Republic v CMB (Criminal Case 10 of 2016) [2022] KEHC 15316 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEHC 15316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL CASE 10 OF 2016

SN MUTUKU, J

JUNE 28, 2022

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

CMB ..... ACCUSED

RULING

Background

1. CMB, hereinafter called 'the accused,' is charged with murder in an Information drawn as follows:

> "Republic v CMB
>
> Information
>
> The court is hereby informed by the Director of Public Prosecutions on behalf of the Republic that the above named accused person is charged with the following offence:
>
> Statement of offence
>
> Murder contrary to section 203 as read with section 204 of the *Penal Code* (cap 63), laws of Kenya.
>
> Particulars of offence
>
> CMB: On May 25, 2016 at around 17:00 hrs, at Kariobangi area in Embulbul Trading Centre in Kajiado North Division in Kajiado County murdered Loster Machengo Baraza.

History Of The Case

2. The accused was arraigned to court for the first time on June 7, 2016. The plea was not taken on that day. Due to lack of mental assessment report, the plea was not taken until December 20, 2018, 2 ½ years later. Court record shows that all this time the accused was in and out of Mathari National

Teaching and Referral Hospital. On December 20, 2018, the accused appeared before Hon Mr Justice R Nyakundi (Justice Nyakundi) to take the plea. He denied committing the offence. The court recorded a plea of not guilty.

3. On January 15, 2019, the court conducted a pre-trial conference. The prosecution and defence counsel addressed the court on their respective cases they intended to present to the court. The defence hinted that it would present a defence of insanity and applied for a second psychiatric assessment report.

4. On April 30, 2019, Justice Mwita took over the matter after the transfer of Justice Nyakundi. He ordered a second mental assessment report. It seems that as at that time, the accused had not been assessed a second time.

5. The trial commenced on December 3, 2019 with the prosecution calling one witness, one Meshack Okaalo Baraza. He testified that the deceased and the accused are his sons and that both used to give him problems with threats to kill him. From the evidence of Meshack, the accused and deceased were arrested over those threats and were charged, tried, convicted and jailed. He testified that the accused had been having issues with mental health since 2001 and had been in and out of Mathare Hospital on and off. He testified that his two sons started fighting.

6. Meshack testified that the caretaker at Embulbul where they lived called him and told him that the accused had stabbed the deceased. He rushed to the place and found police had already arrived. The body was taken to the City Mortuary where he identified it for purposes of post mortem on May 31, 2016.

7. After the evidence of Meshack, no other witness testified for the prosecution. The court adjourned the matter to March 3, 2020 for hearing. On that day the matter was adjourned after the defence counsel asked for an adjournment. The case was adjourned to July 7, 2020 when the prosecution informed the court that witnesses could not travel to court due to lockdown. This was during Covid 19 pandemic when most of the country was under lockdown.

Last Adjournment

8. The matter was adjourned to November 2, 2020. For some time up to February 24, 2021, there was no activity on the file. On that date the prosecution was not ready to proceed, again due to lack of witnesses. That state of affairs was to remain until March 22, 2021 when the court (Mwita, J) allowed the prosecution last adjournment. Hearing was fixed for October 25, 2021.

9. On October 25, 2021, I took over these proceedings upon transfer of Justice Mwita. On that day, prosecution counsel told the court that they had problems in bonding witnesses and sought witness summons. This was granted and the matter adjourned to February 23, 2022. On February 23, 2022, hearing did not proceed again due to lack of witnesses. This court allowed another adjournment and stated that it was the last adjournment. The information was that the police were having difficulties in tracing witnesses.

10. The case was allocated two days for hearing: 13th and June 14, 2022. On June 13, 2022, the state did not have witnesses. An application to adjourn the matter was vehemently opposed by the defence counsel Mr Ochieng. Mr Mang'are for the prosecution told the court that they were expecting witnesses but they had not arrived. Counsel asked the court to review its orders of last adjournment and allow the prosecution more time to bring witnesses. This court allowed for hearing the following day given that the case had two days. The state was directed bring witnesses.

11. On June 14, 2022, the prosecution did not have witnesses. He submitted that he had contacted the DCIO on the challenges faced by the prosecution in getting witnesses and that he had been assured

that witnesses would be available on June 14, 2022 but they did not come. Mr Manga'are explained the efforts the ODPP had put in place to ensure witnessed attended court but that office did not receive any communication from the DCI office on the matter. He submitted that the court order granting the final adjournment had been communicated to the DCI but they were unable to reach the witnesses.

