REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Criminal Case 28 of 2011

REPUBLIC……..……STATE

-VERSUS-

PC. GEORGE OKELO

PC. WILSON FONDO ……..……....……ACCUSED

R U L I N G

1. On 17th November, 2011 the two applicants, both police constables with the Kenya Police were arraigned in court charged with the murder of Nancy Vicky Akinyi on 28th June, 2004 at Mtwapa Police Station. Hearing was set for 5th and 6th March, 2012, but Mr. Wasunna Kiamba appearing for the 2nd accused gave notice of an intention to bring a constitutional application to challenge the charges.

2. That application was filed on 29th November, 2011 and is the subject of this ruling. It is expressed to be brought under articles 20, 21, 22, 23, 24 and 165(3)(b) of the Constitution of Kenya and seeks three principal declaratory orders:

1. THAT the applicants' right as to a fair and just trial have been violated.

2. THAT there cannot be a fair trial of the applicant for an offence allegedly committed way back in June 2004.

3. THAT the court do declare that the applicants' rights as per chapter 4 of the Constitution of Kenya are being infringed and conservatory order be issued (sic).

It is based on five grounds that can be summarized into two:-

a. Due to the long delay in prosecuting the matter, it is impossible for the applicant to get a fair trial.

b. There are no new compelling reasons to charge the applicant with the offence of murder committed nearly nine years ago.

3. These grounds are fleshed out in the affidavit of the applicant. Briefly, the applicant depones therein that he was attached to Mtwapa Police Station at the time of the murder of Nancy Vicky Akinyi, and did record a statement in 2004 and has always been available for any further inquiries. That in 2005 a suspect by the name Eric Onyango was charged with the murder in High Court Criminal case no. 30 of 2005 (Mombasa); that he was never informed that he was a suspect and therefore did not preserve any evidence, and moreover any likely defence witnesses have died or relocated; that the prosecution delay is inordinate and besides, no new evidence has been supplied. The applicant annexed to his affidavit his statement and the judgment in Criminal Case No. 30/2005, acquitting the original accused person, Erick Onyango.

4. The State opposed the application by filing a replying affidavit on 29-2-2012 sworn by Alloys Okemo. He states that following the acquittal of Erick Onyango, the Hon. Attorney General exercising his mandate under the old constitution directed that all police officers at Mtwapa Police Station be subjected to a fresh investigation. Subsequently, it became apparent that the deceased was in a healthy state when booked into the cells, and that the initial prosecution of Erick Onyango was an attempt to block a full inquiry into the death of the deceased while in police custody. Hence the directions by the DPP to charge the present accused persons.

5. The State took the position that there is no time limitation as to when an accused can be arraigned for an offence, thus the accused's rights have not been violated as indeed they have been furnished with the prosecution evidence to be adduced against them.

6. During the oral arguments, the parties relied on their respective affidavits. The 1st accused supported the application. Mr. Wasunna submitted on behalf of his client that although the DPP is empowered under Article 157(11) of the current Constitution to bring the charge at any time, the power must be exercised with due regard to the administration of justice, public interest, and ought not to be abused, as he argued was true of the case before us. Mr. Wasunna urged the court to interpret the relevant constitutional provisions in line with Article 20(3) (b) in order to enhance rights and fundamental freedoms. In particular he cited Article 25 which bars the limitation of the right to a fair trial. He argued that because of the lapse of time, the accused may not trace their witnesses resulting in a denial of their right to a fair trial. In closing Mr. Wasunna cited the case of **GITHUNGURI VS REPUBLIC [1984] KLR 91** and in **GITHUNGURI V REPUBLIC [1986] KLR** in support of his arguments.

7. Mr. Kemo argued that following the directions of the Hon. Attorney General for the reinvestigation of this matter statements, under inquiry were taken from suspects and re-evaluated. Mr. Kemo denied that the Attorney General abused his power under Section 26 of the old Constitution.

