

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 18 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

REUBEN SHANGI AKELLO.....1ST ACCUSED

SIMON NDUNGU WAINAINA.....2ND ACCUSED

RULING

This case was originally High Court Criminal Case No. 41 of 2011 at Nakuru High Court. The two accused persons have been charged with the murder of a fellow prisoner namely Peter Mungai Macharia. The plea was taken in the High Court at Nakuru on 19th May 2011. However the proceedings did not commence in Nakuru. The case was transferred to Nairobi by the order of the court in Nakuru issued on 2nd October 2012. The grounds for the transfer were given as security reasons.

The offence is alleged to have occurred when the two accused persons were serving a jail term in Naivasha Maximum Prison as convicts. The details of the offence for which they had been jailed are not clear to this court. The matter did not proceed to hearing from the time the file was received in Nairobi. It was assigned a new case number as High Court at Nairobi Criminal Case Number 18 of 2013. By the time I took over the proceedings in this matter no witness had testified. The reasons for the delay in starting the hearing are on the court record but briefly the issue of treatment of the accused persons took some time to resolve, if at all. The accused persons also seemed to have issues with their legal counsels assigned to represent them. I have noted that the first advocate to represent both the accused persons was a Mr. Muoki. He applied to withdraw after the accused persons told the court that they had lost faith in him. The court ordered that separate counsels be assigned to represent each accused persons. This was done but after some time the 1st accused told the court that he had no faith in his legal representative and the court changed counsels yet again.

I took over the proceedings in this case on 27th October 2014 after the transfer of Hon. Lady Justice Muchemi. I read the court records and noted that the attendance of the accused persons had been dispensed with by the court due to an incident that occurred in court on 11th December 2013. This incident, which is of a violent nature, is well documented in the court file.

Five witnesses have testified before me in the absence of the accused persons following the order by Hon. Lady Justice Muchemi's order that they be excluded from attending court. Their conduct and unruly behavior made it impossible for the court to conduct proceedings in their presence. The case for the prosecution was closed following the unsuccessful application for further adjournment. This court prepared a ruling and decided to have the accused present during the reading of the ruling. A production order was issued for the two accused persons to be present on 19th December 2016. On that day, this court asked the counsels for the accused persons to talk to them while in court cells before proceedings commenced. This was aimed at gauging their behaviour and confirming whether they would behave in court. Mr. Kagura for the 1st accused and Mr. Wakaba holding brief for Mr. Mutitu for the 2nd accused informed the court that they were not able to guarantee that the accused persons would behave in court. Counsels were of the view that the court proceeds to deliver its ruling in the absence of the accused persons and given the outcome, the court to give directions on how to proceed. The court delivered its ruling placing each of the accused persons on their defence.

In order to give directions on how the defence proceedings would be conducted, this court issued a production order for the accused persons to attend court for the defence case. The matter was fixed for 31st January 2017. On that date, both the accused persons attended court and from their address to the court it became apparent that they do not appreciate how the matter had been handled. They complain of being accorded unfair trial and the conduct of their advocates.

This court appreciates that the accused persons have a right to a fair trial as guaranteed under **Article 50 (2)(f)** which states as follows:

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

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.

It is therefore clear that the accused person's right to be present during the trial is dependent on his conducting himself in a manner that allows the court latitude to conduct proceedings in a sober manner. Any unruly behaviour by the accused person may compromise his right to be present during the trial by failing to treat the trial proceedings with the seriousness and respect that they deserve.

The purpose of today's mention is therefore to find out whether the accused persons are willing to submit themselves to the dictates of the law and allow the court to take their defence. The decision this court arrives at will be dependent on their response to this issue.

Dated, signed and delivered in open court this 7th day of March 2017.

S. N. Mutuku

Judge