



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.7 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JAPHET KOBIA alias KARWAMBA.....1ST ACCUSED

JAMES KIUNGA NTOITHILAI.....2ND ACCUSED

GODFREY KARAUARI KARITI.....3RD ACCUSED

SIMON MUTUA.....4TH ACCUSED

RULING

1. On 3/07/2019, the prosecution closed its case and the accused were placed on their defence. They have already testified and called four other witnesses who have testified on their behalf.

2. The Court had directed that the defence does supply the prosecution with witness statements of the witnesses it intended to call. When the matter came up for further defence hearing on 16/6/2020, **Mr. Namiti, Learned Senior Prosecution Counsel** was ready to proceed but informed the Court that he had not been served with witness statements that the defence had lined up.

3. On her part, **Ms. Aketch** Learned Counsel for the accused informed the Court that she was not ready to proceed. That she had six additional witnesses but she had not been able to supply the prosecution with the witness statements.

4. **Article 50 (2) (j) of the Constitution** provides that every accused person has the right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. This is to accord the person being tried the opportunity of being aware of the case to be advanced against him/her and prepare accordingly. Is the same accorded to the State?

5. This court has unlimited original jurisdiction in both criminal and civil matters as stipulated under **Article 165 (3) (a) of the Constitution**. In exercising its judicial authority the court is to ensure that justice shall be done to all. Therefore, even though the Constitution does not expressly spell out that the State be informed of the evidence the accused will rely on, equal chances have to be given to all to enable justice to be occasioned. This elaborated by the Court of Appeal in the case **Thomas Patrick Gilbert Cholmondeley v Republic[2008] eKLR** where it stated as follows: -

“However hard one may try to dissemble, what Mr. Tobiko was asking the Judge to do was to order the defence to disclose to them in advance their (i.e. the defence) case as the prosecution had done in favour of the defence. The right to a fair trial guaranteed to persons accused of an offence by section 77 of the Constitution is not a monopoly of such accused persons. The prosecution and the defence should be given equal chances. In pursuit of such equal chances, Mr. Ojiambo ought not to have conveniently kept quiet on who the other witnesses were but should have disclosed their names to the prosecution. Since Mr. Ojiambo had failed to do so the court was under a duty to order the defence to desist from their silence and disclose to the prosecution their case, including the statements of the witnesses to be called, copies of all ballistic and scientific reports that were intended to be produced. ”

6. The accused were asked severally to supply the State with witness statements. Even after, this court gave a last adjournment on the part of the defence on 3/02/2020. On 16/05/2020, **Ms. Aketch** stated that she had not supplied the witness statements because her offices were closed due to Covid-19.

7. Any judicial system worth its salt ought to ensure expeditious disposal of disputes in a manner that ensures equality to both parties. It is only then that the old adage that justice delayed is justice denied can be achieved.

8. In **Joseph Ndungu Kagiri v Republic [2016] eKLR** Mativo J held: -

“In my considered opinion, the speedy trial provided for in our constitution is not "a rushed and unconsidered justice." No. It cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must as of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system that is not too fast, and not too slow, but just right. To me that is the proper meaning of the phrase "to have the trial begin and conclude without unreasonable delay." The drafters of the constitution never anticipated a trial that is too speedy to the detriment of an accused person. I reiterate that the flip side of the maxim "justice delayed is justice denied..." is a rushed, unconsidered, un-procedural and unconstitutional trial that undermines sound criminal justice system." The effect is that such a trial is a sham and has absolutely no place in our constitutionalism.”

9. This Court acknowledges that there is a pandemic ravaging every part of the world. However, that may not be a sufficient reason as to why the witness statements were not supplied. The accused were to comply with this court's directive to supply the witness statements even prior to the pandemic.

10. Alternatively, there are other means which the accused would have used such as email. Thus, their failure is unwarranted. This matter has been in court since 2014, it is now 2020 and it seems that the accused persons who are out on bond are holding this court hostage leading to delay of the delivery of justice. This court cannot fail to uphold its constitutional mandate stipulated under **Article 159 of the Constitution.**

11. Accordingly, I am of the view that the defence's case be closed. Parties to file their submissions and judgment date be issued.

DATED and DELIVERED at Meru this 25th day of June, 2020.

A. MABEYA

JUDGE