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

Criminal Appeal 48 of 2007

BERNARD MIAKO KANG'ETHE……APPELLANT

-AND-

REPUBLIC……..RESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Mr. K. Muneeni dated 9th November, 2006 in Criminal Case No.1423 of 1999 at Makadara Law Courts)

JUDGMENT

Along with two other persons, the appellant herein, ***Bernard Miako Kang'ethe,*** was charged with the offence of obtaining money by false pretences, contrary to s.313 of the Penal Code (Cap. 63, Laws of Kenya). The charge was framed in eleven separate counts which were tried at first, before Chief Magistrate (as he then was) ***Mr. O. Tunya***; then before Chief Magistrate ***Mr. Apondi*** (as he then was); then before Chief Magistrate ***Mr. Nyakundi***; and then Judgment was written and delivered by Senior Resident Magistrate ***Mr. K. Muneeni.*** Trial started on 26th July, 1999 and Judgment was delivered more than seven years later. This was a much delayed trial, in my opinion, an unfortunate example of the process of justice compromised through dilatoriness.

The accused persons were each sentenced to pay fines, with terms of imprisonment in case of default, in respect of eight of the counts of the charge. The appellant herein, who was the 2nd accused, appealed on the following grounds:

(i) that the learned Magistrate who wrote the judgment, had relied on written submissions without his consent;

(ii) that he had been convicted on the basis of mere suspicion;

(iii) that the Judgment was founded on circumstantial evidence that did not meet the required legal standards;

(iv) that the prosecution had not proved their case beyond reasonable doubt;

(v) that the trial Court had erred in fact and in law, by shifting the burden of proof to the appellant herein;

(vi) that the trial Court had erred in law and fact by failing to analyse the material contradictions and

inconsistencies in the evidence;

(vii) that the trial Court erred in law by admitting similar-fact evidence drawn from other cases, Crim. Case No.1424/99, and Criminal Case No.1424/99;

(viii) that prosecution was partly conducted by an incompetent person, contrary to ss.85(2) and 88(1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya);

(ix) that the trial Court erred in law and fact by applying wrong principles of law and drawing wrong inferences, to the prejudice of the appellant.

In the submissions, learned counsel ***Mr. Ondieki*** presented as the core gravamina of the complainant, firstly, the contention that the trial proceedings were partly conducted by an incompetent prosecutor; and secondly, the assertion that the appellant had been detained in custody for nearly two months, 2nd May, 1999 to 14th June, 1999 without being charged.

Counsel urged that, where the trial-rights of the accused as contemplated by s.72(3)(b) of the Constitution are violated, then the resulting proceedings become a nullity, and he relied for this point on the Court of Appeal decision, ***Albanus Mwasia Mutua v. Republic***, Criminal Appeal No.120 of 2004, and on decisions of the High Court, ***Republic v. James Njuguna Nyaga***, H.C. Cr. Case No. 40 of 2007 ***(Mutungi, J)*** and ***Ann Njogu & 5 Others v. Republic***, H.C. Misc. Crim. Appeal No.551 of 2007 **(*Mutungi, J*)**. Counsel submitted that since the offence charged was a misdemeanour, the appellant should have been charged within 24 hours of being arrested and detained. It was urged that once the constitutional requirement was breached, then "the weight of the evidence matters not."

Learned counsel then submitted that one of the officers who had conducted the prosecution case was unqualified, in terms of ss.85(2) and 88(1) of the Criminal Procedure Code – and so this was a violation of the prescriptions of statute law, and rendered the trial a nullity.

Learned State Counsel ***Ms. Gakobo*** conceded to this appeal, stating that ***P.C. Simiyu*** who had conducted the prosecution case was not qualified.

On this point, which both counsel considered so crucial, I have carefully checked the record to see the particulars of the prosecutors who appeared in this case. I find them to have been as follows:

(i) 14th June, 1999 – Chief Inspector Warutere.

(ii) 21st June, 1999 – P.C. Simiyu.

(iii) 25th June, 1999 – Chief Inspector Kilonzo.

(iv) 28th June, 1999 – P.C. Simiyu.

(v) 12th July, 1999 – Inspector of Police Kilonzo.

(vi) 26th July, 1999 – Chief Inspector Kilonzo.

(vii) 27th July, 1999 – Inspector of Police Nzumu.

(viii) 17th August, 1999 – Chief Inspector Kilonzo.

(ix) 18th August, 1999 – Nil.

(x) 17th September, 1999 – Chief Inspector Kilonzo.

(xi) 29th September, 1999 – Chief Inspector Kilonzo.

(xii) 30th September, 1999 – Chief Inspector Kundu.

(xiii) 29th October, 1999 – Chief Inspector Kilonzo.

(xiv) 3rd November, 1999 – Chief Inspector Kilonzo.

(xv) 5th November, 1999 - Chief Inspector Kilonzo.

(xvi) 26th November, 1999 – Chief Inspector Odoyo.

(xvii) 20th December, 1999 – Chief Inspector Kilonzo.

(xviii) 27th January, 2000 – Chief Inspector Kariuki.

(xix) 20th March, 2000 – Inspector of Police Onyango.

(xx) 27th March, 2000 – Inspector of Police Onyango.

(xxi) 25th April, 2000 – Inspector of Police Onyango.

(xxii) 10th May, 2000 – Police Constable Simiyu [*it is on this occasion that the testimony of PW8 was taken*]

(xxiii) 6th June, 2000 – Inspector of Police Onyango.

