



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 9 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

MICHAEL THUO GIKARU.....APPLICANT

RULING

1. The Applicant is the 5th Accused person in this matter where he is charged alongside his co-accused with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offences are that on 23rd December 2013, at Mathare 3C in Starehe District within Nairobi County, jointly with others not before court murdered Johnson Kiruthu Kagio and David Njoroge Kiige. All five accused pleaded not guilty and are remanded in custody pending their trial which is yet to commence.
2. The Applicant has now filed a Notice of Motion dated 4th March 2014 under **Article 50(2) (b)** and **(j)** of the **Constitution** seeking for orders that the decision to commit him to trial was improper for lack of sufficient evidence and therefore that such committal be quashed, dismissed and revoked and that he be set free unless otherwise lawfully detained.
3. The Application is supported by the Affidavit of **Aaron Tanui**, learned defence counsel for the Applicant sworn on 4th March 2014. His contention is that there is no reference to the Applicant in the committal bundle in name or as having participated in the alleged crime. He avers that the Court has a duty to filter out cases that ought not to proceed to full trial; and especially so, in the absence of committal proceedings that were repealed through **the Criminal Law (Miscellaneous Amendments) Act, No. 5 of 2003**. He adds that where the committal materials disclose no offence, the court had unfettered jurisdiction and is bound to protect an applicant from the labour, stress and expense in having to wait till the end of the prosecution's case. He further avers that the Respondent's decision to commit the Applicant is unreasonable and so manifestly prejudicial that it should be quashed.
4. The Application is opposed by the Republic through the Replying Affidavit of the investigating officer, **PC Steve Owuor** of CID Headquarters sworn on 18th March 2014. He deposes that the Applicant has been referred to using the alias, *Bubas*, and that he was arrested after being physically identified by the witnesses. He adds that it is in the interests of justice for parties to be heard and that the evidence of the witnesses, D1 and D2 ought to be tested for the Court to make a determination. Further, he states that the prosecution intends (as permitted by law) to make amendments to the charge sheet by including the alias by which the Applicant is referred to in the witness statements.
5. At the hearing of the Application on 24th March 2014, I heard submissions from **Mr. Tanui** and **Mr. Okeyo** for the applicant and respondent respectively. **Mr. Tanui** submitted that the prosecution should show a *prima facie* case against an accused. He contested the arraignment on the ground that the prosecution was conducting a trial by ambush since the Applicant is not

- mentioned anywhere by any of the witnesses. He urged the court to take up its duty to filter out cases that should not go to trial in light of the absence of committal proceedings. He however did not submit on how the applicant's fair trial rights under the Constitution had been violated.
6. To further buttress his submissions, counsel relied on several authorities to wit:- **Republic v Francis Waweru Criminal Case No. 5 of 2003 [2006] eKLR; Said Mussa and Earl Jones, Magistrate for the Belmopan Court in the Cayo Judicial District, Supreme Court of Belize Claim No. 155 of 2008; and Republic v Pattni [2005] 1KLR**. He also cited **Archbold's Criminal Pleading Evidence and Practice, pp. 128 & 129**. I will return to these later.
 7. On the other hand, **Mr. Okeyo** the learned prosecution counsel totally relied on the averments in the sworn affidavit of the investigating officer, **PC Steve Owuor**, adding only that the State will seek to amend the charge sheet to reflect the alias name of the applicant.
 8. Having carefully considered the opposing affidavits and the submissions, I consider that the issue in this application is whether the Court has power to summarily determine whether or not the applicant should stand trial on the basis of evidence the prosecution intends to rely on. This issue must ultimately turn on the question whether there is an abuse of prosecutorial power or the process of court.
 9. The applicant's complaint is that he has been charged despite his name not having been mentioned anywhere in the witness statements. He urges the court to find his prosecution improper and stop any further proceedings against him. In calling on the court to do so, the applicant is in a sense asking the court to apply the procedure in the now repealed committal proceedings hitherto provided under **Section 233 of the Criminal Procedure Code** by which a magistrate, having read the committal documents, could discharge an accused person upon a finding that there were insufficient grounds for committing an accused person for trial. This procedure was repealed through the **Miscellaneous Criminal Law Amendments Act No. 5 of 2003**.
 10. Indeed the case of **Republic v Francis Waweru (supra)** to which the applicant referred the Court is a case in point. In that case the court dismissed the prosecution case and acquitted the accused person at a preliminary stage. The circumstances in that case are distinguishable in that, firstly, the case was heard when the procedure for committal proceedings was still applicable; and secondly, the issue before the High Court which arose out of those committal proceedings was a defective charge. Similarly, the power of the Court to quash a criminal trial on the ground of insufficiency of evidence described in **Archbold's Criminal Pleading Evidence and Practice, pp. 128 & 129** to which the applicant referred me is in the context of a committal trial. With respect to the case of **Said Mussa and Earl Jones, (supra)** that the Applicant also relied upon, the Court dismissed the order of the magistrates court committing the claimant to trial on the ground that there was no evidence to support the trial. This decision was based on the provisions on committal proceedings under the **Indictable Procedure Act Chapter 93, Laws of Belize Revised Edition 1990**.
 11. In **Republic v Pattni (supra)**, the Court did consider the prosecution evidence before determining that the accused person had no case to answer and therefore does not also support the Applicant's case. Indeed the court went ahead in that case to observe that following the repeal of provisions on committal proceedings, there was no known procedure that courts should follow in the production of committal documents before the commencement of a trial.
 12. I must observe in this application that the decision to prosecute a person for commission of a crime lies solely with the Director of Public Prosecutions. As **Article 157 (6)(a)** of the **Constitution** provides, the Director of Public Prosecutions (DPP) has powers to:

