



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL CASE NO. 49 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DENNIS NYANGAU NYANGARE alias IBRAHIM.....ACCUSED**

**RULING**

1. The accused herein **DENNIS NYANGAU NYANGARE alias IBRAHIM MAKARIO** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of the offence are that on 9<sup>th</sup> June 2003 at Bogiakumu Sub-Location in Kisii Central District within Nyanza Province, jointly with another already convicted and sentenced to death, murdered **SAMUEL OMWERI NYAOGA**

2. On 12<sup>th</sup> July 2010, the accused pleaded “not guilty” to the said charge of murder and his case has been pending hearing since then to-date because the prosecution has been unable to avail any witnesses in court. To this end, the prosecution has all along been seeking adjournments of the case and on 7<sup>th</sup> September 2016, this court made an order granting the prosecution the last adjournment of the case after which the same was listed for hearing on 15<sup>th</sup> November 2016.

3. On 15<sup>th</sup> November 2016, the prosecution once again sought another adjournment of the case on the basis that the police were still trying to trace their original file which had been apparently been taken to the archives. The application to further adjourn the case was opposed by Mr. Okenye for the accused who reminded the court that the prosecution had already been granted a last adjournment during the previous hearing date.

4. This court declined to grant the prosecution any further adjournment of the case whereupon Miss Mbelete counsel for the prosecution sought for a mention date to enable her place the file before the in-charge of prosecution for termination. The case was then listed for mention on 30<sup>th</sup> November 2016.

5. On 30<sup>th</sup> November 2016, Miss Mbelete informed the court of a new development in the case to the effect that there had been a mix up in the police files since the related original filed under which the accused person's co-accused had been convicted and sentenced to death on 9<sup>th</sup> March 2006 had long been archived and this led to summons to witnesses being sent to the wrong file. Miss Mbelete then informed the court that the original file had actually been traced, the witnesses identified, and they were willing to come to court to testify. Miss Mbelete sought the review of the court's earlier orders made on 15<sup>th</sup> November 2016 in which an application for adjournment had been rejected. She undertook to avail all the

witnesses in court if granted a hearing date.

6. Mr. Okenye for the accused once again opposed the application for review of the earlier order rejecting a prayer for adjournment while stating that there had been lack of diligence by the prosecution in pursuing the case. Mr. Okenye added that no proper basis had been laid to warrant a review of the earlier orders of the court rejecting an application for adjournment.

7. I have considered the application for review of the orders of 15<sup>th</sup> November 2016 in which this court declined to grant any further adjournment to the prosecution. I have also considered the explanation offered by Miss Mbelete counsel for the state regarding the circumstances under which the original police file was misplaced following the conviction of the accused person's co-accused in 2006. Indeed, it is clear to me from the particulars of the offence contained in the charge sheet, that the accused person's co-accused had already been convicted and sentenced to death. The accused in this case, as I have already stated in this ruling, took plea in July 2010 long after his co-accused was convicted in 2006 and under those circumstances, one cannot rule out the possibility that the police file could have already been archived as was stated by Miss Mbelete, thereby leading to the file's non-availability when required during the hearing of a subsequent case.

8. It goes without saying that the prosecution witnesses could not be traced or bonded in the absence of the police file and to me, this explains why none of the prosecution witnesses has appeared in this case since its inception.

9. Article 50 (2) (e) of the Constitution stipulates as follows:

**“(2) Every accused person has the right to a fair trial, which includes the right—  
(e) to have the trial begin and conclude without unreasonable delay;”**

10. In the instant case, while I recognize that the accused person's right to a speedy trial is enshrined in the Constitution, the reasons for the delay of this matter have been explained, to the satisfaction of this court, by the prosecution. The grave nature of the charge in this case calls for this court to strike a delicate balance between the right of the accused to a speedy and fair trial, and the right of the victims of the crime to justice for the offence committed against their kin. The rights of the victims of the crime are more pronounced in this case considering the fact that it involves the capital charge of murder.

11. The state counsel explained, at length, the challenges and confusion that led to summons to witnesses being forwarded to the wrong file at the wrong police station. The prosecuting counsel assured the court that the confusion had been resolved and that the witnesses were ready, able and willing to testify in the case. I find that the reasons advanced by the state in seeking the review and setting aside of the orders of 15<sup>th</sup> November 2016 are both plausible and compelling. There is indeed a new development in the case regarding the availability of the prosecution witnesses, which has been the proverbial Achilles' heel in this case, that this court cannot just wish away.

12. Under the above circumstances, I am convinced that allowing the said witnesses to testify would be the most appropriate thing to do in which case the accused, who has been out on bond and still deemed innocent until proven guilty, will also have a chance to participate in the trial and clear his name of the charges. It is therefore my humble view that the accused will not be prejudiced at all if the witnesses testify in the case especially if the same is done within the shortest period possible.

13. Consequently, I allow the application by the prosecution and hereby set aside the orders made on 30<sup>th</sup> November 2016 rejecting the prosecutions application for adjournment. I direct that this case be heard on priority basis and on a clear day on 29<sup>th</sup> April 2016 when the prosecution is expected to avail all the witnesses in court in order to fast track this case in view of the fact that it has been pending for over 6 years.

14. It so ordered.

Delivered, dated and signed in at Kisii on **13th day of March**, 2017.

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

- Miss Ouko for the State
- Mr. Okenye for the Accused
- Omwoyo court clerk