12. Mr Mang'are submitted further that the situation being faced by the prosecution should be attributed to the DCI for lack of action in availing witnesses. He urged the court to review its order of final adjournment and give the prosecution another chance to bring witnesses.

13. This was opposed by the defence on the grounds that there are no reasons being given why witnesses were not in court and that there is no formal communication on the efforts taken to bring witnesses to court.

Determination

14. I have considered this matter. It is clear to me that the accused has waited for justice for over 6 years. Only one witness has testified after which the prosecution seems to encounter challenges in availing witnesses.

15. The law under article 50 (2) (e) of the *Constitution* is clear that every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay. This right is absolute and cannot be limited by dint of article 25 (c) of the *Constitution*. Of course this court owes a duty to all the parties that come to it seeking justice. But under our criminal justice system, an accused seems to enjoy an advantageous position as was stated by the court in *Joseph Ndungu Kagiri v Republic* [2016] eKLR while addressing the question of a fair trial. The judge stated as follows:

> "In the Kenyan criminal jurisprudence, the accused is placed in a somewhat advantageous position. The criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balanced role in the trial of an accused person. The court is the custodian of the law and ought to ensure that these constitutional safe guards are jealously protected and upheld at all times. The trial should be judicious, fair, transparent and expeditious but must ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in articles 50 of the *Constitution* of Kenya 2010. The right to a fair trial is one of the cornerstones of a just society."

16. I am alive to the fact that in our court system, especially in respect to criminal matters, cases do not move as fast as they should. Various reasons apply why this is the case. But when a case takes 6 years to conclude and the reasons for this are lack of witnesses when those mandated to bring those witnesses to court seem not to be doing much to avail those witnesses, then we have a serious problems. We have individuals in our justice system chain who do not seem to obey the dictates of the law.

17. From the time I took over this matter, I have not received any evidence that the officers tasked to bring witnesses to court did anything that may convince me that indeed they acted with diligence and expediency. I have had absolutely nothing to convince me that any effort was being applied towards having this matter prosecuted.

18. I sympathise with the prosecution counsel who waits, sometimes helplessly, for other officers to bring witnesses to him to enable him prosecute the case.

19. In my view, to continue adjourning this matter without good reason to do so, would be tantamount to aiding those tasked with the role of bonding witnesses to court with denying the accused his right to fair trial to have his trial begin and conclude without unreasonable delay.

20. This court must guard against an invitation to deny the accused a fair trial. For that reason, I decline to allow further adjournment in this matter.

21. One witness has testified. It is for this court to consider that evidence and determine whether it makes out a case against the accused so as to place him on his defence. The evidence of Meschack is based on hearsay. He told the court that he was informed by the caretaker that the accused had stabbed his brother the deceased. The said caretaker did not testify to confirm that report. Rules of evidence do not allow this court to take hearsay evidence seriously unless it is backed by the evidence of a witness who perceived with his five senses the fact in issue. Using the evidence of Meshack to place the accused on his defence is tantamount to calling on him to provide the gaps left by the prosecution evidence.

22. Denying the prosecution a further adjournment brings their case for to a close. Section 306 (1) of the *Criminal Procedure Code* comes into play. It provides that:

> 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.

23. Applying the provisions of this section to this case leads me to the conclusion that there is no evidence upon which this court can confidently rely on to place the accused on his defence. Consequently, I hereby record a finding of not guilty and acquit the accused CMB forthwith.

24. I have noted that the accused has been in and out of hospital at Mathare National Teaching and Referral Hospital for quite some time. Meshack his father told the court that the accused had been in and out of hospital way before this case arose. Meshack is apprehensive that the release of the accused may endanger family members of any other person. For this reason this court makes an order committing the accused to Mathare Hospital for a comprehensive report on his mental status before he can be released back to society.

25. This case shall be mentioned before the Deputy Registrar after two months to confirm is such a report has been filed. The Deputy Registrar shall extract this order and serve it on the top management of Mathare Hospital and other relevant authorities. The first mention shall be on September 20, 2022.

26. Orders shall issue accordingly

DATED, SIGNED AND DELIVERED THIS 28TH JUNE 2022.

SN MUTUKU

JUDGE