He distinguished **Githunguri's case** from the case before us stating that unlike Githunguri, the present applicant was never informed that he would not be charged. To this, Mr. Wasunna responded that the two cases are not different as the 2nd accused was a witness in the first trial in Mombasa and that the **Githunguri case** deals with the prejudice arising against an accused when charges are brought late leading to difficulty in procuring witnesses.

8. The basic facts leading up to this case are not in dispute. The deceased, Nancy Vicky Akinyi was involved in an incident that led to her arrest and incarceration at the Mtwapa Police Station where the two accused were attached as police officers. On the next day she was reported very sick and later died from intracranial hemorrhage. The accused in the first trial, Erick Onyango, a bouncer at the bar where the initial commotion arose, was acquitted of her murder on 10th June, 2008.

9. This application is unique in that its background straddles two periods – the first being the era of the old constitution in which the Attorney General under section 26 controlled all prosecutions. The latter period commenced in August 2010 with the adoption of the new constitution which transferred that power to the Director of Public Prosecutions (see Article 157).

10. The right to a fair, speedy trial enshrined in Section 77 of the old Constitution provided inter alia for the accused's rights to:

a. Presumption of innocence

b. Be informed of the offence preferred against him.

c. Adequate time and facilities to prepare his defence.

d. To defend himself or by a legal representative

e. To examine prosecution witnesses and call his own in defence.

f. To interpretation in a language he understands and to be present at the trial.

Section 84 provided for the enforcement of the protective provisions, including the provisions to secure the protection of law outlined under section 77.

11.The Bill of Rights (Chapter four) in the 2010 Constitution is extensive and detailed both in the substance, scope and enforcement of the rights. Articles 49 and 50 provide for the rights of the arrested person and fair hearing. Fair hearing under article 50 incorporates inter alia the accused's rights to:-

a. Presumption of innocence

b. To be informed with sufficient detail of the charge

c. To have adequate time and facilitates to prepare a defence.

d. To public trial before a court duly established by the constitution.

e. To have the trial begin and conclude without unreasonable delay

f. To be present at the trial.

g. To choose and be represented by an advocate of his choice.

h. To be assigned an advocate by the State where substantial injustice would otherwise result

i. To remain silent at the trial

j. To be informed in advance of the evidence the prosecution will rely on.

k. To adduce and challenge evidence

l. To refuse to give self incriminating evidence.

m.To interpretation in the language he understands

12. It can be readily seen, and that is my intention in setting out these rights fully, that the substance of section 77 of the old Constitution regarding a fair trial is carried over into the new Constitution under article 50. In addition articles 20-23 incorporate and exceed the enforcement procedure provided in article 84 of the old Constitution.

Equally the 2010 constitution attempts to tackle past ambiguity and difficulty in the interpretation of (these) rights and their enforcement in articles 20, 22, 23, 24, 25.

13.As I understand it, the applicants' complaint in the present context relates to the delay by the State in bringing the charges, which they fear prejudices their right to a fair trial, because they may encounter difficulty procuring evidence in their defence (see articles 50c, e, f, k of the new Constitution and Section 77 (2)(e) of the old Constitution. They allege that the DPP is abusing his mandate under Article 157(6) of the present Constitution and in particular cite sub-article (11) which states:

"In exercising the powers conferred by this Article, to institute, undertake or terminate any criminal proceeding) the Director of Public Prosecutions shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process."

14. Mr. Kemo for the State has sworn that upon the re-investigation of the matter on directions given by the Hon. Attorney General in 2010, the DPP formed the impression that the initial trial against Erick Onyango was a ruse to shield the real culprits hence the present prosecution. Clearly, such a perversion as alleged should rightly concern the DPP as the offence involved is a serious one. Public interest, the interest of administration of justice and the prevention of the abuse of the legal process clearly do come into play.

15. But against these considerations must be weighed the individual rights of the applicants under article 50 of the Constitution. This is where I have found the **Githunguri cases** extremely useful, not only because there is a dearth of jurisprudence on the specific rights under the new Constitution involved in this case, but also because the general principles in Githunguri are in my view still relevant. In the present case, the rights being enforced do not materially differ from those of the old constitution that the Applicant in the Githunguri cases was seeking to enforce.

