



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Criminal Appeal 49 of 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AMOS GICHUHI KIMERIA.....ACCUSED**

**RULING**

This ruling is in respect of the Chamber Summons application dated 9<sup>th</sup> July, 2012. The application is brought under Article s **19, 20(1) 23, 24, 25, 27, 28, 33, 33(2)(3), 34, 50, 50(8)** of the **Constitution**.

In this application, the applicant who is charged with **murder** contrary to **Section 203** as read with **Section 204** and whose plea has been deferred o 19<sup>th</sup> July, 2012 is seeking that the court proceedings herein be conducted in absence of members of the public and media and the media be prohibited from, covering, airing and/or publishing any story relating and/or connected to the case herein. The application is premised on the grounds that:

- a) the members of the public are unlawfully and improperly interfering with the applicant's representation by his counsel in court which threatens counsel's security, peace of mind, privacy and concentration in court proceedings herein;
- b) the media is misreporting facts and information about this case which may adversely affect the applicant's defence and intimidate his witnesses or prejudice his Constitutional rights to be presumed innocent until proven guilty;
- c) the reports and/or story being published by the media demonizing the applicant herein and may prejudice his life after the proceedings herein as it portrays him as a "cannibal" and/or somebody who is not fit to live among people which may put unnecessary pressure to court such that even if justice is done, it may not be seen to have been done;
- d) the nature of reporting being made by the media may bring disrespect, lack of confidence and/or contempt of court if the applicant was to be found innocent of the charges herein.

When this application came up for hearing on 9<sup>th</sup> July, 2012, I certified the same as urgent and ordered that it be served on the State for *inter partes* hearing on 12<sup>th</sup> July, 2012.

On 12<sup>th</sup> July, 2012, when the matter came up for hearing, learned counsel for the State stated that the prayers sought did not affect the State and for that reason, the prosecution did not wish to reply.

Learned counsel for the applicant reiterated the averments contained in his affidavit and urged the court to exclude members of the public and media from the proceedings for the reasons that he is unable to represent his client as members of public cannot understand why such a person can have an advocate; that the image of the applicant presented by the media is prejudicial and should he be acquitted, his life will be endangered; that the applicant is being portrayed as guilty by the media before trial.

Among the rights of the accused that are alleged to have been violated or which are threatened with violation are the right to a fair trial under **Article 50(8)** and his right to human dignity under **Article 28**.

By dint of **Article 22(1)** of the **Constitution** every person can institute proceedings to claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or is threatened and the High Court is enjoined to hear and determine such claims and in so doing, may issue various reliefs.

In determining the question whether a right has been denied, violated or threatened, the court must balance the enjoyment of those rights and freedoms by an individual to ensure that the other rights and fundamental freedoms of others are not thereby prejudiced. The enforcement of the Bill of Rights under **Article 22** aforesaid must be done in accordance with the rules made under **Section 84(6)** of the **former Constitution** as no rules have been made under the **2010 Constitution**. These rules are commonly referred to as the **Gicheru Rules**.

According to those Rules, where contravention of fundamental rights and freedoms of an individual are alleged or apprehended, an application by way of a petition in prescribed form is brought supported by an affidavit. The petition in a criminal case must be served on the Attorney general (now DPP). Once a petition has been filed, the court may hear and determine any application brought by chamber summons for conservatory or interim orders. At the same time, where a constitution issue is raised in matter before the High Court, the same may be treated as a preliminary point and determined as such,

Finally, in the exercise of judicial authority, the Constitution enjoins the courts to administer justice without due regard to procedural technicalities. Applying the foregoing principles to the present application, it can be argued that the **Gicheru Rules** have not been complied with in bringing this application as it has not been brought by way of a petition and the chamber summons filed herein cannot be regarded as the chambers summons envisaged under **Rule 21** of the **Gicheru Rules** for conservatory or interim relief. But it can also be argued that the application has been brought in terms of **Rules 23** which provides that:

**“23. Where a Constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issued as a preliminary point and shall hear and determine the same.”**

In applying the provision of the Bill of Rights, the court must adopt the interpretation that most favours the enforcement of a right or fundamental freedom. In this instance, and in view of the gravity of the issues raised in this application, I will proceed under **Rule 23** and consider the application as raising a preliminary point.

