



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL CASE NO. 107 OF 2014**

REPUBLIC.....PROSECUTOR

VERSUS

KIPKURUI ORONGE.....1<sup>ST</sup> ACCUSED

GILBERT KIRUI.....2<sup>ND</sup> ACCUSED

**RULING**

1. On 10<sup>th</sup> November, 2014, Gilbert Kirui the 2<sup>nd</sup> accused herein appeared before Wakiaga J on the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 18<sup>th</sup> August 2014 at Kisiara village in Transmara East Sub-County within Narok County jointly with another before court murdered **RICHARD KIPNGENO SITIENEI**. He pleaded not guilty to the offence.

2. On the 19<sup>th</sup> March, 2015 Miss Boyon, learned counsel for the state, submitted before Wakiaga J. that the state wished to withdraw the charge sheet against the 2<sup>nd</sup> accused person dated 8<sup>th</sup> October, 2014 and instead bring in a new charge sheet consolidating **Criminal Case No. 102 of 2014** and the present case. The court directed that this matter be mentioned later together with **Criminal Case No. 102 of 2014** for purposed of consolidation.

3. When the matter was subsequently mentioned before Wakiaga J, on 23<sup>rd</sup> June 2015 no consolidation of **Criminal Case 102 of 2014** with this file was done but instead the accused persons were subsequently released on bond. The matter then came up before me for hearing on 22<sup>nd</sup> March, 2016. Mr. Otieno for the state presented his opening remarks before this court after which the prosecution called 4 witnesses and closed its case.

4. Before ruling on whether the accused persons have a case to answer, a perusal of the handwritten proceedings by Wakiaga J, reveals that no fresh plea was taken by both accused persons on 19<sup>th</sup> March 2015 after the prosecution was granted leave to consolidate this charge with another charge which was in a separate case (No. 102 of 2014).

5. Regrettably, the provisions of **Section 214 (1) of the Criminal Procedure Code** were not complied with. **Section 214 (1) of the Criminal Procedure Code** empowers a trial court to order for alteration of the charge. The said Section provides as follows:

**“Either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the order.”**

**Provided that;**

**(i) Where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge.**

**(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused or his advocate, and in such last mentioned event, the prosecution shall have the right to re-examine any such witnesses on matters arising out of such further cross-examination.**

6. Unfortunately the court erroneously omitted to take a fresh plea upon consolidating the 2 files. The trial proceeded on the assumption that consolidation and plea had already been undertaken.

7. In my humble view and for all intents and purposes, the intended consolidation of this case with the charge in **Criminal Case 102 of 2014** resulted in the creation of a new charge. It was therefore a mandatory requirement that a fresh plea be taken on the consolidated charge sheet after the said consolidation.

8. In this instant case, it can be easily deduced that the trial of the two accused persons proceeded without the consolidation and without a charge sheet. Furthermore, whilst it is arguable whether or not the failure to have the accused take plea afresh is prejudicial to them, the fact remains that the words “shall” appearing in **Section 214 (1) (a) of the Criminal Procedure Code** leaves no room for discretion as the Section is couched in a mandatory requirement of the law. The failure to adhere to **Section 214 (1) (i) of the Criminal Procedure Code** renders evidence of tendered by PW1-PW4 a nullity and the same is hereby expunged from the court record. There is an error apparent on the face of the court record which error can only be corrected by the expunging of the evidence that is irregularly on record.

9. In view of the above observation, I hereby direct that the matter be mentioned before court 1 for the purposes of admission of the consolidated charge sheet dated 5<sup>th</sup> January 2015, the taking of plea and the hearing. Mention on 13<sup>th</sup> December 2016 for plea taking.

Delivered, dated and signed in at Kisii on **7<sup>th</sup> of November**, 2016.

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

-Mr. Miss Mbelete for the State

-Mr. Okenye for Okemwa for the Accused

-Omwoyo court clerk