16. It is true though, as submitted by Mr. Kemo that the facts herein differ from **Githunguri's** in my opinion, in one key respect: the applicant in the latter case, unlike in this case, had been publicly notified by the Attorney General that he would not be prosecuted, but the Attorney General came back after nine years and instituted a prosecution. No such assurance had been given in this case, and I doubt that the charging of another suspect (Erick Onyango) and calling of the 1st accused as a witness against him amounts to a signal by the State that the accused would not be charged.

17.The **Githunguri case(s)** was the subject of comment in the recent ground breaking decision by the Court of Appeal in the case of **JULIUS KAMAU MBUGUA VS REPUBLIC [2010]e KLR**. Although delivered after the promulgation of the new constitution, the decision touched on the issues of a speedy and fair trial under Section 72(3) and 77 of the old Constitution. The court stated:

"Lastly, it is expedient to refer to the Kenya case of Githunguri vs Republic [1984(sic)] KLR which illustrates what constitutes an infringement of both the right to a fair trial and trial within reasonable time requirement under Section 77(1) and the enforcement of the two rights (under section 84(1)).

After summarizing the facts relating to the two **Githunguri cases** i.e the Constitutional Reference and Judicial Review Application; the court cited a portion of the judgment in **Githunguri's case:** as follows:-

"There is no time limit to the prosecution of serious offences except where a limitation is imposed by statute. There is no such statutory limitation imposed in respect of the four charges. In so far as the time factor is concerned, the Attorney General is there time free to prosecute provided he does not offend the fundamental rights conferred by Section 77(1) (sic) as protected by section 84(1) of the Constitution…we speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community…as a consequence of what has transpired and also being led to believe there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour – secondly, in the absence of fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal (fair trial) as explained and envisaged in Section 77(1) of the Constitution."

18.While the court in the **Githunguri Case** confirmed the unfettered discretion of the Attorney General in exercise of his power under section 26 of the Constitution, it stated that the same "should not be exercised arbitrarily, oppressively or contrary to public policy."

19. Looking at article 157(11) of the new Constitution, it is evident that public interest, the interests of the administration of justice and protection of the legal system are the key consideration. While better phrased, this sub-article is in substance not too different from the exhortation in Githunguri that the prosecution discretion should not be exercised "arbitrarily, oppressively (as regards to individual rights) or contrary to public policy (public interest)".

20.This conclusion is fortified by the lengthy discussion on the issue of public interest and policy by the court **(Githunguri Case)** in the paragraphs preceding the exhortation as to the exercise, of discretion. Quoting an article, "Discretion in Prosecuting" by Glanville Williams (1956) Criminal Law Review pg 222 the court **(Githunguri)** recounted the words of Sir Hartley Showcross in the House of Commons as saying:

"The truth is that the exercise of discretion in a quasi judicial way as to whether or when I must take steps to enforce the Criminal Law is exactly one of the duties of the office of the Attorney General… The public interest…is the dominant consideration"

21. In the case of **JULIUS KAMAU MBUGUA** (supra) the Court of Appeal collated general broad principles from consideration of exhaustive commonwealth and international jurisprudence on the right to a trial within a reasonable time. One of the jurisdictions considered was South Africa where the final Constitution (1996) under Section 35(3) (d) provides that:

"Every accused person has a right to a fair trial, which includes the right:

a-
b-
c-

d- To have their trial begin to conclude without unreasonable delay.

22. This provision is at pari materia with article 50(2)(e) of the Constitution of Kenya 2010 and was the subject of the South African decision in **SANDERSON VS THE ATTORNEY GENERAL, EASTERN CAPE, 1988(2) S.A. 38 cc**. The decision of the Constitutional Court delivered by Kriegler J dealt, in part with the test for establishing whether the delay was reasonable. He said:

"The qualifier "reasonableness" requires a value judgment. In making that judgment the court must be constantly mindful of the profound societal 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 temporary staff, this interest will loom very large. The entire inquiry must be conditioned by the recognition that we are not atomized individuals whose interests are divorced from those of the society. We all benefit by our belonging to a society with a structured legal system, a system which requires the prosecution to prove the case in a public forum. We also have to be prepared to pay a price for our membership of such a society, and accept that 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.

