure of all the materials to be used in court to all the parties concerned and the delay in so doing, in my view, is in bad faith and a subversion of justice. The prosecution bears the heaviest burden to ensure that the persons it brings to court facing criminal charges are supplied with the evidence against them and prosecuted as soon as possible. This is what our constitution promises every accused person and every victim of a crime. I want to believe that the prosecution in this case will do what it takes and what the calling of that office entails to ensure that this court is facilitated well in order to dispense justice according to the law. I will allow the prosecution two weeks from today to put their house in order and avail all the evidence to the defence. They have had adequate time to finalize their investigations and compile their evidence. Any further delay is uncalled for. I call on the prosecution to take this direction with the seriousness it deserves because in the past I have seen some laxity in following directions of this court to the letter. It is so ordered.

Dated, signed and delivered this 12th day of November 2019.

S. N. Mutuku

Judge