Republic v Yego (Criminal Case 6 of 2023) [2024] KEHC 9212 (KLR) (31 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL CASE 6 OF 2023

JRA WANANDA, J

JULY 31, 2024

(FORMERLY ELDORET HIGH COURT CRIMINAL CASE NO. 60 OF 2018)

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

THOMAS KILIMO YEGO ..... ACCUSED

JUDGMENT

1. The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 31/08/2018 at Kapyego Location, within Marakwet East sub-County within Elgeyo Marakwet County, he murdered one Benson Kibet Kilimo.

2. The matter was initially commenced and conducted as Eldoret High Court Criminal Case No. 60 of 2018 since it is the Eldoret High Court that presided over the subject territory.

3. The accused was arraigned on 15/10/2018 before Hon. Justice S.M. Githinji upon which he pleaded not guilty. The matter then came up for hearing on 27/2/2019. On that date however, the same did not proceed because defence Counsel, Ms. Tum, sought an adjournment on grounds that she needed time to go through the statements supplied. The adjournment was granted and the case fixed for hearing on 24/7/2019. On that date, Prosecution Counsel Ms. Mokua, appearing for the State, informed the Court that she had 4 witnesses and was ready to proceed. Accordingly, PW1 took the stand and testified.

4. PW1, Philomen Cheserek testified that he resides at Kapyego and that he is a National Police reservist. He stated that on 31/08/2018 at around 11:00 am, he was at home when he received a call from the area Assistant Chief, Cornelius Kibet Cheptaraus, who told him that there was an incident at Kapyego and that the suspect (the accused herein), was at the market and he requested PW1 to go and arrest the suspect and take him to the Administration Police Line at Kapyego. He told the Court that he went to the market and found the accused at a pool table, Casino, arrested him and handed him over to the

Administration Police as requested. He stated further that he had known the accused for 2 years and that he had been told that the accused was a murder suspect in the death of Benson Kilimo, whom he also knew as he, too, resided in Kapyego.

5. Upon PW1 concluding his testimony on 24/7/2019 as aforesaid, Ms. Mokua informed the Court that the other witnesses could not make it to Court as the motor vehicle they travelling in had broken down on the way. Her request for an adjournment was then allowed.

6. For various reasons, the matter never proceeded for further hearing until 17/03/2021. On that date, Prosecution Counsel Ms. Limo informed the Court that she had 2 witnesses available but the hearing did not proceed as the Court was attending a meeting. A fresh date was therefore fixed for 14/07/2021. On that date, once more the hearing did not take off as Ms. Limo informed the Court that she could not reach the witnesses. The case was then adjourned to 24/11/2021 and upon the Prosecution's request, the Court issued Summons against Witnesses compelling them to attend Court.

7. On 24/11/2021, after the transfer of Hon. Justice S.M Githinji, the matter came up before Hon. Justice R. Nyakundi who had now taken it over. However, yet again, the hearing was adjourned as Prosecution Counsel Mr. Mugun, informed the Court that he was unable to reach the witnesses. Thereafter, the matter came up in Court on 17/02/2022 but yet again, the hearing did not take off due to absence of witnesses.

8. On 22/03/2022 when the matter again came up for hearing, the Prosecution sought an adjournment on the ground of non-attendance by witnesses, Ms. Tum very strongly sought that the case be terminated as it had taken too long without any meaningful progress. She was directed to file Submissions. Indeed Ms. Tum complied and filed such Submissions on 4/04/2022. The same, however, does not seem to have been seriously pursued since the matter came up for hearing successively on 13/07/2022, 6/10/2022 and 19/10/2022 and was adjourned on all 3 occasions without the Submissions being acted upon.

9. The case came up also on 13/07/2022 but on which date, it is indicated that the matter could not be reached due to the Court's heavy workload. Some witnesses seem to have been present on that date since reimbursement of witness expenses was ordered.

10. In the intervening period, an operational High Court was inaugurated at Iten in Elgeyo Marakwet County and since this matter emanated from that territorial jurisdiction, it was accordingly transferred to Iten.

11. I then took up the case when it first came up before me on 26/4/2023. On that date, again, the hearing did not take off as Prosecution Counsel Ms. Ayuma told the Court that the matter having just been transferred to her Iten office from Eldoret, she had just taken it over and she also did not have witnesses in Court. She asked for time to familiarize herself with the file but also revealed that the information in her possession was that the family of the accused, which comprised the crucial witnesses, was reluctant to testify. In the circumstances, I adjourned the hearing to 26/10/2023. On that date, Ms Ayuma again sought an adjournment on basically the same reasons as previously. Despite strong protests from Mr. Too, Counsel whoheld brief for Ms. Tum, I reluctantly allowed the application but marked the same as "the last adjournment". I then gave a fresh hearing date for 1/12/2023.

12. On 1/12/2023, Ms Ayuma again sought adjournment on basically the same grounds as on the two previous occasions. As expected, Ms. Tum vehemently opposed the application and reminded the Court that, as aforesaid, she had earlier been directed to file Submissions on her application for termination of the case due to lack of witnesses and that she had indeed filed such Submissions. She reiterated that the adjournment be declined and the accused be acquitted under Section 210 of the

Criminal Procedure Code. I then ruled that the Prosecution had not shown seriousness in prosecuting matter even when the Court granted orders of "last adjournment" which orders are not given in vain. However, to give the victim's family an opportunity to come to Court and comment before I make any final orders, I adjourned the matter and fixed it for Mention on 29/02/2021. I directed the Prosecution and the Investigating Officer to inform the family of the deceased to attend Court on the said date to give their views on the Court's intention to terminate the case.

13. On 29/2/2024, no one from the victim's family attended Court although Prosecution Counsel Ms. Mwangi told the Court that they were notified and that the wife of the deceased was personally served and that she signed an acknowledgment of service. Since I found it improper to terminate the case on a Mention date, I fixed it for hearing on 4/07/2024 and made it clear that there would be no adjournment on that date and that if again not ready, the Prosecution would have to make a decision on whether to close its case. Upon the Prosecution's request, I also issued witness Summons to 7 persons whom I was informed were the remaining witnesses thus compelling them to attend Court on the said 04/07/2024. On that date however, Prosecution Counsel Mr. Kirui informed the Court that he did not manage to reach the witnesses. He then sought for a Mention date for purposes of obtaining instructions to withdraw the case. On her part, Ms. Tum prayed that I consider her Submissions, earlier referred to and deliver a Judgment on her application that the case be terminated under Section 210 of the Criminal Procedure Code and I acquit the accused. I accepted Ms. Tum's request and therefore fixed this matter for Judgment.

Defence Submissions

14. Ms. Tum submitted that since the accused took plea on 15/10/2018, only 1 witness has testified and that the matter has since continued to be regularly adjourned due to the Prosecution's failure to avail witnesses despite the Court having issued summons to witnesses on 24/11/2021. She submitted that the Prosecution has offended the rights of the accused person as provided by *the Constitution* of Kenya 2010 having severally requested for adjournments without giving a reasonable excuse. She cited Section 210 of the Criminal Procedure Code and prayed that the accused be acquitted under that provision. Counsel argued further that the defence has always been ready to proceed with the case but for close to 6 years, the Prosecution has not managed to trace witnesses. She maintained that the accused person needs to be accorded fair trial rights and also an expeditious trial. She also submitted that accused has been in custody awaiting trial for 6 years and that such period is a long time to be in remand custody and against fair trial rights guaranteed in Article 50(1)(e) of *the Constitution*. She cited the case of Republic v Muneh Wanjiku Ikigu [2016| eKLR.

15. Counsel further submitted that legal principles to guide a criminal trial Court is sufficiency of evidence capable of establishing the ingredients of the offence an accused person is charged with. She urged that in this case, the Prosecution has failed to bring witnesses to testify. It was Counsel's further contention that only 1 witness has testified, namely, PW1, Philemon Cheserek who is a police reservist, that the evidence of the witness is only capable of sustaining hearsay, but cannot sustain the accused being put on a case to answer. According to her therefore, the only option available to this trial Court is Section 210 of the Criminal Procedure Code which is to acquit the accused person and that failure to do so will occasion an injustice. She reiterated her prayer that the accused person be acquitted.

Determination

16. As aforesaid, the Prosecution had, through Mr. Kirui, indicated its intention to terminate this case by withdrawing it due to the inability to trace, or difficulty in tracing witnesses. This intention was however never formalized. On her part, Ms. Tum has insisted that the Prosecution case should now

be closed, a finding of "no case to answer" be entered on the ground of lack of sufficient evidence to convict, and an acquittal be thereby made.

17. The question that I am therefore called upon to determine herein is "whether the Prosecution should be allowed to withdraw the case or whether the Prosecution evidence should be closed and a finding of no case to answer be entered".

18. In this case, since PW1 concluded giving his testimony on 24/07/2019, the matter has been set down for hearing on many occasions and the Prosecution has on not less than 7 successive instances requested and obtained adjournments thereof. The sole excuse by the Prosecution for seeking these continuous adjournments has been the unavailability of witnesses. The respective Prosecution Counsels that have appeared in the matter on separate occasions have consistently told the Court that they were unable to trace witnesses. This Court has in fact on several occasions issued Summons with the hope that the witnesses would, upon being served, appear in Court to testify but to date, 6 years after the case was instituted, no other witness, apart from PW1, has been availed. This Court has also on several occasions given "last adjournments" which however has also not "borne fruit".

19. As aforesaid, it is now 6 years since the accused took plea and he has been in remand custody since then. 6 years is without a doubt, a long time to be in custody awaiting trial and is equally a very long time to be making fruitless attempt to trace witnesses. It is evident that, as each day passes, the likelihood of finding the witnesses decreases. In the circumstances, the Prosecutor is right to propose to withdraw or terminate the case. The accused person's right to a fair trial under Article 50(2)(e) of *the Constitution* of Kenya, 2010 entails the right to have the trial begin and conclude without unreasonable delay. It cannot be in dispute that the delay in prosecuting this case has been inordinate. From the history of the case, it is unlikely that witnesses will be availed, if indeed there are any. Under these circumstances, it is also evident that it is unlikely that the Prosecution will present sufficient evidence to secure a conviction. As the record would reveals, the Court's efforts to give the victim's family an opportunity to appear in Court and give its views on the Court's intention to terminate the case has also been futile. The Court has been told that despite being notified, the family never bothered to take up the invitation from the Court. At some point, the Court was even told that the witnesses were reluctant to testify and that "there could be interference". No substantiation of these claims was however made.

20. As aforesaid, Prosecution had indicated his intention to terminate the case by withdrawing it although this intention was never formalized. In a situation such as the one that the Prosecution finds itself herein, the Prosecution would have the choice of either withdrawing the case under the provisions of Section 82 of the Criminal Procedure Act (nolle prosequi) as read with Article 157 of *the Constitution* or to call no further evidence and close its case. Needless to state, the legal consequences flowing from either of the two choices is distinct. This is because withdrawal under Section 82 aforesaid means that the Prosecution is not barred from preferring the same charges afresh at a future date. On many occasions, it does result into re-arrest of the accused person and fresh arraignment. However, where the Prosecution chooses not to call further evidence and close its case, a not guilty verdict would be entered in favour of the Accused and he will then be acquitted for lack or insufficiency of evidence. This then means that the Prosecution would be permanently barred from resurrecting the same charges against the accused person (the principle of autrefois acquit).

21. Faced with a situation similar to the one herein, Prof. J. Ngugi J (as he then was), in the case of Republic v Muneh Wanjiku Ikigu [2016] eKLR found as follows:

> 18. ..... The length of time an Accused has faced a trial especially if such an Accused Person has been in custody is one of the factors that the Court (and the DPP) looks at in making a determination whether it is in keeping with the just interests of the administration of justice

to apply for a withdrawal or an acquittal. Of course, such withdrawal will not be permitted when the DPP is acting maliciously or in bad faith or is otherwise abusing the court process. However, none of these situations is alleged or proved here.

19. In cases, such as the present one, where there is no reasonable likelihood of re-commencing proceedings or of tracing witnesses or where there is no reasonable likelihood of obtaining a conviction due to lack of available evidence (for example where a crucial piece of evidence the State hoped to rely on is ruled inadmissible in a motion inlimine), then the correct procedure is the one to proceed with the case, call no witnesses and request an acquittal or let the Court reach a directed verdict of acquittal. This may also be the appropriate thing to do where there has been a significant adverse ruling against the State or the evidence available has been become so manifestly unreliable that there is no reasonable likelihood that the Accused could be convicted.

20. In the present case, as catalogued above, the Prosecution requested no less than seven hearing dates spread over a four-year period. At each of those hearing dates, despite reasonable efforts reported by the Prosecution during those hearing dates and now detailed in the Affidavit of Cpl Esther Kombo, no witnesses were available. The circumstances are that the alleged murder happened at an informal settlement called Kiandutu in Thika where both the Accused Person and the deceased used to live. The family of the deceased, members of which were the key witnesses in the case, also lived in the same settlement. Soon after the case was recorded and plea taken, the Investigating Officer was unable to trace the witnesses any more. She tried to contact them through the mobile phone numbers they had recorded with her to no avail. She visited where they used to live in Kiandutu and even enlisted the help of the area Chief and elders in a bid to locate them. All these efforts were fruitless. The witnesses seem to have disappeared into thin area. The importance of the address of the intended witnesses is that many people tend to live in informal settlements only ephemerally. Many times, also, the neighbours would not have any contacts of each other beyond the physical contacts they have each day. As was the case here, therefore, once the deceased's family relocated, it became impossible to trace them.