23.The ten principles distilled by the Court of Appeal in **JULIUS KAMAU MBUGUA VS R** (supra) relate to the nature of the right to a trial within reasonable time vis-avis-societal interest (which also affects the right to fair trial), the correct approach in determining a violation, the standard of proof of an unconstitutional delay, waiver of the right, the purpose of the right and the appropriate remedy for violation. Applying those principles and the holding in the two decisions in **GITHUNGURI VS R,** I do

not accept that the delay in bringing the present charges is unreasonable as urged by the defence. The offence was committed in 2004, which is 7 years before the arraignment of the accused in this case, and barely three years since the acquittal of a previous suspect for the same offence.

24. While the 2nd accused may have been a witness in the previous case, there is no evidence that the prosecution un equivocally communicated to him and his co-accused that he would not be charged for the offence, hence the issue of their non-preservation of evidence does not arise. The offence itself is serious being the murder of a woman, as alleged, while in police custody. In this country, mistreatment, torture and death of suspects in police custody, has been the subject of constant public complaints whether justified or not. Hence the alleged death of a suspect in police custody is a matter of public interest which the DPP is rightly entitled to consider in reaching a determination whether to institute charges, which we are told came about upon a re-evaluation of cautionary statements in the course of re-investigation ordered by the Attorney General in 2010.

25.Although the applicant claims that no new evidence has been furnished to the defence, the allegation was glossed over as neither the old nor the current evidences were demonstrated before the court. The allegation by the applicant that he took no steps to preserve evidence favorable to him, and that possible defence witnesses have died or relocated due to the prosecution delay, were equally vague. Neither the nature of the said evidence nor identities of alleged witnesses was given.

26.On all accounts, these assertions were in my opinion presented in a rather casual manner which does not fully demonstrate prejudice on the part of the applicant. Principles v and vi enunciated in **JULIUS KAMAU MBUGUA VS R** state that:

"v. Although the applicant has the ultimate burden through out to prove a violation, the evidentiary burden may shift depending on the circumstances of the case. However the court may make a determination on the basis of facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.

vi. the standard of proof of a unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable."

27. I am not convinced that the applicant in this case has crossed this high threshold. And in any event, the right of the individual applicant must be balanced against the "equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions," **(JULIUS KAMAU MBUGUA V R)** moreso, when they are public servants.

28.The defence counsel cautioned this court that no limitation of the right to a fair trial is permitted under Article 25 of the 2010 Constitution, but with respect, that article must be read alongside article 24 which prohibits the limitation of any right or freedom except by law, and within certain parameters. Article 25 appears to list rights and fundamental freedoms including the right to fair trial, which cannot be limited through legislation, under any circumstances while article 24 contains the general exceptions.

29. However counsel for the defence correctly referred the court to article 20(3) (b), and 4 of the Constitution the former which stipulates that in applying a provision of the Bill of Rights, a ***"Court shall –***

a) …

b) ***Adopt the interpretation that most favour is the enforcement of a right or fundamental freedom."***

30. The accused's assertion of their right to a fair trial, is seriously undermined by the failure to demonstrate prejudice. But even if they succeeded, their right must be juxtaposed against the deceased's right to life under article 26(1) of the Constitution and the "societal need to ensure that the enjoyment of rights and fundamental freedom by any individual does not prejudice the rights and fundamental freedoms of others," hence the existence of the Penal Code, for example, which prohibits murder.

In short the individual right must be balanced against society's interest in bringing those suspected of committing crimes to account for them.