“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 independence of the DPP in this respect is protected under **Article 157(10)** which provides that:

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”

In discharging its prosecution mandate however, the **DPP** is required under **Article 157 (11)** to have regard to “*the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.*” This requirement is echoed by **Section 4** of the **Office of the Director of Public Prosecutions Act**. The Court has the duty to ensure that those principles are adhered to in order to preserve the integrity of proceedings before it.

13. It is the duty of the Court to uphold the principles set out by the Constitution in exercising its judicial authority. This duty includes upholding the rights of an accused person, and particularly the rights cited by the Applicant, namely, the right “*to be informed of the charge with sufficient detail*” under **Article 50(2)(b)** and the right “*to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence*” under **Article 50(2)(j)**. Where proceedings are brought for a purpose that is not in one accord with these principles, the Court has power to intervene to protect the rights of the accused as well as prevent the abuse of process of court.

14. The power of the Court in this respect was well set out in the case of **Mills v Cooper [1967] 2 QB 459** in the following words:

“Every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and abuse of the process of the court.”

15. The Applicant alleges that from the information supplied by the prosecution, there is no sufficient evidence against him to warrant continuance with the trial. The record however shows that when arraigned in Court on 19th November 2013, the Applicant pleaded to the charges on the basis of the consolidated charge in **H.C.CR. Case No. 9 of 2013** dated 19th November 2013, where his name was included as the 5th accused. From the Information it is clear what charges the Applicant is facing and it is not therefore proper to say that he is being tried by ambush. Despite having cited **Article 50(2) (b)** and **(j)** in moving this Court, the Applicant has not demonstrated how his right to a fair trial has been violated. As admitted by the defence counsel the charge sheet and witness statements have already been availed by the Respondent.

16. As earlier stated, the Applicant contends that he is not mentioned anywhere in the witness statements. I have perused the witness statements and it is true that the names of the Applicant as indicated in the charge sheet do not appear. The Respondent has however stated that the Applicant has been referred to using an alias and further that the Applicant was arrested on the basis of identification by some of the witnesses whose statements are relied on by the prosecution. I consider this an issue of identity of the Applicant which in essence is an issue of fact to be proved or disproved at trial.

17. Further, even if the identity of the Applicant in as far as his name is concerned were in contention, I find that this would not be a ground for reaching a conclusion that charges against the Applicant cannot be sustained. **Section 137** of the **Criminal Procedure Code** provides that:

“The description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation, and if, owing to the name of the person not being known, or for any other reason it is impracticable to give such a description or designation, a description or designation shall be given as is reasonably practicable in the circumstances, or the person may be described as “a person unknown.”
(Emphasis added)

18. From the foregoing, I find that the Applicant has not demonstrated how his fair trial rights have been violated; nor any abuse of the prosecutorial power; nor an abuse of process of court to warrant the grant of the orders sought. I find his application without merit and dismiss it accordingly. The matter shall proceed to trial on the dates already allocated by the court.

Ruling signed, dated and delivered in open court this 13th day of May 2014.

R.LAGAT-KORIR

JUDGE

In the presence of:

-: Court clerk
-: Accused/Applicant
-: For accused/applicant
-: For the State/respondent