REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 38 OF 2014

REPUBLIC……..……APPELLANT

VERSUS

ROBERT KIZITO KWENA……...RESPONDENT

(An Appeal arising out of the Ruling of C.M CR. Case No. 2096 of 2014 delivered by D.O.Ogolla CM on 16th September 2014)

J U D G M E N T

1) This Appeal has its roots in a decision made by this Court on 12th May 2014 in Busia Criminal Appeal No. 32 of 2012 **Republic Vs. Benson Kibet Chumo & Robert Kizito Kwena** (hereinafter referred to as **The Appeal**). After setting aside the acquittal of the two Respondents, this Court ordered a Retrial.

2) In compliance with the Courts direction on Retrial, the State brought a fresh charge against the Duo in Busia Criminal Case No.1116 of 2014 (**Republic Vs. 1). Benson Kibet Chumo, 2). Robert Kizito Kwena).** The two faced the charge of Stealing by Servant Contrary to Section 281 of the Penal Code and an alternative charge of Conspiracy to Commit a Felony contrary to section 393 of the Penal Code.

3) Before the Retrial commenced, and on 5th September 2014, the State sought to amend the charge sheet by introducing six (6) counts of Fraudulent False Accounting by Clerk or Servant contrary to section 330(b) of the Penal Code.

4) Not surprising that Application by the State met the resistance of the Accused persons. The gravamen of the resistance was that when the High Court ordered a Retrial, it could only have been a fresh trial for the offences that were subject of the Appeal and for which they had earlier succeeded in getting an acquittal. In a short Ruling, the Retrial Magistrate Hon. D. O. Ogolla CM agreed with the Defence argument and rejected the Application for substitution. This is what the Learned Magistrate said;

> **"I have considered the Application for substitution by the Prosecution and the objection. What was ordered for Retrial was the case before the late Hon. Nyarima (SPM) I agree with the Defence that addition or alteration of the charges herein will change the nature of the case and so be against the order of the retrial of the High Court. It is for this reason that I reject the application for substitution of the charges and order that this case do proceed in its original form as ordered by the High Court".**

5) Not one to give up, the State mounted a fresh matter being Busia Criminal Case No. 2096 of 2014 **Republic Vs. Benson Kibet Chumo & Robert Kizito Kwena** (hereinafter called the 2nd case). Here the Accused persons faced the six (6) counts under section 330(b) of the Penal Code that the state had

unsuccessfully attempted to introduce into the Retrial proceedings. The Accused persons felt highly aggrieved by the move of The State and on 16th September 2014, the Accused persons through Counsel urged the Trial Court to reject the fresh charges. On this occasion, the State prevailed as the Trial Court dismissed the plea by the Defence. It is this order of Trial Court made on 16th September 2014 that has triggered this Appeal.

6) The Memorandum of Appeal dated 15th October 2014 raises the following five (5) grounds.

a. **The Trial Court negated its core duty to strictly interprete the Judgement by High Court in Busia Criminal Appeal No. 32 of 2012**
b. **The Trial errored (sic) in law and fact by in effect sanctioning two Trials to run concurrently against the Respondent over the transaction.**
c. **The Trial Court errored (sic) in law by failing to appreciate the letter and spirit of Judgement in Criminal appeal No. 32 of 2012.**
d. **The Trial Court failed in its statutory and constitutional duties to safeguard the right of the Respondent.**
e. **The Trial Court closed its judicial eyes by allowing the prosecutor circumvent the Judgement in Criminal Appeal No. 32 of 2012**

7) In arguing the Appeal, Mr. Jumba for the Appellant submitted that to allow the second Trial to proceed was to burden the Accused persons with two concurrent criminal proceedings and to expose them to double jeopardy. Counsel pointed out that the offences in the Retrial and second Trial arose from the same set of circumstances. The dates of the alleged offences is one, being 14th October 2010. The State witnesses are same, the police case file is one and the occurrence book entry capturing the complaint is one. It was clear to the mind of Counsel that the State was attempting to circumvent the order of the Retrial Court when it rejected the introduction of the same charges. The Defence read bad faith on the part of The State and submitted that it should have appealed against the order of the Retrial Court.

8) Counsel further argued that to allow the second Trial to proceed would be to infringe on the Accused persons Constitutional Right to Fair Trial and in particular the Right to have a Trial begin and Conclude without unreasonable delay (Article 50(2) (e)). In expounding his argument in respect to breach of Article 50(2) (e), Counsel argued that no reason was adduced by the State for the unreasonable delay in bringing the new charges four (4) years after the date of the alleged offences.

9) The State is opposed to the Appeal. Mr. Owiti appearing for the state reiterated that the Ruling in the Retrial did not bar The State from mounting fresh charges against the Accused persons. And that although the charges in the second case may be related to those in the Retrial in terms of emanating from similar transactions, the same set of facts revealed more than one offence. Counsel urged me to allow the Trial Court itself to assess and test the quality and sufficiency of the evidence that The State will put forward in respect to the fresh charges (**Stanley Munga Githuguri Vs. Republic [1985]eKLR)**

10) On delay Mr. Owiti thought that the Defence had completely misconceived the provisions of Article 50(2)(1). Mr. Owiti thought that the Article refers to delay within a Trial, that is delay after charges have been brought. As to when a charge should be brought, Counsel pressed that there was no limitation of time barring the State from preferring the said charges.