31.One of the decisions considered by the Court of Appeal in **JULIUS KAMAU MBUGUA VS R** is the Canadian case of **R VS MORIN [1992]1 SCR771.** The court cited the decision of Mclachlin J which emphasized that the true issue at stake in consideration of factors bearing on the determination whether a right has been violated or not, is the question "where the line should be drawn between the conflicting rights of the accused and societal interest." Said McLachlin J:

"an accused may suffer little or no prejudice as a consequence of delay beyond the expected normal. Indeed, an accused may welcome the delay. On the other hand, an accused can suffer great prejudice because of the delay. Where the accused suffers little or no prejudice, it is clear that the consistently important interest of bringing those charged with criminal offence to trial outweighs the accused's …because the consequences of delay are not great. On the other hand, where the accused has suffered clear prejudice which cannot be otherwise remedied, the balance may tip in the accused's favour and justice may require stay."

32.In this case the accused asks the court to issue certain declarations respecting the past and present alleged violations of his rights and a conservatory order, or "any other order" it deems fair to grant. The specific conservatory order sought is not stated but from the submission made by the defence counsel, the applicant's plea effectively is for an order of a prohibitory nature similar to that granted in **GITHUNGURI VS R [1986] KLR 1**.

33.This aspect brings me to the procedural concerns raised by the present application. The application was brought in the murder file without any accompanying originating process such as a Petition as anticipated under the Constitution or the rules for the enforcement of Constitutional Rights and fundamental freedoms, common known as the **Gicheru Rules**. While the application could be considered as a preliminary objection in its own right as anticipated under Rule 23 of the **Gicheru Rules**, the nature of the orders sought pose a difficulty because they are interim in nature.

34. In the case of **MUSLIMS FOR HUMAN RIGHTS (MUHURI) AND 2 OTHERS VS ATTORNEY GENERAL & 2 OTHERS [2011]e KLR IBRAHIM J,** (as he then was considered article 23(3) (c) of the Constitution which currently empowers the High Court to grant conservatory orders, and commented that:-

"In the fullness of time, the Kenyan Courts will have to define and construe what is meant by the relief of a "conservatory order" under the new Constitution. Under the old constitution in section 84(1)(b) the High Court was given power to:

…..make such orders and issue, such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)"

35.The Hon. Judge then proceeded to credit the growth of the practice of granting redress especially conservatory orders at interlocutory stage in our courts to judicial interpretation and innovation.

He went on to state:

"What is clear to me from the authorities is that strictly a "Conservatory Order" is not an injunction as known in civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject matter or set of circumstance that exist on the ground in such a way that the Constitutional proceedings and cause of action is not rendered nugatory…

A conservatory order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the Petition and the trial

was not a futile academic discourse or exercise. "

36. In the present context, the question that arises is this: what purpose would a conservatory order serve in the absence of a basing petition? Such orders if granted in the circumstances of this case would effectively amount to freezing *ad infinitum* the criminal prosecution before the court. That would be a travesty of justice. These matters were not addressed at the hearing but I think it is apparent upon consideration of all relevant matters, that the applicants are not deserving of the orders they seek, and neither are the orders appropriate.

37. I can find no better words to capture this conclusion than those used by the South African Constitutional court in Sanderson as regards appropriate relief:

Even if the evidence he has placed before the court had been more damning, the relief the appellant seeks is radical, both philosophically and socialpolitically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will be seldom warranted in the absence of significant prejudice to the accused…

Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example where it is established that the accused has probably suffered "irreparable prejudice as a result of delay."

And in the words of Kriegler J. J in the same case:

"Delay cannot be allowed to debase the presumption of innocence and become in itself, a form of extra-curial punishment."

38.The accused's application is accordingly dismissed. However, the prosecution is directed to take all the necessary steps to ensure an expedited trial.

Delivered and signed at Malindi this **11th May, 2012** in the presence of the accused, Mr. Kemo for the State. Mr. Wasunna for 2nd Applicant holding brief for Mr. Mwangi for 1st Applicant. cc Evans.

C. W. MEOLI
JUDGE