

**REPUBLIC OF KENYA  
IN THE CHIEF MARGISTRATE'S COURT  
AT MOMBASA  
CRIMINAL CASE NO. 1297 OF 2020**

REPUBLIC.....PROSECUTION

=VERSUS=

1. FRANCIS OCHIENG OUMA
2. LUCAS COSMUS FONDO
3. TIRUS MAKUMI
4. NATO MICHAEL
5. FELIX OTIENO
6. KITI NYALE.....



.....ACCUSED

**ACCUSED PERSONS' FINAL WRITTEN SUBMISSIONS**

May it please your honour

**Introduction**

1. The accused were charged with the following offences:
  - I. **Count I** – Engaging in a prohibited gathering contrary to Rule 7(1) as read with Rule 11 of the Public Health (COVID-19 Restriction of movement of persons and related measures) Rules, 2020.
  - II. **Count II** – Failing to maintain a physical distance of not less than one meter from another person in a public place contrary to Rule 6(1)(a) as read with Rule 6(3) and Rule 11 of the Public Health (COVID-19 Restriction of movement of persons and related measures) Rules, 2020.
  - III. **Count III** – Failure to wear face mask while in public place contrary to Rule 6(1)(b) as read with Rule 11 of the Public Health (COVID-19 Restriction of movement of persons and related measures) Rules, 2020.
2. On the 8<sup>th</sup> September, 2020, the accused persons pleaded not guilty to all three (3) counts and the matter was set down for hearing.
3. The court fixed the case for hearing on 4<sup>th</sup> November, 2020, and directed the prosecution to supply statements to the accused persons, on the said date the hearing was adjourned to 10<sup>th</sup> February 2021, however, the court did not sit on the fixed date. A mention date was given for purposes of taking a hearing date. The matter was therefore mentioned on 9<sup>th</sup> March, 2021 and a hearing date was fixed for 25<sup>th</sup> May, 2021.
4. Thereafter, the prosecution sought for and was granted an adjournment on 25<sup>th</sup> May, 2021 on the reason that the Investigating Officer had been transferred. The court marked the same as a final adjournment and fixed the matter for 24<sup>th</sup> August, 2021.

On the said date, the prosecution finally had one (1) witness in court and proceeded to put him on the stand.

#### **Summary of the Prosecution case**

5. PW1, a police officer attached at the Central Police Station, testified and told court that on the morning of 25<sup>th</sup> August, 2020, he was instructed by the station commander on the day's duty and was placed on standby together with others. IP Cheruiyot went to the CBD on patrol. He stated that at around 9.00am, IP Cheruiyot came back with a group of persons purportedly arrested in town. His duty was to book them, take over investigations and if possible charge them. He concluded his testimony by stating that he charged the accused persons with the offences before the court.
6. On cross-examination by the defence counsel, PW1 admitted that his duty was to book the accused persons, and that the arrests were made by IP Cheruiyot. The witness further admitted he could not possibly have known how the accused persons were arrested.
7. The prosecution closed its case and the honourable court delivered its ruling on 16<sup>th</sup> September, 2021, whereupon the accused persons were found to have a case to answer, and were put on their defence.

#### **Summary of the Defence case**

8. The defence set down its case on 6<sup>th</sup> December, 2021, and called two witnesses. Mr. Khelef Khalifa, chairman of the Muslims for Human Rights (MUHURI), testified as DW1 while Father Gabriel Dolan of St. James Catholic Church – Mtopanga, testified as DW2.
9. DW1 testified that on the morning of 25/8/2020 he was around the Post Office in the central business district area of Mombasa Island, particularly along Prof. Ali Mazrui Road. DW1 described the events of the subject date that, a small group of people had gathered at Makadara grounds with banners and seemed to be purporting to demonstrate. He further testified that from his vantage point along Prof Ali Mazrui Road he suddenly saw police officers dispersing the crowd with tear gas. He explained that upon being dispersed, the group poured into the Digo Road around the Post Office, where he witnessed some of the accused persons being arrested.
10. On cross-examination by the prosecution counsel on the exact time he was around the Makadara grounds area, DW1 responded that it was in the morning, most probably between 10am to 11am, otherwise he was unable to recall the exact time. He was further cross-examined on how possible it was to determine whether the demonstrators were maintaining social distance and wearing face masks, to which he responded by alluding that the said Makadara grounds is frequented by people

idling around, and that particularly all persons in the subject group had worn face masks and were maintaining reasonable safe distance.

