



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case [.....]

REPUBLIC PROSECUTOR

VERSUS

JOSEPH NJUGUNA KOIGI..... ACCUSED

RULING

It is common ground that the applicant was arrested on 20th November 2007, but was not taken to court until 26th February 2008.

By the applicant's calculations, he was first taken to court after the lapse of 96 days, from the date of arrest.

As he is charged with murder, the applicant shall be liable to the death sentence, if he were to be convicted. In the event, pursuant to the provisions of section 72 (3) (b) of the constitution, the applicant ought to have been first taken before a court of law within 14 days of his arrest.

Having been first taken to court after more than 96 days, the applicant has asked this court to declare that his constitutional rights have been infringed. He also says that because of the delay in bringing him to court, he has been deprived of the right to a trial within a reasonable time.

In the circumstances, the applicant asks this court to terminate the trial against him because it is founded on an illegality.

In making that request, the applicant emphasized that the delay of 96 days was inordinate, and also that the state had not given any reasonable explanation for it. In his view, the contention that the delay was caused by the post-election violence is not tenable. Furthermore, the delay by the Government Chemist, in providing its report to the prosecution, had not been sufficiently explained, submitted the applicant.

In answer to the application, the respondent submitted that the delay in bringing the applicant to court, had been sufficiently explained in the replying affidavit of PC Francis Adungosi, who was the investigating officer in the case.

The investigating officer said that it took long for him to trace the witnesses, for purposes of recording their statements. He also explained that the investigations were disrupted by the post-election violence, as the police officers who had been investigating the case were re-deployed to handle the violence which erupted after the 2007 elections.

A further explanation was that the Investigating Officer had taken several exhibits to the Government Analyst, who ended up taking time before providing his report.

First, this court takes judicial notice of the fact that the 2007 General Elections in Kenya, were conducted in late December. That implies that the 14 days' period, during which the applicant should have been taken to court, expired long before the elections were held. I say so because by my calculations, a suspect who was arrested for a capital offence, on 20th November, 2007, ought to have been taken before a court of law on or before 5th December 2007.

The Investigating Officer has not offered any explanation for failing to take the applicant to court within that time.

And even if the delay by the Government Analyst is taken into account, this court holds the considered view that the said explanation is not reasonable. I so find because the respondent did not provide me with such information as would enable me to make an informed independent assessment of the reasons why the Government Analyst delayed in providing his report. It could have been helpful to the court, if the respondent had provided information regarding the particulars of the exhibits which were taken to the Government Analyst, and also indicating the dates when the exhibits were given to the said Analyst.

If thereafter the Investigating Officer had disclosed the date when the report of the Government Analyst was received, as well as a record showing the steps he took, in trying to obtain the report soonest; the court may have had a basis for making an informed assessment. But no such information has been made available. And the court cannot simply accept the assessment of the Investigating Officer, in the absence of information which the court can use to verify it.

I have therefore come to the conclusion that the state has failed to discharge the onus of proving that the applicant was taken to court as soon as was reasonably practicable. Therefore, it follows that the applicant's constitutional rights have been infringed.

The next question is whether or not the applicant's trial should now be terminated.

Whereas the applicant argues that his trial was founded on an illegality, the state submitted that an acquittal was not the automatic consequence of a delay in taking an accused person to court. It was the state's contention that pursuant to section 72 (6) of the Constitution, the accused would only become entitled to compensation.

I was urged to consider the gravity of the offence with which the accused has been charged, and the circumstances in which the offence was committed. I was also invited to take into account the provisions of section 70 (a) and section 71(1) of the Constitution.

By virtue of section 70 (a), every individual in Kenya is entitled to the fundamental rights and freedoms to life, liberty, security of the person and the protection of the law. But that section also makes it crystal clear that the individual shall be entitled to enjoy those rights and freedoms;

“subject to respect for the rights and freedoms of others and for public interest.....”

Unfortunately, in this instance, the life of LWM, has been cut short. She is believed to have been raped and then murdered. Those that took away her dignity and her life are believed, by the prosecution, to include the applicant herein. However, the law recognizes that the accused herein shall be presumed innocent until and unless he is proved guilty.

In that context, it would be premature of this court to be asked to ensure that crime, if proved, is punished. But then again, if the court were to terminate the proceedings at this stage, the court would have brought to an end the only process through which the prosecution could lead evidence to prove the guilt of the accused.

To my mind, such a step would leave the accused person with the right to seek compensation for the infringement of his rights, whilst depriving the prosecution any opportunity to prove the guilty of the accused. That would be inequitable.

Mutungi J. recognized that an accused person who was released or acquitted may thereafter seek compensation for his unlawful arrest or detention. This is what the learned Judge said;

“Without stressing the obvious, release/acquittal of the accused/applicant from the charge of murder facing him in these proceedings is no bar to the applicant in moving under a civil suit against any person/persons for compensation for unlawful arrest or detention, if he can prove his case.” -REP V STEPHEN KIBE MAKUMI CR. C. NO. 23/06

In effect, the accused who has been taken to court after the lapse of the prescribed period of time shall benefit from both an acquittal as well as compensation. Meanwhile, the victim of the criminal offence with which the accused had been charged will have lost the opportunity to prove that the accused was guilty, and that he should be punished, if convicted.

In my understanding, such an acquittal would make a mockery of section 70 (a) of the Constitution, which states that the individual shall enjoy his rights and freedoms subject to the rights and freedoms of others and to public interest.

In my considered view, public interest demands that if any person be proved to have committed a criminal offence, he should be duly punished. By doing so, whilst compensating him for any wrongs done against him, the court would have performed its duty of balancing the rights and freedoms of the accused as against public interest.

In the result, although the constitutional rights of the accused have been violated, I decline to terminate the criminal proceedings against him. I find that his remedy, which is expressly stipulated in section 72(6) of the Constitution, is compensation. He may therefore proceed to seek such compensation in separate proceedings.

Meanwhile, the criminal proceedings against him will continue to their logical conclusion. It is so ordered.

Dated, Signed and Delivered at Nairobi, this 23rd day of September, 2009.

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FRED A. OCHIENG

JUDGE