



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 42 OF 2013

REPUBLIC..... PROSECUTOR

VERSUS

1. MTSUMBA MUMBA

2. JUMAA MUMBA PEKESHE..... ACCUSED

RULING

This is a Ruling in an application by Counsel for the accused persons, Mr. Nabwana seeking to have the Investigating Officer investigate a claim by the accused persons that while they are in custody for failure to raise bond terms, their uncle, Jumapili Pekeshe Dume has chased away their mother and is selling their land making them extremely helpless and apprehensive. Mr. Nabwana has made the application under Article 159 (2) (f) of the Constitution.

He further prays that the Investigating Officer, after investigating the claim furnishes the report to the D.P.P. for action.

M/S Ochollla for the state objected to the application terming it misplaced since the case in which the same has been made is a murder case. She urged the defence counsel not to use the fact to get orders but have the accused's rights, if he feels have been infringed, addressed by the right court.

In considering the said application, I wish to appreciate the provisions of Article 159 (2) (a) and (d) of the Constitution.

Article 159 (2) of the Constitution provides that;-

“In exercising judicial authority, the court and tribunals shall be guided by the following principles:

(c) Justice shall be done to all irrespective of status;

(d) Justice shall be administered without undue regard to procedural technicalities;

While I agree with the prosecution that this is a murder case and that by this application the defence counsel may be seeking to have issues in another case determined in another, I have considered the circumstances in which the accused find themselves. They are in custody and hence unable to fight for their rights as would be free persons. And if their claim is true, it would only be prudent to conclude that their said uncle is taking advantage of their incarceration to vent injustice on their family and made them helpless.

As such, it would only be in the interest of justice, to disregard all procedure and forum so as to address the predicament the accused find themselves in.

I therefore urge the office of the Director of Public Prosecution to exercise the powers bestowed upon them under Article 157(6) of the Constitution which provides the;-

“The Director of Public Prosecutions shall exercise state powers of prosecution and may:-

- a. Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

The claim by the accused against their uncle borders on criminality. I direct that the office of the Director of Public Prosecution Coast region, instructs the police to investigate the said claim and if it is found the accused person’s uncle, Jumapili Pekeshe Dume is culpable, action be taken against him accordingly.

Ruling delivered, dated and signed this 4th day of November, 2015.

D.O. CHEPKWONY

JUDGE

In the presence of:

M/S Ocholla for the state

Mr. Nabwana for Accused persons

Court Assistant Mr. Kiarie

Court – The Ruling read out and to be typed and parties to be furnished with the same for further and/or necessary action. Hearing on 9/12/15.

D.O. CHEPKWONY

JUDGE