



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 46 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

1. TUMAINI KARISA

2. NYAMVUNA DZENGO MAKASI.....ACCUSED

R U L I N G

1. The court is called upon, by the prosecution, to consolidate two files, HCCR CASE NO. 46 OF 2018 and HCCR CASE NO. 12 OF 2019 so that the two proceed as one. For that application a consolidated charge sheet dated 23/10/2019 was presented to court on the same day.

2. The justification given by the prosecution for seeking consolidation is that the two cases relate to the death of one deceased person named MWAKA KAZUNGU DIMWA said to have occurred on the 8/9/2018 and the three accused persons named in the two files are suspected to have caused that death.

3. The reasons given by the prosecution to have led to the two different charges being filed was that the accused in CR. NO. 12/2019 was arrested later and was not available by the time those in CR NO. 46 OF 2018 were arrested and arraigned in court.

4. It was then added that for efficient use and employment of judicial time and state resources it was desirable to have the two consolidated because the witnesses would be the same in both files.

5. The application was opposed by the counsel for the first accused person in No. 46/2018 who said that consolidation would prejudice his client who is the mother to the accused in No. 12/2018 in that his client was likely to give evidence likely to incriminate the son and therefore put the two into conflicting paths. He added that by reason of close consanguinity his client was not comfortable and would be prejudiced if charged in the same matter with her son.

6. This determination must answer one question; *when would a court permit the consolidation of two charges so that the trial proceed as one?* The starting point is Section 135(1) Criminal Procedure Code. The law provides:-

“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”.

7. As worded that Section must be seen to be intended to save courts time and resources so that an offence or offences founded on the same facts, or forming a series of offenses are tried together. The rationale to me is that if the facts are the same then, evidence to prove such facts may come from same witnesses hence it would be efficient and time saving to have all such offences handled as one rather than being tried separately. That is the situation that would prevail even where there exist more than one charge or information preferred.

8. In this matter the charge or information presented present only one offence, the unlawful cause of death one MWAKA KAZUNGU DIMWA. If separate trials were to be ordered, it portends the danger that same witnesses would be called twice at different times to give evidence to same effect. That to me would defeat the constitutional dictate that justice must be administered so as to protect and promote the purpose and principles of the constitution. The other danger is possible witness a party generated by several attendance which may led to one case attracting more witness than another. In such event the treatment accorded to the accused in both files would not be the same a situation which is wholly undesirable.

9. This court proceeds from the understanding that in criminal trials of this nature, it is expected that witnesses coming from far flung areas are reimbursed travelling expenses from the financial resources of the judiciary which are public funds. I do find that one of the principles and purpose of the constitution is the efficient application and utilization of public funds and other resources. That purpose and principle of the constitution would not be promoted if one was to order separate trial for the death of one individual.

10. The only time the court would discourage joint trial is where it is demonstrated that such would embarrass or prejudice the accused person. In this matter the only prejudice alleged is that the 1st accused, TUMAINI KARISA, being the mother of SIMON UDZILE SAMWEL would feel uncomfortable to be tried together with her son. In my evaluation, I do not see that to present real prejudice at the trial. All that one need to do in a criminal trial, is to establish the truth by evidence. That truth is expected of every Kenyan by obligation to give evidence save for situations where the law protects one from being compelled to give evidence. No such privilege is alleged nor is any evident between the 1st accused and her son.

11. I do find that there is no prejudice or embarrassment that awaits the 1st accused, or indeed any of the three accused persons, if consolidation is ordered. For that reason, I do allow the application to consolidate the information in the two files and that the consolidated information shall be heard in file no. 46 of 2018.

Dated and delivered at Mombasa this 1st day of November 2019.

P.J.O. OTIENO

JUDGE