



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 21 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

OLESHIRO OLE KEIWUA.....1ST ACCUSED

KETERENGA KEIWUA.....2ND ACCUSED

RULING

1. The 2 accused persons are jointly charged with the murder of Kimaru Keiwua, which is contrary to section 203 as read with 204 of Penal Code [Cap 63] Laws of Kenya.
2. The prosecution called 7 witnesses in support of the charge.
3. The 2 accused persons gave sworn evidence and called no witnesses in their defence. They were represented by Mr. Yenke.
4. At the close of the trial, Mr. Yenke filed written submissions and urged the court to acquit both accused. He submitted that the evidence against both accused persons was of circumstantial nature which did not irresistibly point to the guilt of the accused.
5. Mr. Mukofu for the state did not respond to those written submissions because the law in section 310 as read with section 161 of the Criminal Procedure Code [Cap 75] Laws of Kenya does not allow him to file any reply.
6. The 2nd accused is the wife of the deceased. The 1st accused is the step-brother of the deceased. The 2nd accused in her sworn evidence testified that the 1st accused and the deceased fought over a debt of Sh.2500/= allegedly owed to the 1st accused by the deceased. In his sworn evidence, the 1st accused denied that the deceased owed him that sum of money.
7. It is clear that there is conflict of interest in respect of one advocate conducting the defence of both accused. Having lead both accused in their evidence in chief Mr. Yenke could not in law cross examine them. In the circumstances, it is clear that both accused persons did not have effective legal representation for their defence as required by article 50 (2) (h) which provides as follows:

“Every accused person has the right to a fair trial, which includes the right –

- a)
- b)
- c)
- d)
- e)
- f)

g)

h) To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

8. The record shows that counsel for the accused was assigned by this court to undertake the defence of the accused, on a pro-bono basis.

9. The upshot of the foregoing is that the accused have not had a fair trial as required by article 50 (2)(h) of the 2010 Constitution on the basis that their legal representation was ineffective. I am therefore constrained to declare a mistrial in this case, which I hereby do. I further order that the accused be tried afresh and each should be assigned an advocate.

10. In passing it is important to point out that the summary trial of persons charged with murder has in large measure contributed to this order of mistrial. In order to avoid future recurrence, I recommend that the prosecution be required to seek leave of the court to proceed summarily. This will also enhance effective case management.

Ruling delivered in open court this 9th day of May 2018.

In the presence of Ms Torosi for the state and in the absence of Mr. Yenko for both accused, who were present.

J. M. BWONWONGA

JUDGE

9/5/2018