11) The power of the State to prosecute is exercised through The Director of Public Prosecutions. Under the provisions of Article 157(10) of the Constitution, The Director of Public Prosecutions exercises that power independently of any person or authority. However, clause 11 obligates the Director of Public Prosecution to exercise the powers conferred upon him by the Constitution in a manner that regards Public Interest, the Administration of Justice and the need to prevent and avoid abuse of the Legal Process. The power of The Director Public Prosecution to institute and undertake criminal proceedings against any person in respect of an offence said to have been committed cannot be doubted. However, his power is bounded by the provisions of Article 157(11) which reads:-

"**In exercising the powers conferred to by this Article, the Director of Public**

Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process."

Where The Director of Public Prosecution strays beyond or outside these confines, then a Court of Law is empowered to check such abuse of power. In doing so the Court will not be curtailing or interfering with the independence of the office of The Director of Public Prosecutions but will be merely acting to ensure that The Director of Public Prosecutions exercises his authority in conformity with the Constitution.

12) The Appellant hearing attempts to assail the decision of The Director of Public Prosecution in preferring fresh charges against him and his co-accused in the second case. The Appellant is convinced that these second proceedings were commenced by The Director of Public Prosecution so as to circumvent the order of the Retrial Court made on 15th September 2014. The six (6) counts that were brought against the accused in the second case are the same charges that the Retrial Court declined to admit as additional charges. One may not therefore be forgiven for taking the view that The Director of Public Prosecutions was, in bringing the second case, attempting to achieve what he had failed to do in the Application for substitution of the charges in the Retrial. Nevertheless whether or not The Director of Public Prosecutions was acting *mala fides* should be construed from the totality of the circumstances.

13) Section 135 of the Criminal Procedure Code provides for joinder of counts in a charge or information in the following terms;-

1. **Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.**
2. **Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.**
3. **where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.**

14) In **Ngibuini V Republic [1987]KLR 517** the Court of Appeal observed as follows in respect to Section 135:-

> **"Where the offences charged are founded on the same facts or form or are part of a series of offences of the same or similar character, they ought to be charged together. The court has the discretion to direct that offences in the same charge or information be tried separately where it is of the opinion that the accused may be embarrassed in his Defence or that for any other reason it is undesirable. Where there is a single complex of offences connected in kind and time it is undesirable although not unlawful for the accused to be arraigned on separate trials. It is undesirable to have separate trials as it denies the court the opportunity to look at the accused vis a vis the series of offences as a whole when sentencing".**(my emphasis)

The observation by the Court of Appeal was that, generally, offences that are founded on the same facts or form or a part of a series of the offences of the same or similar character ought to be charged in the same charge or information.

15) For the Appellant it is argued that the offences contained in the charge sheet in the second case are founded on the same transaction as that which founded the charge in the Retrial. That having failed to persuade the Retrial Court to admit those offences, it is not open to The Director of Public Prosecutions to commence fresh proceedings based on the rejected charges. It was then argued that the course open to The Director of Public Prosecutions was to Appeal against the decision of the Retrial Court. That

argument was countered by The State which argued that a given set of facts could reveal more than one offence. It was further argued that the charges in the second case was in respect of different offences arising on dates that were different from that of the charge at the Retrial.

16) On my part, I find that the short address by the Prosecution in attempting to dissuade the Retrial Court from rejecting the Application for substitution reveals the true connection between those charges and the original charges;

> **"The new charge sheet has not introduced new charges. They are closely related to the previous charges and their transaction is the same. Even exhibits are the same and even the witnesses and their statements. We therefore urge the court to allow the application".**

That explicit explanation speaks to the intimate connection between the new set of charges and that in the Retrial proceedings. Any attempt to now distinguish them is futile. It is my finding therefore that the offences are connected in kind, character, time and are founded on the same set of facts and it would be undesirable to segregate the Trial of the two sets of charges.

17) The desirability of trying the two sets of charges in one proceeding must have been obvious to The State and that is what motivated it to seek an expansion of the charge sheet at Retrial. If it was the view that its Application for substitution was erroneously rejected by Court, then it should have appealed against the decision of the Learned Magistrate. That Appeal could well have formed a basis for a discussion as to the scope of a Retrial. A question that the Appeal Court would have had to grapple with is whether it is open to The State, when allowed a Retrial, to introduce fresh charges connected and founded on the same facts and character as the charge that the accused person faced originally. For now, it is enough to say that The Director of Public Prosecutions abused the Legal process by attempting to sidestep the Court order by simply instituting fresh criminal proceedings.

