



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Criminal Case 19 of 2009

REPUBLIC:.....PROSECUTOR

VERSUS

JOHN KIPSESAT CHEPYATOR:.....ACCUSED

RULING

John Kipsesat Chepyator faces a charge of having murdered Rebeca Kipsesat on the 17th January 2007 at about 1:00 am at Tinomoi sub location Bekibon location in Baringo district of the Rift Valley. He was not brought to court until 30th May 2007 when plea was fixed to be taken on 7th June 2009 on which date it was deferred to 14th June 2007 to allow the court to appoint an advocate for the accused due to the nature of the charge he faces. Hearing was fixed for the 26/11/2007. On that date Mr. Okara for the accused was reported to be unwell and so the case was adjourned to 25/02/2008 on which date Mr. Okara was absent from court as he was said to be bereaved. The case was then fixed to be heard on 08/05/2009 on which date Mr. Okara did not attend court and no one held his brief. Case was adjourned to be heard on 02/07/2008 and a hearing notice was to be sent to Mr. Okara who then sent Mr. Nyambegera to hold his brief. The accused then applied to change the advocate for another as he had never seen the said Mr. Okara. Consequently Mr. Koros was appointed and he immediately gave notice of intention to file a Preliminary objection which he did on the 6th February 2009. He raises the point that the constitutional rights of the accused were violated when the accused was held for 126 days without being informed of the charges he faced contrary to section 77 (2) (b) of the Constitution of Kenya. He added that the continued incarceration of the accused beyond 14 days by police was punitive, oppressive and barbaric and a violation of section 72 (3) (b) of the Constitution of Kenya. There are claims for deprivation of personal liberty, limitation of freedom and fair trial as well as violation of the applicant's right to life.

In an attempt to explain the delay police constable Stephen Okwara the investigation officer in the case swore an affidavit and explained that the delay was caused by the family of the deceased trying to raise money to meet the post mortem expenses and when they finally failed the area councillor one William Kipkwakwar organized fund raisers to meet the mortuary fees and the post mortem fees. He deponed further that the post-mortem report is a pre-requisite document to be availed in a case of murder. The postmortem was finally performed on the body of the deceased on 02/05/2007 and the accused was brought to court on 30/05/2007.

I accept the explanation given for waiting for the postmortem before charging the accused as I consider it an uphill task to prove a charge of murder without proving showing the cause of death. A postmortem report would show the cause of death which incidentally may not have anything to do with an accused in which event then the accused would not be charged with murder or if charged with murder the offence would not be proved. The prosecution cannot be expected to charge anyone unless they have evidence born out of investigations tending to connect the offence to the accused. And it should then be a matter of

common sense that the prosecution prefer a charge against an accused with the aim of proving the offence the accused is alleged to have committed otherwise they would willingly and knowingly be acting in vain. In my view therefore in this case the prosecution needed the postmortem report and I accept that the prosecutions have discharged their burden to that extent.

The deponent of the affidavit giving the reasons for the delay states that the postmortem report was finally performed on 02/05/2007. The question then begs why the accused was not brought to court until 30/05/2007, some 28 days after the postmortem was performed. There is no attempt whatsoever by the prosecution to explain this later delay. And I find that a delay of 28 days which is not explained is a violation of the accused's fundamental rights as guaranteed by the Constitution of Kenya.

This matter has caused me some considerable concern. I am alive to the fact that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the weight of the evidence available. Equally I am alive too to the fact that the interest of justice as a whole must be considered and that an acquittal before all the evidence is taken must be the only alternative. A delay to my mind must not amount to an automatic acquittal. There is an alternative to the acquittal provided for by S. 72 (6) of the same Constitution of Kenya that guarantees the accused's rights. As observed by the court of appeal in the case of **Albanus Mwasia Mutua VR Criminal Appeal No. 120/2004** the duty of the court is to ensure crime is appropriately punished where it is proved and this is for public good for the protection of society and equally it is the duty of the court to protect the constitutionally guaranteed rights of an accused person. That they said is a balancing act and as often said each case must be considered on its own peculiar circumstances. Justice cuts both ways. In my considered view and in the circumstances of this case I hold that justice of the case dictates that the process runs its full course and the accused deals with the evidence at the hearing on its merits. And as I have found that his rights were violated the accused is at liberty to apply to the High Court for compensation under S.72 (6) of the constitution of Kenya. The upshot is that I dismiss the Preliminary objection and order that the case against the accused do proceed to hearing.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF AUGUST, 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF

Chelang'a Court Clerk

Mr. Koros Advocate for the Accused.

Mr. Chirchir counsel for the state

Present Accused in person.

MR. CHIRCHIR: I apply for a hearing date and witness summons.

P.M.MWILU

JUDGE

COURT: Witness summons to issue. Hearing on 29/10/2009.

P.M.MWILU

JUDGE