21. It has now been four years and ten months since the incident took place and since the Accused Person took plea. She has been in custody since then. Four years and ten months is a long time to be in custody awaiting trial. Four years and ten months is a long time to attempt to trace witnesses. Indeed, it would seem that the chances of locating the witnesses diminish with the passage of time. In the circumstances, the Prosecutor is right in not seeking to continue with the criminal trial. Four years and ten months is a long time set against the fair trial rights guaranteed in Article 50(2)(e) of *the Constitution*. Four years and ten months are an especially long time to spend in custody if there is no timeline for trial because there is no indication of if and when the witnesses might be located. Four years and ten months is enough time for the Prosecution - and the Court - to conclude that there is no reasonable likelihood that the prosecution will ever be able to trace the witnesses or present any evidence in the case which could lead reasonably lead to a conviction."

Disposition And Orders

22. In the circumstances, therefore, the Court shall consider the Prosecution as having been compelled by the circumstances to call no witnesses and, therefore, to close its case without presenting any evidence. In that case, the submissions by Mr. Keengwe are surely correct that there is no evidence whatsoever to warrant any other verdict other than one that there is no case to answer. I, therefore, so hold: a case is not made out against the Accused Person sufficiently to require her to be put on her defence. Consequently, I dismiss the murder charge and case facing

the Accused Person under section 210 of the Criminal Procedure Code. She shall forthwith be acquitted unless otherwise lawfully held."

22. I am in full agreement with the said holding and conclusion and like Ngugi J above, I too, find that in this case, there is no reasonable likelihood of re-commencing proceedings or of tracing witnesses. In the premises, I, too, find that it will be only appropriate, fair and justifiable to, rather than allow the case to be withdrawn, to mark the Prosecution case as closed, and deal with it under Section 306 of the Criminal Procedure Code and thus determine whether "a case to answer" has been established to warrant the Accused to be put to his defence. This is what I now proceed to do.

23. Section 306 of the Criminal Procedure Code requires the Court, after closure of the prosecution's case, to make a considered determination on whether an accused person has a case to answer. The section provides as follows:

> " 306
>
> (1) When the evidence of the witnesses for the prosecution has been concluded, the Court, if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit record a finding of not guilty.
>
> (2) When the evidence of the witnesses for the prosecution has been concluded the Court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the Court on his own behalf or make unsworn statement and to call witnesses in his defence ....."

24. Under Section 306 therefore, at this stage, the Court is only considering whether the accused has "a case to answer" and which was described by G. Dulu J in the case of Republic vs Joseph Shitandi & Another (2014) eKLR as follows:

> " A case to answer is a case where if the accused keeps quiet, the evidence of the prosecution should be such that a conviction will result."

25. As regards Section 210 of the Criminal Procedure Code cited by Ms. Tum, it provides as follows:

> " If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him."

26. What amounts to a "prima facie" case under the equivalent of the provisions of Section 210 was considered by the Court of Appeal in Ramanlal Bhatt Vs. R (1957) EA 332 thus:

> " It is true that the Court is not required at this stage to decide finally whether the evidence is worthy of credit, or whether if believed is weighty enough to prove conclusively, that final determination can only be properly made when the case for defence has been heard. It may not be easy to define what is meant by prima-facie case but it must mean one which a

reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation was offered by the defence."

27. Applying these principles to the current case, it is my judgment that there is no available direct evidence that the accused person killed the deceased. PW1's evidence is simply about a phone call that he received from the area Assistant Chief requesting him to go to the market and arrest the accused whom, it was alleged, was a murder suspect and on how PW1 obliged and went and arrested the accused. The witness did not state that he witnessed the accused murder the deceased neither did he see the body of the deceased. In fact, the death has itself not been established since no postmortem report has been produced, leave alone establishment of the cause of death.

28. In the circumstances, I hold that no sufficient case has been made out against the accused person warranting this Court to put him on his defence. Consequently, I dismiss the murder charge and case facing the accused person and acquit him under the provisions Section 210 of the Criminal Procedure Code. Consequently, the accused person is hereby directed to be released from custody forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF JULY 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Accused - present

Ms. Tum for Accused

Ms. Limo for the State

Court Assistant: Brian Kimathi