



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 7 OF 2007**

REPUBLIC PROSECUTOR

VERSUS

JOSEPH KIMAIYO YEGO ALIAS CHELIMO ACCUSED

RULING

JOSEPH KIMAIYO YEGO ALIAS CHELIMO is charged with the murder of SAMUEL KIPTOO YEGO. That on the 19th day of December 2006 the offence was committed. He was arrested on the 27th day of December 2006 and was brought before court for the first time on 27th March 2007. The accused filed his own home made Preliminary Objection on 19th June 2009 whereas his advocate Mr. Magare filed a substantive Preliminary Objection under the provisions of Sections 72 (1), 72 (3) and 77 (1) of the old Constitution of Kenya and Rule 23 of the Constitution (Supervisory and protection of fundamental rights and freedoms) on the 10th November 2009. The objection is that the applicant's fundamental rights were breached as he was brought to court after one hundred and twenty four (124) days contrary to statute and hence any trial of him would be a nullity and it ought to be quashed ex debito justitiae. Counsel submitted that the delay was not explained, the case was given a very casual treatment by the police and the charge should be quashed so as to send a wake up call to the police, the Attorney General and the Court to do their work. He submitted that no amount of compensation can substitute a breach of fundamental individual rights and any trial in those circumstances is a nullity. He prayed that I quash the information and acquit the accused.

In opposing the Preliminary Objection Chief Inspector of Police John Obine swore an affidavit in which he stated that the offence was committed on 19th December 2006 but the accused who was suspected to have committed the offence went under and was not arrested until 27th December 2006 by members of the public. That investigations were conducted between 19th December 2006 and 17th January 2007 and the typing of the witness statements and necessary directions between the Marakwet DCIO and the State law office were not complete until 20th March 2007 due to shortage of police officers, lack of a typewriter and a motor vehicle at the police station to hasten the exercise. The initial investigator also died during the period slowing the process. Senior State counsel Mr. Chirchir submitted in opposition that though there was clearly a delay, the same was explained and such explanation was plausible.

I have carefully considered the Preliminary Objection and all the submissions by both Counsel. It appears agreed between both sides in this case that the arrest was on 27th December 2006. The court record shows that the accused was first presented before court on 27th March 2007. A simple counting of those days brings me to ninety one (91). That less the prescribed fourteen (14) days leaves seventy seven (77) days delay.

It is the onus of the prosecution to show that they brought the accused to court as soon as it was

reasonably practicable – S. 72 (3) (b). I note that investigations were virtually completed even before the accused was arrested as he was said to have disappeared. The delayed statements were those of the three central witnesses who could not be immediately located. The rest of the delay was explained as having been caused by the death of the initial investigating officer and the lack of typing facilities and means of transport by the few police officers at the relevant station to speed up the process.

I agree with counsel for the accused that a lot of time passed without action and something ought to be done to send a waking up call to those concerned to take their work seriously or is it more seriously? A period of seventy seven (77) days by my calculations beyond the prescribed time is clearly excessive by any standards. I do not agree however, that the something to be done to send that waking up call is to acquit the accused. It is common knowledge that some of the country's police stations are poorly equipped and ill-mannered. That failure cannot, in all fairness, be attributed to the prosecution. And while the prosecution must at all times endeavour to make the best of the little resource that they have, when they fail that failure must, in my view, be put in its proper perspective and be placed where it falls. I accept the reasons for the delay in presenting the accused before court and more so because despite the slow start the case has since progressed and the prosecution has always brought its witnesses to court on hearing dates. I have seen the authority of **ELIZABETH AKINYI ODOYO & ANOTHER VS. R CRIMINAL APPEAL NOS. 49 & 62 OF 2003** in which the appellants had their appeals allowed on grounds of a delay of about eight (8) days which the court found to have compromised their constitutional rights. That case is however very distinguishable from the present one. In that appeal the prosecution did not offer any explanation whatsoever for that delay. That is what would be an unmitigated breach of fundamental rights of the accused. In the present case, however, the prosecution have given the death of the investigating officer, lack of facilities at the police station and the non-availability of important witnesses as the reasons of the delay. On my part I accept that as the prosecution's discharge of its onus as compelled on them by Section 72 (3) (b) of the old Constitution of Kenya. Accordingly I dismiss this preliminary objection and order that the hearing of the case against the accused shall proceed to its end.

It is ordered accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF SEPTEMBER 2010.

P. M. MWILU
JUDGE

In the presence of:-

Accused

Magare Advocate for accused

Kabaka holding brief for Chirchir State Counsel for the State

Andrew Omwenga – Court Clerk

P. M. MWILU
JUDGE