The applicant through counsel has deposed that following his arraignment before the court, there have been newspapers reports which are prejudicial to his fair trial; that the members of public in court have expressed their disgust at the fact that an advocate can represent a person charged with such a crime. From the annexed copies of newspaper cuttings, it is clear some of the leading mainstream newspapers (the Nation, the Standard and the Star) have been carrying reports of this case. For instance in the article in question, it is reported that:

- i) **“A farm worker suspected of killing a middle-aged man and eating his organs.....”**
- ii) **“A farm hand suspected of slaughtering another and cooking his organs has appeared in**

**court..... Mr. Lodoket who lives in a large farm in Tetu area of Subukia was apparently way-laid last Thursday evening, when he was struck with a panga and some of his body parts removed..... Among the organs which were missing from the body were the heart, liver, penis and intestines. .... intestines were found in a neighboring house half-cooked in a boiling pot..... The thigh fresh was found in the ceiling.”**

**iii) “He always carried a panga with him while herding livestock belonging to his employer, but no one thought he would use it to kill somebody and later make a meal out of him ..... Residents of Tetu Farm in Subukia say Mr. Kimeria attacked Mr. Samuel Epolisi Lodoket, beheaded him and proceeded to make a meal of boiled bowels and roasted human flesh for the night.”**

**iv) “The suspect, who has been under tight police security at Kirengero Police Station is accused of hacking Mr. Peter Chepongos to death at Tetu Farm before making soup using the victim’s bowels and a leg.”**

(Emphasis added)

These detailed reports are being published even before the applicant has pleaded to the charges. All there is in the court file is the information charging him with murder and a brief outline of the particulars of the charge, namely that the offence is alleged to have been committed on 28<sup>th</sup> June, 2012 at Tetu Farm Subukia District and the name of the deceased. No evidence has been presented in the case as the trial is yet to commence, yet the media has concluded that the applicant slaughtered with a panga, killed, cooked and ate human organs of the deceased. The articles are highly prejudicial to the applicant’s fair hearing and are perhaps the cause of the public reaction.

Judicial authority derived from the people of Kenya, is vested and exercised only by the courts, and not the media. While it is appreciated that the Constitution guarantees media freedom, like all freedoms, media freedom must be exercised responsibly and without infringing on the enjoyment by others of their rights and freedoms. This is what the Media Act demands of the media in Kenya. **Section 35** provides that:

- 1. The media shall, in a free and independent manner and style, inform the public on issues of public interest and importance in a fair, accurate and unbiased manner whilst distinctly isolating opinion from fact and avoiding offensive coverage of nudity, violence and ethnic biases.**
- 2. The media shall keep and maintain high professional and ethical standards and shall, at all times, have due regard to the Code of Conduct set out in the Second Schedule to this Act.”**

Having find that the reports are prejudicial to the fair trial of the applicant, should members of the public be excluded at the trial of this case?

Right to a fair hearing includes the right a public hearing before a court, the right to be presumed innocent until the contrary is proved. Article 50(8), however, provides the circumstances under which the media and members of the public may be excluded from public hearing as follows:

**“(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.”**

The manner in which this case has been publicised makes the applicant and his counsel vulnerable persons unless appropriate measures are employed.

Balancing the applicant’s right to a fair and public trial and the citizens’ right to information, I make the following orders:

i) The media shall report accurately and fairly the trial and only matters or evidence presented before the court without drawing conclusions that are likely to incite or influence public outrage against the applicant or his counsel.

ii) Any media house that will violate (i) above or any member of the public who will threaten, by word of mouth or conduct, the applicant or his counsel will be excluded from the proceedings.

The foregoing are not gag orders but a reminder of guidelines of professional reporting as articulated in the Code of Conduct for the Practice of Journalism made pursuant to section 35(2) of the Media Act.

**Dated, Signed and Delivered at Nakuru this 16<sup>th</sup> day of July, 2012**

**W. OUKO  
JUDGE**