



**Republic v Yoma & 11 others (Criminal Case E074 of 2022)
[2025] KEHC 646 (KLR) (Crim) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E074 OF 2022
MW MUIGAI, J
JANUARY 30, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

**TITUS YOMA 1ST ACCUSED
TITUS MUTUNE 2ND ACCUSED
JOHN CHENGO MASHA 3RD ACCUSED
LINAH KOGEY 4TH ACCUSED
BENJAMIN KIPKOKEI KOIMA 5TH ACCUSED
BENJAMIN LORIMA 6TH ACCUSED
VOLKER EDAMBO 7TH ACCUSED
CYPRINE ROBI WANKIO 8TH ACCUSED
JODPHAT SENSIRA 9TH ACCUSED
MOHAMMED ALI GUYO 10TH ACCUSED
MOHAMMED BAA 11TH ACCUSED
JAMES RONO 12TH ACCUSED**

RULING

1. The Presiding Judge referred the matter to this Court for plea taking deferred on 29/01/2025. On 29/1/2025 the proceedings commenced as follows;



- Mr. Baraza, leading Counsel of the State/ODPP team addressed Court, that the 11th accused Mohammed Baa had not been arrested to date despite warrant of arrest being issued by the court.
2. Chief Inspector Peter Kanagi from National Police Service appeared in Court on behalf of the Inspector General and produced Report/letter dated 13/1/2025 authored by Regional Police Commander North Eastern Region that alluded to the efforts made to trace 11th Accused Mr. Mohammed Baa Amin ASP (retired) at his original home Madaga Village, Korwa Sub Location in Batalu Location, Wajir County. The 11th Accused his parents and close relatives relocated to unknown location and his home being near the border, there is likelihood that he might have crossed over to neighboring country, efforts to trace him were ongoing.
 3. The ODPP informed Court that this is a different Court dealing with different jurisdiction; applying the Rome Statute domesticated by the *International Crimes Act* 2008. The statutes deal with serious crimes against humanity.
 4. Section 7 of *International Crimes Act* provides for adoption of the Rome Statute. Article 61 of the Rome Statute provides for the suspect(s) be present during the trial and hence plea taking is held in abeyance. The Rulings by Hon. Kimondo J were Judicial Review challenging the decision to prosecute which was upheld. The Rulings by Hon LJ Mutende reinforced the earlier Rulings findings.
 5. The ODPP requested to be allowed to engage in International Cooperation and Mutual Legal Assistance processes to be employed to effect arrest of 11th Accused person and present all suspects for plea-taking.
 6. ODPP requires 45 days to engage IPOA and consult further on review and amendment of charges preferred.
 7. The Defense Counsel led by SC Nelson Havi & Mr Andrew Makundi intimated that in light of the power donated by Constitution to the ODPP to make decision to prosecute withdraw, amend, substitute charges they will be ready to proceed when ODPP is done with amendments of charge sheet.
 8. The Victims represented by Mr Edward Mbanya & Mr Willis Otieno submitted that the stare decisis doctrine applies; the Rulings of the Court recognized the domestication of Rome Statute by *International Crimes Act*. With regard to amendment of charges/Information, they did not object to the amendment but the length of time and proposed a shorter period.
 9. The Court was asked to consider that the matter arose in 2017 and the victims have been waiting and further delay of the matter is not only denial of justice of victims but more trauma inflicted on them. The matter has been in Court 4 times pending /deferring plea taking. The plea taking should commence in the afternoon as the matter ought to be expedited. The plight of victims ought to be taken into account and the matter expedited as it is 7 years later/now.
 10. The Victim's representatives noted the Rulings of the Court are binding on parties and the Court and a similar application was made previously by ODPP requesting, 45 days to apprehend the 11th Accused person and ODPP was granted the adjournment and thereafter plea-taking to proceed.
 11. The plea taking ought to proceed as the matter has
delayed and Accused persons may take plea in the absence of the 11th Accused person. Thereafter, ODPP may make all other Applications.
 12. The Law applicable in these proceedings is the Laws of Kenya specifically Criminal Procedure Code as the Rome Statute is domesticated by *International Crimes Act*.



13. Law Society of Kenya represented by Mr Mango, Mr Kabata & Ms Dorcas Oluoch LSK Kisumu Branch emphasized that the matter is of great public importance/interest and ODPP applying Article 157 Constitution, should be in administration of justice and not abuse of legal process. Section 4 of ODPP Act provides that ODPP is to act in a manner that promotes public confidence. This is the 4th Application by ODPP deferring plea-taking.
14. Article 159 of *the Constitution* & Guidelines for Active Case Management in Criminal cases promotes efficiency and expeditious disposal of [criminal] cases.

With regard to waiting for arrest of 11th Accused who absconded and warrant of arrest is in force, the Lawyers indicated plea-taking could proceed in the absence of some/any Accused persons. The same is provided for in Section 2,4,& 5 of *International Crimes Act*. A case in point was/is the Joseph Kony case.

12. Mr. Festus Kinoti of IPOA confirmed court that they were the Investigating Agency in this matter that culminated to the preferred charges by ODPP. It was intimated if the Court granted adjournment for amendment of charges by ODPP, the Investigation Officers were in Court ready to engage and discuss the matter with ODPP with a view to expediting plea taking in the afternoon.
13. ODPP responded by acknowledging delay of the process but on reasonable grounds, whereas it is good to expedite matters procedural safeguards must be adhered to and ensure fair hearing and not determine that all men are guilty.
14. Whereas charges/information plea -taking may proceed without some/any of the suspects/Accused person, not all cases proceed in the same manner. In this case the Prosecution is seeking to establish accountability because of the role each party/suspect played as part of the command team and the responsibility is based on Rome Statute.
15. The Court Record reflects the following Rulings/Judgments so far;
 - a. Ruling of 18/1/2024 by Hon.K.Kimondo J declined application to have 3 Bench to hear and substantial questions of law.
 - b. Ruling of 25/7/2024 by Hon K.Kimondo on the Application that the charges disclosed in the Information did not meet the threshold of International crimes based on command responsibility. The charges did not comply with Constitution. Plea-taking to proceed.
 - c. Ruling of 3/10/2024 by Hon. L. J. Mutende on application to defer plea-taking as 11th Accused is on Warrant of arrest. Plea-taking deferred to proceed on 5/11/2024.
 - d. Ruling of 5/11/2024 by Hon. L.J.Mutende on 4th Suspect's absence on medical grounds. Plea-taking deferred to proceed 15/1/2025.

These are binding court orders for compliance and enforcement unless until set aside, varied, reviewed or successfully appealed against.

12. With regard to the 1st ground for adjournment is that the 11th Accused person has been under warrant of arrest and DCI/National Police Service has presented facts detailed by letter of 13/1/2025 of efforts so far employed to trace, apprehend arrest the 11th Accused person. ODPP requests further 45 days and seeks to engage International Co-operation and Mutual Legal Assistance processes and seeks deferment of plea taking. This request is vehemently opposed by Investigating arm/body IPOA & Victims through respective Counsel.



12. Article 61 of *Rome Statute* (Chapter 5 Investigation & Prosecution) (2) provides;

The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has;

- a. Waived his right to be present; or
- b. Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm the charges will be held.

In that case, the person shall be represented by Counsel where the Pre-Trial Chamber determines that it is in the interest of justice.

12. The *International Crimes Act* 2008 domesticates the Rome Statute. By Section 4 of the Act, the Act provides that the Rome Statute shall have force of law and the relevant provisions of the Rome statute are absorbed/ applicable under the *International Crimes Act* include Chapter 5 Investigation & Prosecution which includes Article 61 outlined above & Part 6 that relates to the conduct of Trials among others.

13. Section 5 of *International Crimes Act* provides International crimes in Kenya or elsewhere include, genocide, crime against humanity or war crime.

Section 7 of the Act provides for General Principles of Criminal Law applicable as outlined in Article 20-33 of Rome Statute. The Jurisdiction of the Court to try offences outlined in Section 6 of the Act shall be by the High Court.

12. In line with the above provisions of law, with respect the process to avail the Absent suspect has been explained in great detail and it amounts to plausible and reasonable efforts to arrest and avail the 11th Accused in Court for plea-taking. However, as foreseen even in the International Criminal Court it is possible to have suspect available then flees disappears/absconds and Article 61(2) of Rome Statute provides an elaborate process that culminates to proceeding in the absence of the missing/ absent suspect as provided by Article 61(2)b of the Statute.

13. In the case of The Prosecutor vs Joseph Kony decision delivered on 29/10/2024, Pre-Trial Chamber III considered the following;

14. “On 8/7/2005, Pre-Trial Chamber issued warrant of arrest under seal to Joseph Kony for war crimes and crimes against humanity allegedly committed in 2003-2004 in Uganda. The warrant of arrest was amended on 27/9/2005. On 24/11/2022, Prosecution submitted a request to hold hearing for confirmation of charges against Mr Kony in his absence. On 30/3/2023, The Registry submitted Report on efforts taken to locate and secure his arrest. On 2/5/2024, the Judge authorized the Registry to start procedure for selection of Counsel for Mr Kony and to appear to make observations on his behalf.”

15. On 23/11/2023 Pre-Trial Chamber II issued decision to hold confirmation of charges hearing in Kony’s case in the suspect’s absence. The suspect qualified as a person who could not be found within Article 61(2) (b) of Rome Statute

16. The Court observed as follows; [paragraph 98 of decision]

The Obligation of the Chamber set out in Article 61 2 (b) of the Statute in relation to efforts taken to secure the appearance of the suspect and to inform him or her of the charges and the



date of the hearing, do not require any positive result to be obtained. The Chamber must only ensure that the efforts undertaken to secure the appearance and inform the suspect were adequate for that purpose. The adequacy of the steps is assessed in light of the 'all reasonable steps' standard applicable in the present instance.

12. Locally, In the case of Bramwel Juma Wanyalikhya vs ODPP & 18 others (2019) eKLR [ACEC REVISION CASE 24 OF 2019]

The Applicant with 17 others was arraigned before Chief Magistrate's Court in ACC No 50 of 2018 facing various counts of corruption and economic crimes. During plea-taking 17th & 18th Accused persons both Canadians were absent. It emerged that lack of issuance of Summons to appear and that their appearance in Court could not be secured as they were beyond jurisdiction of the court.

However, the Court proceeded to take plea and entered plea of not guilty against /for 17th & 18th accused persons yet they were not in Court.

12. The Applicants applied for revision and relying on the case of Kimani vs Kihara (1983) eKLR where it was the Accused person has to be in Court for purposes of pleading to formal charge only then can the Magistrate be said to be trying a case. A Party cannot be found guilty on charges one did not plead to and on evidence they did not hear. The charge has to be read to those present and charge to read with others not before Court and case against 17th & 18th Accused withdrawn under Section 87(A) CPC. The Trial Court Ruling was set aside as it was contrary to Section 50 Constitution. See also Republic vs Ibrahim Hati Isaak & 5 Others [2016] eKLR & Geoffrey Murithi alias Gikundi & Anor vs ODPP [2017] eKLR on the same point.
13. From the above legal provisions and case-law, it emerges that under International criminal law the criminal case may proceed in the absence of the suspect/Accused person after all reasonable steps have been taken and Counsel is appointed to represent the suspect/Accused person in absentia.
14. On the other hand, locally; there is the Constitutional standard that shall be complied with. Article 2 (1) & (3) of *the Constitution* , *the Constitution* is supreme law of the land. Article 2(5) & (6) of *the Constitution* provides for General Rules of International law Treaties & Conventions ratified are part of Kenyan Law but subject to Constitution 2010. *The Constitution* 6th Schedule Article 262 Rule 7 mandates all laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring in conformity with this Constitution.
15. It is imperative that 11th Accused is protected under Article 50 of *the Constitution* as all other parties in these proceedings. All efforts of all reasonable efforts shall be exhausted and if not fruitful the ODPP shall exercise the right to withdraw charges against 11th Accused person and proceed with the trial to its logical conclusion.
16. Be that as it may it is also not practical to hold the Court and suspects and victims all Parties ransom that until 11th Accused is found that is when the matter shall proceed. What if he is not found despite all reasonable steps taken genuinely to get 11th Accused person?
17. The Court wishes to observe that where a criminal case proceeds with suspects/Accused persons charged with others not before Court, those are suspects adversely implicated during investigations and have not been traced, arrested or identified, thus the proceedings are conducted with the mention of others not in Court. However, where all suspects are apprehended and arraigned in Court then any/ some abscond from Court all efforts to trace them are first exhausted before ODPP exercises mandate to withdraw amend or substitute charges/Information and this proceed with others not before court.



18. The ODPP also made application seeking to amend charges before plea taking. The Constitutional mandate the Office of Director of Public Prosecution (ODPP) is provided under Article 157 of *the Constitution*. The main mandate is to institute criminal proceedings. Walingo v *Directorate of Criminal Investigation & 4 others; Seno & another (Interested Parties) (Constitutional Petition E028 of 2022)* [2024] KEHC 2889 (KLR) The Defence and Victims Counsel did not object to amendment of charges but time and proposed plea taking commences then applications are made thereafter.
19. The Victims Representatives vehemently objected to adjournment for 45 days but not to the amendment of charges they cited the plight and frustration of the deceased's family, other victims that have waited for their day in Court. On the other hand, ODPP expressed concern that the substantial legal issues are novel and serious International crimes where accountability in command responsibility ought to be determined through evidence.
- However, all parties are entitled to expeditious disposal of the matter but at the same time each party's rights are protected under the law, both the victims and suspects, one should not be condemned unheard and all should be accorded fair hearing. Therefore, the exercise of judicial discretion in the circumstances must, like all other discretionary powers be exercised judiciously and ensure justice all the parties. The duty of the Court must of necessity be to balance the rights of the parties in this case.
12. Taking all circumstances into account the justice of the case demands that an adjournment is granted to the ODPP as follows;
- a. 30 days to ensure all reasonable steps have been taken in efforts to trace and apprehend the 11th Accused person. A Report to that effect shall be presented again finally by Inspector -General or Senior Official/Representative in National Police Service to Court and
 - b. ODPP to pursue amendment of charges/Information in consultation with IPOA and/or other relevant Institutions as was alluded to during the hearing.
 - c. ODPP to consider withdrawal of charges against 11th Accused if all efforts to trace him are futile as the matter cannot remain in Court ad infinitum.
 - d. The Amended Charge Sheet/Information shall be subject of plea-taking on 3/3/2025.

RULING DELIVERED DATED & SIGNED IN OPEN COURT IN NAIROBI CRIMINAL DIVISION ON 30/1/2024.

M.W. MUIGAI

JUDGE