18) The Appellant was also of the view that to bring fresh proceedings involving offences that are allegedly been committed four (4) years ago would amount to an infringement of his Right to fair Trial and more so his right have the Trial begin and conclude without unreasonable delay. That Article 50(2)(e) provides:-

> 50(2)**"Every accused person has the right to a fair trial, which includes the right…..**
>
> **(a)……..**
>
> **(b)…….**
>
> **(c)……..**
>
> **(d)……..**
>
> **(e).To have the trial begin and conclude without unreasonable delay".**

The State Counsel's position was that Article 50(2)(e) was completely irrelevant as it deals with Rights that accrue to the Accused person once he is charged.

19) These rival arguments invite me, in prefatory, to determine whether or not the provisions of Article 50 (2) (e) of The Constitution extends to the Pre-Trial period. I decline to make a decision one way or other on this question because firstly, Counsel did not address me fully on the issue. Secondly, because that determination is not necessary for the resolution of this Appeal. If I am persuaded that the new proceedings have been brought after an unreasonable delay,then I will have to hold that The Director of Public Prosecutions has brought the proceedings in abuse of the legal process. The Appellant will therefore be able to find protection by insisting that the Director of Public Prosecutions exercises his powers within the limits of the provisions of Article 157(11). It is unnecessary to make any reference to

the Bill of Rights. Perhaps this becomes clearer by again setting out the provisions of Article 157(11).

> "**In exercising the powers conferred to by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.**"

20) The State Counsel made a valid argument there is no statutory bar limiting the time within which the charges in the second Trial should be brought against the accused person. That said, criminal proceedings brought, without satisfactory explanation, long after theevents said to constitute the offence for which the accused person faces Trial could amount to an abuse of Court process. In other instances prolonged delay without more can render the proceedings vexatious and an abuse of Court process (**R v Gray Justices, ex parte Graham [1982]3 ALL ER 653).** What amounts to unreasonable delay, prolonged delay and/or satisfactory explanation will depend on case to case. The statement by Kriegler J in a South African Constitutional Case of **Sanderson vs The Attorney General Eastern Cape case CCT 10/97** when deciding a matter on a delayed trial rings true for pre-trial delay;

> "**The test for establishing whether the time allowed to lapse was reasonable should not be unduly stratified or preordained**."

21) In determining whether delay is reasonable Kriegler J in **Sanderson** (supra) sounded this caution and urged this balance,

> "**The qualifier "reasonableness" requires a value judgment. In making that judgment, courts must be constantly mindful of the profound social interest in bringing a person charged with a criminal offence to trial, and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay of prosecution, this interest will loom very large. The entire enquiry must be conditioned by the recognition that we are not atomized individuals whose interests are divorced from those of society. We all benefit by our belonging to a society with structured legal system; a system which requires the prosecution to prove its case in a public forum. We also have to be prepared to pay a price for our membership of such society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. But we have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by the accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment. A person's time has a profound value, and it should not become the play-thing of the state or of society**."

I bear this in mind as I turn to determine the Appellants complaint of unreasonable delay.

22) In the matter before me, the charges relate to offences which were allegedly committed in October 2010. The first attempt to introduce those charges was made in September 2014. This would be about four(4) years after the alleged offences. At the time of applying for the inclusion of the six (6) counts, The State simply stated that there was need to include them because they were closely related to the previous charge and were of the same transaction. In the submissions to this Court, the State Counsel argued that The Director of Public Prosecution applied to bring additional counts as a result of the discovery of fresh evidence. I would however reject this submission because it is not borne out by what transpired before the Retrial court. The Director of Public Prosecutions told Court:-

> **"The new charge sheet has not introduced new charges. They are closely related to the previous charges and their transaction is the same. Even exhibits are the same and even the witnesses and their statements. We therefore urge the court to allow the application".**

It must be remembered that in the original Trial, the Accused persons were acquitted after the close of the Prosecution case. What this Court has not been told is why The State did not find it necessary then

to introduce the additional counts. Why now and not then? The only reason put forward by the State Counsel in this Appeal lacks *bonafides* as it contradicts the reasons put forward before the Retrial magistrate. It seems obvious to me that The State saw an opportunity of improving and revamping its case against the Accused persons when the High Court ordered a Retrial. And when the Retrial court refused to admit the additional charges, The Director of Public Prosecution relaunched them in the second case. This surely is an abuse of Court process when considered that it is coming so late in the day. The Court will not countenance such abuse.

23) In reaching this decision, the Court is alive to societal expectations that a person suspected of committing a crime should not be let scot free before his criminal liability or otherwise is determined by a Court of law in a judicial process. My decision may well have been different had it not been that the Appellant is currently standing trial for charges stated by the prosecution to have arisen from the very same transaction as the rejected charges. The Retrial offers a fair opportunity of having the criminal liability of the Appellant resolved on merit.

24) As would now be apparent, I am for allowing the Appeal. I do hereby set aside the Ruling of Hon. D.O Ogolla (CM) of 16th September 2014 in Busia CMCC No. 2096 of 2014. In its place, I do hereby reject all the six(6) charges. The inevitable result is that the entire case collapses.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 30th DAY OF APRIL 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

KADENYI……..……COURT CLERK

JUMBA…….……. …. FOR THE APPELLANT

OWITI.…….…..…….…….FOR THE RESPONDENT