REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 35 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ERNEST OJIAMBO alias MUSEVENI.....1st APPELLANT

STEPHEN WANDERA MUREFU alias MZEE PUNDA..2ND APELLANT

RULING

(NOTICE OF MOTION FILED BY THE ACCUSED PERSONS ON 10TH OCTOBER, 2016)

1. This ruling conveys the reasons for my decision on 6th April, 2016 dismissing the application filed on 10th October, 2016 by Ernest Ojiambo Mulefu (the 1st Applicant/1st Accused person) and Stephen Wandera Mulefu (the 2nd Applicant/2nd Accused person) in which they sought to arrest the judgment delivered by my brother F. Tuiyott, J on 16th August, 2016. In that judgment F. Tuiyott, J found the applicants guilty and convicted them of two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63.

2. At the time of delivering judgment, F. Tuiyott, J had already been transferred to another station and the onus of sentencing the accused persons fell on me as per the requirements of Section 200(2) as read with Section 201(2) of the Criminal Procedure Code, Cap. 75 ("the CPC")

3. The Applicants' notice of motion is brought under the provisions of the Constitution. However, a perusal of the contents of the notice of motion clearly shows it is brought under Section 89(1), 134 and 137(a)(i) of the CPC. The heading of the application and the submissions of the applicants establishes that this is an application to arrest judgment under the provisions of Section 324 of the CPC.

4. In summary the applicants' assertion is that their prosecution was not based on the first report made to the police as captured in the Occurrence Books of Funyula Police Post and Busia Police Station.

5. It is also their case that a suspect charged for committing the same murders was acquitted by this Court (D. Onyancha, J) in Busia H.C. Criminal Case No. 7 of 2010. The other arguments put forth by the applicants are majorly attacking the findings of the Court. I do not find it necessary to produce those arguments in this ruling.

6. The State opposed the application through a replying affidavit sworn by Benjamin Kelwon, a prosecution counsel in the office of the Director of Public Prosecutions. In Summary the State's case is that the application is baseless, misconceived and untenable in law. According to the State, an application brought under Section 324 of the CPC can only succeed if the charge sheet upon which an applicant is convicted is fatally defective even after the same has been amended. Further, that the applicants had been accorded an opportunity to defend themselves and if there was any defect in the information the court would have returned a finding of not guilty.

7. The application before me rests on Section 324 of the CPC which states:

> **"324. (1) The accused person may, at any time before sentence, whether on his plea of guilty or otherwise, move in arrest of judgment on the ground that the information does not, after any amendment which the court has made and had power to make,state an offence which the court has power to try.**

(2) The court may either hear and determine the matter during the same sitting,or adjourn the hearing thereof to a future time to be fixed for that purpose.

(3) If the court decides in favour of the accused, he shall be discharged from that information."

The essence of the above provision is to ensure that not one innocent man is sentenced for an offence not provided by the law. It avails a last chance to the court to ensure that the charge discloses an offence before pronouncing sentence. It is therefore a useful provision.

8. Indeed Section 276(1) of the CPC envisages the quashing of an information either before the accused pleads or on a motion made in arrest of judgment. It must therefore be stated that the application herein is properly before this Court.

9. In order for an applicant to succeed in moving the court to arrest judgment, he must demonstrate that the information does not state an offence which the court has power to try. It is difficult to think of the circumstances under which Section 324 can be successfully invoked. That is not the same as saying that this is an idle provision of the law.

10. A charge sheet can be said to be defective on the face of it where it does not disclose the offence with which an accused is charged and or particulars do not disclose any offence or give reasonable information as to the nature of the offence. A charge sheet can also be defective where it does not accord with the evidence given at the trial – see the Court of Appeal decision in **Peter Ngare Mwangi v Republic [2014] eKLR**.

11. In the case at hand, the information upon which the applicants were convicted disclosed the offence as murder contrary to Section 203 as read with Section 204 of the Penal Code. For each count the particulars of the offence disclosed the date and place where the applicants murdered the two deceased persons. It cannot therefore be said that the charge sheet is defective on the face of it as it complies with Section 134 of the CPC which requires a charge or information to contain a statement of the specific offence or offences together with sufficient particulars, as may be necessary, giving reasonable information as to the nature of the offence charged.

12. The information cannot also be said to be defective for not being supported by the evidence adduced. A Judge of this Court heard the witnesses and concluded that there was sufficient evidence to find the applicants guilty as charged

13. In short there is no reason for invoking Section 324 of the CPC as the applicants have not demonstrated that they were convicted upon information which did not state an offence which the court had power to try.

14. The application before this Court therefore lacks merit and the same stands dismissed.

Dated, signed and delivered at Busia this 8th December, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT