REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CRIMINAL CASE NO. 35 OF 2010

REPUBLIC-- PROSECUTOR

VERSUS

ERNEST OJIAMBO MULEFU ALIAS MUSEVENI----------1ST ACCUSED

STEPHEN WANDERA MUREFU ALIAS MZEE PUNDA---2ND ACCUSED

RULING

1. The Prosecution has closed its Case in the Trial of Ernest Ojiambo Mulefu alias Museveni and Stephen Wandera Mulefu alias Mzee Punda (jointly referred to as the Accused persons). They face the charge of Murder on two Counts. In Count 1, it is alleged that on the night of 6th and 7th day of February 2010, at Nangoma village Matayos Division within Busia County, jointly with others not before court, murdered Agaitano Babu Ochieno . The 2nd Count is that on the same night and at the same place, they jointly with others not before Court murdered Silvester Ojanji.
2. Before the Court could hear Counsel on submissions as to whether the Accused Persons should be placed on their Defence, the Accused persons filed a Notice of Motion dated 18th September 2015 seeking the determination of the following issues:-

1. **Whether the court was satisfied/informed as to the mental fitness of the accused persons to stand trial herein.**
2. **Whether the accused persons were supplied with and or informed in advance of the evidence the prosecution intended to rely on or had reasonable access thereof before the commencement of the trial herein.**
3. **Whether within the context of issue No. 2 above, the accused persons could have had adequate time and facilities to prepare their trial and defence.**

3. That Application was supported by the Affidavit of Joseph Paul Makokha sworn on the same date. Mr. Makokha is the Advocate for the Accused Persons. The Advocate depones that he took over the conduct of this matter on behalf of the Accused Persons on 11th December 2014. Previously, the Accused Persons had successively been represented by three other Advocates. And that having studied the typed proceedings, after the close of the Prosecution case, he found it necessary to take further instructions from the Accused persons.
4. The Accused Persons complain that the Prosecution did not avail its evidence and witness statements on time or at all. That further the Accused Persons were subjected to an Amended Information and hearing on the basis of that Information before they could have time to understand it and advise their advocate on the impact of the amendment and how to proceed.

The Accused Persons hold the view that their right to fair trial has been violated.

5. On another limb, the Advocate averred that the Accused Persons had denied ever being taken for mental assessment and that as the Advocate for the Accused persons, he was in doubt as to whether the Accused persons were fit to stand trial.
6. In opposing the Application the State through Mr. Benjamin Kipyegon Kelwon swore an affidavit on 22nd September 2015. In it, Counsel averred the Prosecution supplied all statements and other documents to the Defence on 13th May 2014. On 15th May 2014, Mr. Wanyama acting for the Accused persons made an application for adjournment on the ground that the Accused persons wanted to see some Occurrence Books. That the same were supplied to the Accused persons who scrutinized them to their satisfaction. And the hearing commenced on 15th of July 2014, two months after the Defence had been supplied with the witness statements and the Occurrence Books.
7. Counsel deponed that on 15th July 2015(perhaps 15th July 2014) the information was amended and the Defence raised no objection with the case proceeding on the same day. Counsel emphasized that the Accused persons were represented by an Advocate throughout the trial. On the question of Mental Assessment, the State Counsel annexed to his Affidavit copies of two P3 forms one in respect of each of the Accused persons in proof that the Accused Persons had been examined by a competent Medical Officer and found fit to stand trial.
8. In arguing the Application, Mr. Makokha elaborated the issues raised in his affidavit. Counsel argued that on 29th April 2013 the Court ordered that, amongst other documents, OB number 4/7/2010 be availed to the Defence and this was never complied with. Secondly, that an additional count was introduced to the Information on 15th July 2014 and although Mr. Wanyama, Counsel for the Defence, never objected, the Court proceeded to take evidence of the witnesses thereafter. That the record shows that after PW1 had taken the witness stand and introduced himself, Mr. Wanyama interjected and informed the Court that his client wanted to read the statement of the witness. The witness was stood down to give the Accused persons an opportunity to read the statements and hearing resumed at 11.23 a.m. Counsel submitted that the Advocate for the Defence was not given sufficient opportunity to take instructions on the Amended Information.
9. Further, the Court was referred to a document described as "Memorandun of Dissatisfaction and stoppage of Counsel services." It was argued that the document raised several complaints about the violation of the Accused persons' right to a Fair Trial. That in paragraph one the Accused persons stated

1. **The Counsel has not been able to get all the necessary documents and avail the same to the applicants for possible preparation for hearing and defense as envisaged by section 50(a) of the Constitution.**

And in paragraph 6 they stated as follows:-

(6) It is unfortunate that the learned counsel can accept to go on with hearing despite the fact of receiving the witnesses' statements while in the dock, listen, and cross examine without preparing.

Counsel submitted that while allowing Mr. Wanyama to cease acting for the Accused Persons, the Court ought to have addressed the other issues raised by the Accused persons.

10. On the issue of Mental assessment, Counsel submitted that in Criminal cases, the general rule is that unless an issue arises as to the mental status of an Accused Persons, Courts normally proceed on the assumption that the Accused Person is of sound mind. However, in murder trials

the general practice is for Courts to refer suspects for mental assessment before they are arraigned in Court. He argued that this requirement is because in murder trials, the issue of sanity of an accused person is an issue that the Prosecution must tender proof beyond reasonable doubt. Counsel then contended that the Accused persons were never taken for mental assessment.

11. The Defence criticized the State for introducing the Medical Examination Report prepared by Dr. Njau. Counsel argued that the Prosecution should not be allowed to rely on the documents as it was an attempt by it to tender evidence after it had closed its case. That was contrary to the provisions of Criminal Procedure Code and the Evidence Act. Counsel argued that the Prosecution was not the author of the document nor was the author availed for cross-examination.
12. Mr. Obiri for the State submitted that the Medical Reports was evidence that Mental Assessments had been conducted on the Accused persons. Counsel told Court that the practice is for the Prosecution to avail reports and that on the basis of those reports that the Court makes the decision as to whether or not an accused is fit to stand trial. That there is no requirement that the makers should give evidence.
13. On the question of evidence, the Prosecution was of the view that the application was not specific on which statements were not availed to the Defence. That the Defence was given all opportunity to examine all documents that the Prosecution would rely on and ask questions on them. On the issue of the Occurrence Books, Counsel argued that all the books were availed and the Court noted compliance to its order. On the Amended Information, it was the position of the State that the Defence Counsel did not object to the amendment which was properly made. And as required the Information was read over to the Accused persons.
14. In respect to the "Memorandum of Dissatisfaction", Counsel submitted that this was an application by the Accused persons to sack the advocate and which application was allowed by Court. It was neither a protest against the Court nor the Prosecution. All in all the Prosecution took the position that the application was without merit and merely intended to block the proceedings and delay the conclusion of the Trial.

Of Mental Assessment

15. As pointed out by the Court of Appeal in **James Masomo Mbatha Vs Republic** (2015) eKLR,

"It is usual practice to have persons accused of murder undergo assessments as to their mental state, so as to determine if they are fit to stand trial."

This practice may be borne from the duty placed on the Court by the provisions of Section 162 (1) of the Criminal Procedure Code, which reads:-

1. **When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.**

In requiring the Mental Assessments in Murder cases, as a matter of routine, the Courts act on the side of caution by making out an inquiry as to the soundness of mind of the Accused person even where the Court has no reason to believe that the Accused is of unsound mind.

16. The Mental assessments are in practice required and taken before an Accused Person pleads to the Information. This makes sense because an Accused Person starts to prepare and make his Defence right from the time of taking plea.

17. In the matter at hand, plea was first taken on 23rd September 2010 before Onyancha, J. There is nothing on record to show that the Accused Persons had undertaken mental assessments. The taking of evidence began on 18th September 2012 before Kimaru, J who heard 4 witnesses. Upon the transfer of the Judge, this hearing rebooted Denovo before me. But prior to this, the Information was amended on 15th July 2014 and plea was taken afresh.
18. Clearly therefore there is nothing on record to show that the Judge who was first seized of the matter and those who took over subsequently had the benefit of Mental Assessments of either of Accused Persons. Is this sufficient reason for this court to declare a mistrial"
19. It has to be remembered that as there is a presumption of sanity of an Accused Person in Criminal Trials (Section 11 Penal Code), there is no legal requirement for a Court to inquire into the soundness of the mind of an Accused Person unless the Court has reason to believe that the Accused Person is of unsound mind. As the Predecessor to the Court of Appeal observed in Kaplotwa s/o Tarino vs R (1957)EA 553 at page 554,

In R v Sharp (1), 41 Cr. App R 197, Salmon, Jl, directed the jury that while a prisoner is normally presumed to be fit to plead, if the court has reason, in any particular case, to doubt his fitness, it is the duty of the court to inquire into the matter and the onus is on the Crown to being and prove fitness. In our view this is the law applicable to proceedings under Section 162 of the Criminal Procedure Code, and it is for the Crown under that section to prove fitness to plead if a question arises as to the sanity of an accused person.

So only when a question arises as to the sanity of an Accused Person must a Court inquire into that fact. And Murder Trials are not an exception to this rule notwithstanding the usual practice now followed.

20. In the proceedings before Justices Onyancha and Kimaru, there is nothing to show that any question arose as to the sanity of the Accused persons here. And throughout the part of the Trial before me, the Accused persons appeared to me not only to be of sound mind but also alert and intelligent. They followed the proceedings robustly. Not for a moment did I have reason to believe that either of the Accused Persons was of unsound mind. But there was this rather intriguing averment by the Defence Counsel:-

“**That as at this point, I as the Accused Persons Advocate I am in doubt as to whether the accused Persons herein are fit to stand trial.”**

And this led me to ask Counsel of the Accused Persons whether he or either of the Accused Persons had reason to believe that either of the Accused Persons was of unsound mind. Counsel in reply told Court that he was unable to answer the question. Nothing in that response made this Court change its believe that the Accused Persons were of sound mind. This Court holds that no circumstances arose before me that required this Court to carry out an inquiry as to the unsoundness of mind of either of the Accused Persons.

21. Another reason why the argument by the Accused persons must fail is because there is Medical evidence that the Accused Persons are as a matter of fact mentally sound. In reply to the current application, Mr. Benjamin Kelwon swore a replying affidavit on 22nd September 2015. In that affidavit, he annexed 2 Medical Examination Reports on the Mental Assessment of the Accused Persons. This Court was asked by the Defence to disregard these reports because it was an attempt by the Prosecution to tender such evidence after it had closed their case.
22. This Court is unable to agree with the Defence argument. As observed earlier, in Criminal Trials, there is a presumption of sanity of the Accused persons. Secondly there has been no reason for this Court to believe that either of the Accused persons is of unsound mind. What there is, is an

attempt by the Defence to have the Trial declared a mistrial ostensibly because the Court is not "satisfied/informed as to the Mental fitness of the Accused Persons to fair trial." An attempt made after the close of the Prosecution case. The State was therefore entitled to produce evidence that the Accused Persons had undertaken Mental Assessment. And since the Accused Persons themselves did not swear affidavits specifically denying the Medical Assessments, this Court believes them to be authentic.

23. What are the findings of the Report" Dr. Njau Z.G. found both Accused Persons to be mentally sound adults. The Reports are dated 31st August 2010. This was a date before the Accused Persons first took plea before Onyancha, J. on 23rd September 2010. It is my finding that the Accused Persons were (and are) mentally sound to plead and to stand trial.
24. Let me make this observation! The question of Mental fitness raised by this Application demonstrates at least one reason why there is wisdom in the practice of Courts routinely requiring Mental assessment of Accused Persons facing Murder trial even where no need has arisen. Another lesson to be learnt is that Courts should record receipt of a Medical Report certifying fitness to stand trial and the contents thereof. In this way the Courts will be saved unnecessary and perhaps embarrassing questions such as those raised here.

Of The Right to a Fair Trial

25. Article 50(2) of the Constitution provides safeguards of an Accused's Right to fair trial. Amongst the tenets of fair trial is the Right of the Accused to be informed of the charge he faces with sufficient detail (Article 50 (2)(b), the Right to have adequate time and facilities to prepare Defence (Article 50(2)(c), 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 (Article 50 (2)(j). As I understand it the grievance of the Accused Persons is that these Rights have been infringed in the course of this trial. Let me look at the specific complaints.
26. On 29th of April 2013, the following consent order was recorded.

"**By consent certified copy of OB No. 4/7/2010 be availed to the Accused Counsel.**"

There is now a complaint that this order has not been complied with todate. Yet this is the first time an issue has arisen specifically as to the non-compliance. That this issue is being made at the close of the Prosecution case is surprising because the Defence had more than adequate opportunity to raise it earlier. The Prosecution has called 10 (ten) witnesses to testify on various hearing dates (non continuous) from 15th July 2014 to the 28th April 2015. In none of these occasions has the Defence raised a complaint about the non-compliance of the Consent order. A golden opportunity that presented itself for raising that complaint would have been when on, 15th May 2014, Mr. Wanyama acting for the Accused persons applied that the Defence be furnished with certified copies of certain OB entries. If indeed the Consent order had not been complied with, then one would have expected the Defence to raise it on that day. Mr. Wanyama has been criticized by the Accused Persons for the manner in which he conducted their case and when the Accused Persons requested Court that another Counsel be assigned to them they alleged that Mr. Wanyama had failed to get all necessary documents for preparation of their Defence. If there was substance in this allegation then one would have expected the new Advocate to take up the issue with Court at the earliest opportunity. It is therefore surprising that Mr. Makokha who took over from Mr. Wanyama and conducted the Defence in respect to five witnesses did not find it necessary to raise any complaint about non-compliance of the Consent order before the close of the Prosecution case. I do not find any merit in this complaint.

27. I now turn to the proceedings of 15th July 2014. On that day the Court allowed the amendment of the Information by addition of a second count. This was after the application for amendment

by the State had not been opposed by the Defence. After the Accused Persons had pleaded afresh, the matter proceeded to hearing as it had been slated for that business on that day. When PW1 took the witness stand and introduced himself, Mr. Wanyama interjected and told Court as follows:-

"**Although the statement of this witness had been availed to me my clients say that they want to read it".**

Upon that request the Court stood down the witness to enable the Accused Persons read the statements and ordered that hearing would resume at 11.15 a.m. on the same day. The Court record shows that hearing resumed at 11.23 a.m., and when it did so there was no complaint either by Mr. Wanyama or the Accused Persons that the time allowed for them to read the statements was not sufficient. It is for this reason that I find this late grievance by the Accused Persons to be unwarranted.

28. This Court has also been criticized for failing to act fully on the Memorandum by the Accused Persons requesting the Court to assign them another Counsel. Let me reproduce the said document in its entirety;

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISCELLENOUS APPLICATION NO…OF 2014 ARISING FROM ORIGINAL CRIMINAL CASE NO. 35 OF 2010 AT BUSIA HIGH COURT

ERNEST OJIAMBO MULEFU ALIAS MUSEVENI AND STEPHEN WANDERA MULEFU ALIAS MAPUNDA---------------------------------- APPELLANTS

VERSUS

REPUBLIC--------------------------------- RESPONDENT

MEMORANDUM OF DISSATISFACTION AND STOPPAGE OF COUNSEL SERVICES

The above named herein the applicants being litigants in your honourable esteemed court hereby humbly write to express their sincere and genuine reservations at the manner their matter is being handled by the honourable counsel assigned to them by stating as follows:-

1. **The Counsel has not been able to get all the necessary documents and avail the same to the applicants for possibly preparation for hearing and defence as envisaged by section 50(a) of the Constitution.**
2. **The learned counsel has time and again failed to articulate issues raised by the plaintiffs for address by the Honourable court hence putting them (plaintiffs) and the counsel in a collision course.**
3. **It has always been the desire of the applicants that witnesses be examined satisfactorily by offering insightful and relevant information to the counsel for use, but it is to their dismay and disappointment that the issue is ignored by the learned counsel hence leaving the plaintiffs at the prosecution's mercy.**
4. **The learned counsel has failed to establish the basis of the case since the witnesses are left to speak out of their statements without any cross examination by the counsel hence**

leaving the honoruable court in no clear picture of the actual facts of the case.

5. **The applicants are left to wonder which are the actual dates of the case facing them and which are the charges they are supposed to answer to since the key witnesses in the case talk of dates out of the charge sheet but the learned counsel is unable to verify the facts.**
6. **It is unfortunate that learned counsel can accept to go on with hearing despite the fact of receiving the witnesses' statements while in the dock, listen, and cross examine without preparing.**

It is in view of the above grievances that the applicants hereby request the court to assign them another counsel and in the event recall the already testified for proper examination to give the court proper insight and updated facts of the case.

29. On 2nd of December 2014, I granted Mr. Wanyama leave to withdraw from acting and directed The Deputy Registrar to appoint another Counsel to represent the Accused Persons. On my reading of the Memorandum it was a complaint specifically against the Counsel then on record. And as correctly argued by Mr. Obiri, it was not a complaint about the conduct of the Court or the Prosecution. And frankly, I cannot see what more this Court would have done other than allow the request by the Accused Persons that the State assigns them another advocate.
30. Mr. Makokha for the Accused Persons now argues that the Court should have acted on the request by the Accused Persons for recall of the witnesses notwithstanding that the request was made through a letter. If indeed the Accused Persons were desirous that all the witnesses who had testified be recalled because their previous Advocate had not represented them effectively upto that point then nothing would have been easier than for them to instruct their new Counsel Mr. Makokha to raise the issue as a first order of business. The Court record shows that Mr. Makokha was happy to proceed with the hearing from where it had reached. The Court record further reveals that only after the 10th witness had testified that the Defence ,through Mr. Onsongo holding brief for Mr. Makokha, requested that PW1 and PW4 be recalled for cross-examination. Note only PW1 and cPW4! The Court record further shows that Mr. Makokha did not press that request and on 12th May 2015 abandoned the request by the Defence for the recall of the two witnesses. I very much doubt that the Court record bears out the Accuseds' belated complaint that their trial has proceeded in an oppressive manner.
31. While I am reluctant to hold, as suggested by Mr. Obiri for the State, that the Application of 18th September 2015 was brought merely to distract and delay the conclusion of the Trial hearing, I unhesitantly hold that it is without merit. The Notice of Motion dated 18th September 2015 is hereby dismissed.

Dated, signed and delivered at Busia this 16th day of December 2015

F. TUIYOTT

J U D G E

In the presence of:-

Oile -C/Assistant

…………………….for Applicants

…………………… for State/Respondent

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