



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CRIMINAL CASE NO.57 OF 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES OMONDI *alias* CASTRO.....1<sup>ST</sup> ACCUSED**

**WYCLIFF WALIMBWA SIMIYU.....2<sup>ND</sup> ACCUSED**

**PAUL OTHIENO *alias* BABA.....3<sup>RD</sup> ACCUSED**

**MARY MUTHONI.....4<sup>TH</sup> ACCUSED**

**RULING**

This case has a history. This is the second trial of the accused persons. This court commenced *de novo* hearing of this case on 25<sup>th</sup> January, 2012. In between, this Judge went on transfer to Busia High Court. Part of the hearing continued when this Judge was sitting in Busia. When the Judge was again re-transferred to Nairobi – the Court continued with the hearing of the case despite the fact that the Judge was no longer assigned to work in the Criminal Division. On several occasions, this court has impressed upon the prosecution of the need to expedite the hearing of the case. For instance, on 15<sup>th</sup> October 2012, the then prosecutor Mr. Muteti failed to attend court because it was said that he had attended a conference in Tanzania. This was despite the fact that the Judge, while sitting in Busia had earlier on 7<sup>th</sup> August, 2012 fixed the case for hearing for three consecutive days starting on 15<sup>th</sup> October 2012. The court was not impressed by the decision of the prosecutor to prioritize a conference over the conduct of the case.

This court ordered the case to be referred to the Head of Criminal Division for the allocation of the same to another Judge in the Criminal Division to hear the case. When this Judge was transferred back to Nairobi in January 2013, the prosecution and the defence appeared before this court and pleaded with the court to continue with the hearing of the case. The court acceded to the request on condition that the prosecution avails all the witnesses when the case was next listed for hearing. This court did on 7<sup>th</sup> April 2014 fix the hearing of this case for the 14<sup>th</sup> and 15<sup>th</sup> July 2014. It was Mr. Muteti who was in court on that day. The prosecution had more than sufficient time to inform the witnesses to be available in court. This is more so since the majority of the remaining witnesses are police officers. Yesterday, Miss Oundo informed the Court that she would avail the two remaining witnesses after which the prosecution would close its case. Miss Oundo gave the court assurance that the two witnesses will be availed today. The story changed when the matter was placed before the court today. The prosecution informed the court that the two witnesses are not available in court - the prosecution also desired to call all the remaining witnesses. The prosecution did not offer any reason why they failed to contact the said witnesses in time. The only reason the prosecution gave is that they have tried to contact the witnesses by phone but they could not reach them. Surely, the prosecution should have contacted the said witnesses using formal channels in the intervening period since the hearing date was fixed three (3) months ago. I agree with Mr. Weda that the prosecution has not given any reason for seeking, once again to adjourn this case. The scales of justice requires that the interest of the prosecution and that of the defence be taken into account at all times during trial. The scales of justice must be balanced.

In the present case, the accused persons have been in remand custody for over seven (7) years. It is in the interest of justice that the hearing of this case is expedited and concluded. The prosecution has been given

more than ample time to avail their witnesses. To further adjourn this case will cause injustice to the accused persons. The application for adjournment is therefore refused.

The hearing of this case shall proceed.

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY 2012**

**L. KIMARU**

**JUDGE**