



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL CASE NO. 22 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MICHAEL NJERU MURAGE.....1<sup>ST</sup> ACCUSED**

**SIMON MUCHOKI MURAGE.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The two accused Michael Njeru Murage and Simon Muchoki Murage appeared before this court on 4/11/19 to answer a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code.**
2. The plea could however not be taken as the accused had not been examined by a Psychiatrist to determine whether they are fit to plead and to stand trial.
3. An objection to taking the plea was also raised by the defence counsel Mr. Ngangali who submitted that the accused were summoned to appear before Baricho Court over a land matter which was subject to a succession cause No. 16/1985. There is also an E.L.C mater No. 19/2015. When they appeared pursuant to the summons they were arrested and charged with murder.
4. He submits that there was malice. That deceased was killed by a mob long time ago. He prayed that the D.C.I Baricho be summoned. That abuse of court process ought to be avoided.
5. Mr. Aslmosi, for the Director of Public Prosecution urged counsel not to confuse the court. The court should not look at civil matters. There is a charge and information has been filed in court. The decision to charge the accused was made on 30/8/19 by his predecessor. The decision to charge was made by Director of Public Prosecution. The accused were arrested when they appeared at Baricho Court.
6. I have considered the submissions. The issue which arises is objection to taking plea.
7. The accused person(s) have been charged with a specific offence and the particulars have been disclosed. The matters which were raised by the defence counsel are submissions from the bar. The matters raised relate to successions matters and a land dispute in the Environment and Land Court.
8. Mr. Ashimosi for the Director of Public Prosecution has submitted that the charges were preferred by the Director of Public Prosecution and the accused cannot challenge the authority of the Director of Public Prosecution to prefer charges.
9. For avoidance of doubts, the law is clear that where a criminal Prosecution has been initiated and undertaken by the Director of Public Prosecution under the Constitutional mandate conferred under **Article 157(6) of the Constitution** the court can only interfere under sub-article (11) where any of the principles laid down are flouted. **Article 157(6) & 11** provides:-

(6) ***“The Director of Public Prosecution shall exercise State powers of prosecution and may –***

***(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.***

***(b) Take over and continue criminal proceedings commenced in any court (other than a court martial) that have been instated or undertaken by another person or authority, with the permission of the person or authority and***

***(c) Subject to clause (7) and (8) discontinue at any stage before judgment is delivered any criminal proceedings instituted***

by the Director of Public Prosecutions under Para (b).

**(11) In exercising the powers under this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.”**

9. The counsel for the accused has not laid down material before this court to demonstrate that the decision by the Director of Public Prosecution violates **Article 157(11)**. The fact that there are civil and succession matters is not a bar to charging the accused with a criminal offence. The matters raised by the defence counsel can only be determined after the court has heard the evidence.

11. The prayer to summon the D.C.I. at this stage is with respect misplaced as the accused have not pleaded to the charge and even after they plead it would be futile to summon the D.C.I because it cannot determine the case. The court has to hear all the witnesses and determine the case. In the case of **Michael Monari & Another –v- The Commissioner of Police & 3 others Misc. Application No. 68/2011 Justice Warsame** (as he then was) stated:-

**“It is not the duty of the court to go into the merits and demerits of any intended charge to be preferred against any party. It is the function of the court before which the charge shall be placed and which shall conduct the intended trial to determine the veracity and merit of the evidence to be tendered against an accused person -----**

**The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and on that account is deserving punishment.”**

12. I am persuaded by the finding by the Judge as a trial is due process of the law to determine whether the person charged is guilty or not.

13. The person charged has a right to be presumed innocent until proved guilty as provided under which provides:- **Article 50(2)(a) of the Constitution**

**“Every accused person has the right to a fair trial which includes the right – to be presumed innocent until the contrary is proved”.**

14. The fact of charging the accused does not take away that right. Plea taking is a step in the trial process after which the court proceeds to give directions on the hearing at a later date and ensuring that he is afforded a fair trial.

15. The prosecution has only presented the information containing the charge. Matters raised by the defence are matters which should be raised in the trial. They cannot be raised at this forum to obstruct a lawful prosecution. The evidence in support of the charge must be tested at the trial. The burden of proof is on prosecution. The accused has no burden to prove his innocence. There is no allegation that the accused will not be afforded a fair trial. In **Mexiner & Another –v- A.G** it was stated:-

**“It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge.”**

16. Taking the accused through the due process gives them the opportunity to challenge evidence by the prosecution and adduce evidence. They will not be barred in any way from presenting the documents on the succession matter and the ELC case.

**In Conclusion:-**

The Director of Public Prosecution has submitted that the decision to charge the accused was taken by the Director of Public Prosecution in August. The accused are charged with murder which is alleged to have been committed on 30/10/18. The delay in preferring the charges is not inordinate. It has not been demonstrated that the prosecution is malicious. The Director of Public Prosecution has the mandate to prosecute the accused. The accused have a right to fair trial as enshrined under **Article 50 of the Constitution** and they will have an opportunity to raise the matter which they have raised before this court so that it can be established whether or not there is any culpability on their part and/or any ulterior motive by the Director of Public Prosecution. For these reasons I find that the objection is without merits. The accused will proceed to plead as soon as they are certified fit to stand trial.

**Dated at Kerugoya this 5<sup>th</sup> day of November 2019.**

**L. W. GITARI**

**JUDGE**