



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Criminal Case 15B of 2008

REPUBLIC.....APPLICANT

VERSUS

IBRAHIM KARONEI ALIAS KIPKETER KEMBOI CHOKOPA.....RESPONDENT

RULING:

The Applicant herein one Abraham Koronei alias Kipketer Kemboi Chokopa faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 31<sup>st</sup> day of December 2007 at Chegaiya area in Kisumu Division in Uasin Gishu District within Rift Valley Province jointly with others not before court murdered Evanson Ndungu Karanja. Plea was taken on 23/05/2000 and the case was fixed to be heard on the 02/10/2008. However before that date and more particularly on 31<sup>st</sup> July 2008 the accused filed a Notice of Motion under Section 123 of the Criminal Procedure Code, and Sections 71, 72 and 77 of the Constitution of Kenya on the grounds that his constitutional rights have been breached in that his right to fair trial has already been and continues to be violated; right of presumption of innocence until proved otherwise has been overlooked and that his right to personal liberty has been and continues to be violated. The accused swore an affidavit and deposed inter alia, that the trial of him would be void and a nullity and he would suffer irreparably due to the deliberate omission by the prosecution to inform him within reasonable time the charges he faced. Counsel for the accused raised the objections that the applicant's right to protection of life, fair trial were breached and the continued incarceration was punitive and oppressive, the order by the deputy registrar of the court committing the accused to custody was a limitation to his freedom.

There is no contention that the accused person was arrested on 04/04/2008 and he was first brought to court on 17/04/08. That was 13 days after his arrest. On this date plea could not be taken as the court was not sitting and the court had also not appointed an advocate to appear for the accused. This was submitted by Mr. Omutelema learned counsel for the prosecution. Plea was then set to be taken on the 24/04/08 but again even on this date no advocate had been appointed for the accused by the court. Plea was then set to be taken on 22/05/08 by which date the court was yet to appoint an advocate for the accused and so the accused appointed his own counsel Mr. Bittok now on record for him and plea was finally taken on the said 22/05/08 and on 31/07/08 the application under consideration was filed. The applicant relies on several authorities in support of his application amongst them the court of Appeal decisions of **Albanus Mwasia Mutua –vs- R. Nrb. Criminal Appeal No.120 of 2004** and **Ann Njogu and 5 others –vs- Republic Criminal application No. 551 of 2007**.

The state has explained the delay in taking plea as having been occasioned by the court not sitting on the first day the accused was brought to court on 17/04/08 and thereafter because the court did not appoint an advocate for the accused soon enough as is required for persons facing a capital offence. This delay is the type that was observed by the court of Appeal in the authority of **Kazungu Kasiwa Mkunzo and Another -vs- The Republic Mombasa Criminal Appeal No.239 of 2004** where the court observed that delay could be caused by any number of factors such as the diary of the court.

In my consideration of this application I start at the point that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the weight of evidence. However that acquittal is not automatic merely because there has been delay. Section 72 (3) (b) of the constitution has given the prosecution a chance to explain any delay and if they satisfy the court that the accused was brought to court as soon as was reasonably practicable then the accused will face trial and the case will be

determined upon the available evidence. The court is required to consider well the circumstances under which the delay occurred as each case must be considered on its own peculiar circumstances. In this case the accused was brought to court on 17/04/08 thirteen days after his arrest. As the court was not sitting he was committed to remand custody. Facing a capital offence he was not entitled to bail either under the constitution or under S. 123 of the Criminal Procedure Code. When plea was taken on 22/05/2008, that was some 35 days after the accused was first produced in court. Delay was in taking the plea and not in being brought to court and that delay was occasioned by the process of appointing an advocate to represent the accused, such advocate being appointed by the court at the taxpayer's expense for the benefit of the accused who faces a serious offence whose punishment is death. I agree that with the state and associate myself with the reasons given in the **Kazungu** case above. In this case the delay in taking plea was occasioned by the court diary as the accused was indeed first brought to court within the stipulated time. I find that the delay in obtaining counsel for the accused caused the delay in taking of plea. I find also that such counsel was being sought for the benefit of the applicant. The applicant's was not the only case before the court and it was fixed alongside others. It is also common ground that there was only one judge in the station the other one having died in the month of April 2008 and no replacement Judge having been posted. That year's court Easter vacation fell during the same time.

It has been stated variously that a balancing act by the court to exercise the duty of the court to uphold the rights of persons charged with criminal offences and to follow due process of determining criminal cases and to punish crime where it is proved so as to protect society. That is why an acquittal of an accused person before all the evidence is adduced must be the only option. In the circumstances of this case I do not find that it is the only option. I accept the prosecution's reasons for the delay in taking the plea and accordingly dismiss the Preliminary Objection.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF AUGUST 2009.**

**P.M.MWILU**

**JUDGE**