



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL CASE NO. 3 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MZEE ISSA MOHAMMED alias JAGUJI.....ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Mwangi for the state

Mr. Abubakar advocate for the accused person

RULING

This is an unfortunate case. On 4.8.2015, the accused person **Mzee Issa Mohammed alias Jaguji** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged in the charge sheet that on 19.7.2015, at Tchundwa village, Faza location, within Lamu county, the accused jointly with others not before Court murdered **Omar Ahmed Mohammed alias Omar Bini**. The accused person denied the charge.

According to Article 50 (2) (H) of the Constitution, the state instructed Learned Counsel **Mr. Abubakar** to represent the accused, while **Mr. Mwangi**, the prosecution counsel appeared for the state in order to consider the culpability of the accused person. It was required of the state to prove the charge beyond reasonable doubt. (See **Woolmington v DPP {1935} AC 462, Miller v Minister of Pensions {1947} 2 ALL ER 372 at 373**).

According to Section 203 of the Penal Code where an offence of murder has been committed, the burden is on the state to prove the following elements:

- (a). That the deceased is dead.***
- (b). That the death was caused unlawfully.***
- (c). That there was malice aforethought in causing the death.***
- (d). That the accused committed the murder.***

As it turned out since the indictment of the accused on 4.8.2015, these four aspects of the case highlighted above being crucial have not been proved with any probative value of evidence. The prosecution submits that all efforts and strategies employed to summon attendance of witnesses have not borne fruits.

The essence of prosecution submissions is that the fairness of the trial has been largely affected by non-availability of witnesses. What is peculiar about this case, is the fact of infringement of the right to a fair trial under Article 50 of the Constitution against the accused person which includes the right to have the trial begin and conclude without unreasonable delay. One specific issue which came to the fore upfront from the submissions of the prosecution counsel is the breach of Article 50 (2) (e) of the Constitution on expeditious trial within a reasonable time. It is instructive to note that the right to a fair trial is not limited to the initiation or commencement of the trial against an accused person. It also applies to the conclusion thereof of the allegations that an accused person has committed a particular offence within the scope of our Penal or Statutory Laws. It is a matter of public concern that the police and the DPP under their Constitutional mandate in Article 244 and 157 remain at liberty to infringe the rights conferred on an accused person by the Constitution.

The right to a fair trial as stipulated in our Constitution, is much broader than the specific rights outlined under Article 50 in the scheme of 1, 2, 3, 4, 5, 6, 7, 8, of the said Article. It embraces a concept of substantive fairness and justice a cornerstone of any civilized system of criminal administration. Fair trial rights demand of the Court not to grant further postponement of cases without compelling evidence on the part of the state. On the case at hand, in my view the explanation for the delay is unsatisfactory. The accused person has been incarcerated within the correctional centers of our country without an opportunity of being heard in regard to matters arising from the complaint investigated by the police and sanctioned for prosecution by the state.

Turning to this judicial challenge comparative jurisprudence in **Gilroy v Flynn {2004} IESC 98** took this approach:

“The Courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued.”

Hardiman J. addressed the general effect of lapse of time on a proposed trial in cases of all kinds where he drew the following principles: -

- (a). A lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice: “the chances of the Courts being able to find out what really happened are progressively reduced as time goes on”.*
- (b). The lapse of time may be so great as to deprive the party against whom an allegation is made of his “capacity to be effectively heard.”*
- (c). Such lapse of time may be so great as it would be “contrary to natural justice and an abuse of the process of the Court.....”*
- (d). Having regard to the above matters the Court may dismiss a claim against a defendant by reason of the delay in bringing it “whether culpable or not”, because a long lapse of time will “necessarily” create “inequity or injustice”, amount to “an absolute and obvious injustice” or even “a parody of justice.”*
- (e). The foregoing principles apply with particular force in a case where “disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past”, as opposed presumably cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony.*

Subsequently and on the same question is the provisions under Article 159 (2) (b) on the maxim *“justice shall not be delayed.”* In applying that legal constitutional dictate the Canadian case in **R v Morin {1992} SCR 771 Sopikka J** observed:

“While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be tested as follows:

- (1). The length of the delay.*
- (2). Waiver of time periods.*
- (3). The reasons for the delay.*
- (4). Inherent time requirements of the case.*
- (5). Actions of the accused, actions of the crown.*
- (6). Limits of institutional resources.*
- (7). Other reasons for delay.*
- (8). Prejudice to the accused.*

In the instant case, there are fundamental points to note as **Mr. Mwangi** alleged in his closing remarks. The accused was properly charged before this Court. Unfortunately, since 2015, no hearing has taken place within a reasonable time. Note that the submissions by prosecution counsel indicates that all efforts have been spent consulting with the police who are tasked with the duty to bond witnesses. Subsequently, there has been utter neglect in bonding any witnesses to give evidence in support of the charge. Indeed, the delay is so long that its clearly unreasonable sufficient to occasion an infringement of Article 50 (2) (E) of the Constitution.

On the basis of our Constitution on the right to a fair hearing, an accused person charged with an offence should not have the matter hanging over his head for a long time. The whole scheme of Article 50 and 159 (2) (b) of the Constitution is to provide for the protection of the Law to ensure that any person charged with an offence should not be oppressed by state in delaying a trial unreasonably long without prosecuting the offence.

Further, having found these proceedings have been unreasonably delayed; it’s my considered view that under Article 10 of the Constitution the National Police Service has not acted in accordance to the principles of governance and national values. Their action is a departure from the provisions of Article 10 which embodies integrity, transparency and accountability as touchstones values which bind all state officers.

Consequently, with respect to the National Police Service it is unlawful to act in the way they did of not bonding witnesses in support of the indictment filed against the accused. That conduct is incompatible with the Constitutional right to a fair trial. This is a delay for which the state is responsible and the proceedings continue to hang over the accused for about six (6) years.

The Supreme Court of India in **Ratram v State of M. P. {2012} 4 SCC 516** ruled as follows:

“Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism.”

The doctrine of legitimate expectation entails that the National Police Service in acting lawfully affords the accused person legal protection in respect of the unfair conduct of not honoring their obligation to bond witnesses.

In the case of **Council of Civil Service Union v Minister for the Civil Service {1985} AC 374 Lord Fraser** remarked:

“Legitimate expectation may arise either from the express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The Law will hold a public authority to its promise or practice unless there is a good reason not to do so as a requirement of good administration, by which public authorities ought to deal straight forward and consistently with the public.” (See Hoexter Administrative in South Africa 2nd Edition (Cape Town 2012).

In these circumstances further adjournment in favor of the state to continue pursuing attendance of witnesses would infringe the right to a fair hearing. The Court further acknowledges that the conduct of the police service not to make any representation to the prosecution counsel on the status of availability of witnesses is clearly unlawful and in contradiction of the accused’s legitimate expectation to the extent of summoning of witnesses for the trial to be held within a reasonable time. In considering the question in which the criminal proceedings against the accused person has been pending before this Court, it appears to me unreasonable and any further adjournment will cause substantial prejudice to the prosecution, the accused or the state witnesses.

The result is the charge of murder is hereby dismissed for lack of evidence on the part of the state. The accused is at liberty and set forthwith free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT GASEN THIS 30TH DAY OF JULY 2021

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state
2. The accused person