



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MILIMANI

ANTI-CORRUPTION CASE NO. 24 OF 2019

REPUBLIC..... PROSECUTOR

VERSUS

GEORGE NGUGI)

MUSEE MOSES MALUKI)

ABDUL AZIZ ALIM)

NOAH AKALA ADUWO).....ACCUSED

RULING

Mr. Kanyoko, the Advocate for the 1st suspect herein objected to the taking of plea on the ground that the charge sheet is defective in that it charges the accused in count III with attempt to extort by threats contrary to section 300(1)(a) of the Penal Code and at the same time, proceeds to charge him again, in count IV with an offence of conspiracy contrary to section 393 of the Penal code.

He submitted that the particulars of the two offences are identical and thus the charges are in fact duplicated.

He argued that a charge of conspiracy, just like attempt as an incomplete/ inchoate offence and thus, the two should not sit together in the same charge sheet on the same facts.

He referred to section 134 of the CPC in submitting that that a charge should be clear and should have no room for ambiguity as this could embarrass the accused in discerning the offence he/she is facing.

He argued that either the prosecution elects to proceed with attempt or conspiracy, but it cannot have both sitting in one charge sheet.

Mr. Chege for 3rd and 4th suspect associated himself with the submissions of Mr. Kanyoko.

M/s Kaniu appearing for the prosecution in a brief response submitted that both count 3 and 4 are quite distinct offences and element of the two offences are also different.

She pointed out that an attempt to extort by threat is actually different from conspiracy which is a complete offence that entails planning and meeting of the minds.

She further argued that this application is premature because accused have not taken plea/or charges have not been read to them.

I will start with the last submission of M/s Kaniu that the application is premature because the charges have not been read to the accused persons.

That position taken by the state is misconceived. Already, the accused persons are before court and the charges they are to respond to have been duly filed and registered with the court.

Any motion in respect of those charges cannot be premature, including any preliminary motion to oppose the taking of plea or dismissal of the same.

I thus find that this ground of objection cannot be sustained, once accused/suspect is presented before court, he is at liberty to be heard especially where he objects to validity or legality of the charge brought against him.

That aside, I now address the issue raised, by Mr. Kanyoko on whether the charge of conspiracy can stand together in one charge sheet with attempts to extort by threats.

Mr. Kanyoko submitted that a conspiracy is an inchoate offence, the same way as an attempt. He thus submitted that you cannot charge conspiracy together with the attempt.

I am unable to agree with Mr. Kanyoko on one fact; conspiracy is a unique offence.

Whereas an attempt “merges” with the actual or substantive crime/offence once the crime is committed; so that it is not possible to prosecute someone for an attempt and actual offence at the same time because the element of an attempt are included in the completed offence.; that is not the case with conspiracy.

This is because elements of proving conspiracy are never included and do not form part of the related offence.

There are two type of conspiracy. First, conspiracy is found to commit an offence, for instance, an agreement to commit an offence of say murder, for this even if no overt act is done, this kind of conspiracy is completed.

The second type of conspiracy is found to do an act, which is not illegal but by illegal means.

This act does not amount to criminal conspiracy unless some act besides the agreement is done by one or more parties to such an agreement in pursuant of the four enterprise.

The difference between conspiracy and other offences, is that whereas in other offences, the intention to do a criminal act is not a crime in itself until something is done amounting to doing or attempting to do some act, conspiracy on the contrary is constituted in an agreement to do something illegal, or something legal but by unlawful means, no matter whether it is done or not.

In conspiracy, what is to be proved is not the actual offence or attempt to commit the offence, but agreement and common design rather than specific element of a particular crime.

In the present case, I see no danger that accused will be embarrassed in defence of the charge(s) since the question of whether there was a scheme/plan/conspiracy to commit a felony, by extortion is by itself different given whether indeed extortion or attempt to extort did actually occur in fact.

I thus find no merit in this objection and dismiss it accordingly.

Ruling read in open court.

L.N. MUGAMBI

CM

9/9/19