11. The defence did not re-examine and proceeded to call its 2<sup>nd</sup> witness to the stand. Father Gabriel Dolan, DW2 testified that on that particular morning of 25/8/2020, he was accompanied by Sister Teresia of the St. James Catholic Church, Mtopanga. Their sole business that was to join a group of activists for a planned march and peaceful demonstration to the DCC's Office to deliver a petition concerning the misuse of COVID-19 funds in Kenya.
12. He testified that he parked his vehicle at the Legal Aid clinic run by MUHURI, near the court premises, and walked towards the Post office.
13. He further testified that while he and Sister Teresia were walking on the footpath leading to the Post Office, they were joined by the 2<sup>nd</sup> and 4<sup>th</sup> Accused persons, who were well known to them.
14. With respect to the arrest of the accused persons, DW2 testified that the 2<sup>nd</sup> and 4<sup>th</sup> accused persons who were walking had just joined them, were arrested by police officers while still in their company. He testified that the said two accused persons had put on face masks on and were not engaging in any illegal gathering.
15. At the close of the testimony by DW2, the defence closed its case and opted to do written submissions and a judgment date was fixed by the court, with directions to file the same within 14 days.
16. We hereby render our final submissions for the honourable court's consideration.

### **Issues for determination**

- a. Whether the prosecution has discharged the burden of proof of beyond reasonable doubt.*

### **Analysis and determination**

#### **Whether the prosecution has discharged the burden of proof of beyond reasonable doubt.**

17. Your honour, the doctrine on Criminal justice is that an accused person under Article 50 (2) (a) of the constitution has the presumption of innocence in his favour guaranteed in the bill of rights unless the contrary is proved by the state beyond reasonable doubt. That burden of proof is well settled that it's the state that bears the responsibility at all times. The well-established jurisprudence on this doctrine that the accused persons committed the alleged offence rests on the prosecution to prove the charge beyond reasonable doubt can be traced way back to the cases of **Woolmington v DPP 1935 AC** and **Miller v Minister of Pensions 1947 2 ALL ER**

372 – 373. Whereas in the latter case Lord Denning stated on this phrase of beyond reasonable doubt as follows:

***“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”***

18. Further in the superior court within the common law jurisdiction Lord Oputa of the Supreme Court of Nigeria in the case of **Bakare Versus State 1985 2NWLR** adopted the statement as follows at page 465:

***“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.***

19. Your honour, in order to succeed and obtain a conviction in a criminal offence the prosecution must show in the words of the statute under **Section 107(1) of the Evidence Act, Cap 80** that the alleged verdict is against the weight of the evidence and other relevant material that the accused committed the offence as charged for any judgment of the court to be obtained in their favour, as cited herein below;

***“Evidence Act that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts, which one asserts must prove those facts exist”.***

20. The prosecution has the duty to prove all the ingredients of the offences beyond reasonable doubt and there is no burden on the part of the accused persons to prove their innocence at any one given time.

21. Honourable court, the relevant question to be answered in this case is whether the evidence from the one (1) witness called by the prosecution is sufficient to establish the guilty of the accused persons beyond reasonable doubt.

22. Your honour, we shall proceed to prove that PW1’s testimony is insufficient to establish the guilty of the accused persons beyond reasonable doubt.

23. It was PW1’s testimony and admission that he did not perceive, see or witness the following events;

(a) *Alleged occurrence of the prohibited gathering;*

(b) *Whether the accused persons were present at the alleged prohibited gathering or not;*

(c) *Whether or not the accused person's had worn face masks, and were maintaining social distance at the alleged prohibited gathering and at their time of arrest;*

24. Your honour, the answer to the above three (3) critical questions is in the negative, PW1 simply cannot purport to testify on events he did not perceive, and his testimony on the aforesaid events was pure hearsay, and is inadmissible under **section 63(2) of the Evidence Act, Cap 80.**

25. Further, the prosecution did not adduce any evidence directed to proving that the accused persons were indeed engaged in a prohibited gathering; failed to wear face masks and or failed to maintain social distance. The prosecution merely cast aspersions on the said elements and closed its case. Your honour, mere allegations or possibility of commission/ and or omission of an offence is not enough and does not meet the standard of proof expected of the prosecution.

26. On the premises and in light of the evidence of DW1 Khelef Khalifa and DW2 Father Gabriel Doolan, if at all the accused persons were gathered at their time of arrest, then the same was an allowed/accepted gathering, conformed to **article 37 of the Constitution of Kenya, and Rule 6(1)(a) & (b) of the Public Health (COVID-19 Restriction of movement of persons and related measures) Rules, 2020.**

#### **Conclusion**

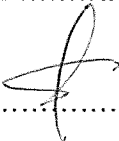
27. On the foregoing basis we therefore humbly submit that the prosecution has failed to direct evidence and or proof its case beyond reasonable doubt. The prosecution has failed to establish the accused persons' presence and status/circumstance at their time of arrest.

28. Further the prosecution has failed to establish the correlation the accused persons and the charges brought against them.

29. We humbly implore the honourable court to consider our submissions and acquit the accused persons of all the three (3) charges **under section 215 of the Criminal Procedure Code, Cap 75.**

30. That is all we can state.

**DATED at Mombasa this .....10th .....day of .....December.....2021**

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**LUMATE TE MUCHAI & COMPANY**

**ADVOCATES FOR THE ACCUSED PERSONS**

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