(xxiv) 21st June, 2000 – Inspector of Police Mutte.

(xxv) 19th July, 2000 – Inspector of Police Kimanzi.

(xxvi) 16th August, 2000 – Inspector of Police Kilonzo

(xxvii) 22nd August, 2000 – Inspector of Police Simiyu.

(xxviii) 22nd September, 2000 – Chief Inspector Kimanzi & Police Constable Simiyu [*the testimony of PW12 was taken on this occasion*].

(xxix) 23rd October, 2000 – Chief Inspector Kimanzi.

(xxx) 3rd November, 2000 – Chief Inspector Kimanzi & Police Constable Simiyu.

(xxxi) 1st December, 2000 – Chief Inspector Kimanzi.

(xxxii) 7th December,, 2000 – Chief Inspector Kimanzi & Police Constable Simiyu.

(xxxiii) 8th January, 2001 – Inspector of Police Gitau.

(xxxiv) 30th January, 2001 – Chief Inspector Kimanzi & Police Constable Simiyu [*it is on this occasion that the testimony of PW13 was taken*].

(xxxv)13th February, 2001 – Chief Inspector Kimanzi.

(xxxvi) 28th February, 2001 – Chief Inspector Kimanzi.

(xxxvii) 19th March, 2001 – Chief Inspector Kimanzi.

(xxxviii) 22nd March, 2001 - Inspectors of Police Sarah & Kimanzi.

(xxxix) 23rd March, 2001 – Inspector of Police Njenga.

(xl) 26th March, 2001 – Chief Inspector Kimanzi.

(xli) 21st May, 2001 – Inspector of Police Warachi.

(xlii) 18th June, 2001 – Inspector of Police Warachi.

(xliii) 2nd July, 2001 – Inspector of Police Warachi.

(xliv) 5th July, 2001 – Inspector of Police Kundu.

(xlv) 6th July, 2001 – Chief Inspector Kundu.

(xlvi) 18th July, 2001 – Chief Inspector Kimanzi.

(xlvii) 19th September, 2001 – Chief Inspector Kimanzi.

(xlviii) 20th July, 2001 – Chief Inspector Kimanzi.

(xlix) 3rd August, 2001 – Chief Inspector Kimanzi.

(l) 17th August, 2001 – Chief Inspector Kimanzi.

(li) 31st August, 2001 – Chief Inspector Kimanzi.

(lii) 14th September, 2001 – Inspector of Police Gitau.

(liii) 17th September, 2001 – Chief Inspector Kimanzi.

(liv) 1st October, 2001 – Chief Inspector Kimanzi.

(lv) 2nd October, 2001 – Chief Inspector Kimanzi.

(lvi) 4th October, 2001 – Chief Inspector Kimanzi.

(lvii) 5th October, 2001 – Chief Inspector Kimanzi.

(lviii) 1st November, 2001 – Chief Inspector Kimanzi.

(lix) 9th January, 2002 – Inspector of Police Waracha.

(lx) 1st March, 2002 – Chief Inspector Kimanzi.

(lxi) 19th March, 2002 – Chief Inspector Kimanzi.

(lxii) 19th April, 2002 – Chief Inspector Mukui.

(lxiii) 14th May, 2002 – Chief Inspector Mukui.

(lxiv) 17th May, 2002 – Chief Inspector Mukui.

(lxv) 31st May, 2002 – Chief Inspector Mukui.

(lxvi) 19th June, 2002 – Chief Inspector Mukui.

(lxvii) 30th October, 2003 – Chief Inspector Mukui.

(lxviii) 1st December, 2003 – Inspector of Police Mutie.

(lxix) 2nd January, 2004 – Inspector of Police Elizabeth.

(lxx) 21st January, 2004 – Chief Inspector Mukui.

(lxxi) 21st April, 2004 – Inspector of Police Kariuki.

(lxxii) 27th April, 2004 – Inspector of Police Kariuki.

(lxxiii) 31st May, 2004 – Inspector of Police Kariuki.

(lxxiv) 6th July, 2004 – Chief Inspector Mukui.

(lxxv) 12th July, 2004 – Chief Inspector Mukui.

(lxxvi) 22nd July, 2004 – Chief Inspector Mukui.

(lxxvii) 29th July, 2004 – Chief Inspector Mukui.

(lxxviii) 6th May, 2004 – Chief Inspector Mukui.

(lxxix) 26th August, 2004 – Inspector of Police Muriuki.

(lxxx) 20th September, 2004 – Inspector of Police Kariuki.

(lxxxi) 21st October, 2004 – Inspector of Police Kariuki.

(lxxxii) 9th November, 2004 – Chief Inspector Mukui.

(lxxxiii) 11th August, 2005 – Inspector of Police Mwangi.

(lxxxiv) 22nd August, 2005 – Inspector of Police Mwangi.

(lxxxv) 23rd August, 2005 – Inspector of Police Kariuki.

(lxxxvi) 25th October, 2005 – Inspector of Police Mukui.

(lxxxvii) 29th November, 2005 – Chief Inspector Mukui.

(lxxxviii) 14th December, 2005 – Inspector of Police Mukui.

(lxxxix) 16th December, 2005 – Chief Inspector Mukui.

(xc) 20th December, 2005 – Chief Inspector Mukui.

(xci) 21st February, 2006 – Chief Inspector Mukui.

(xcii) 24th February, 2006 – Inspector of Police Mwangi.

(xciii) 24th April, 2006 – Chief Inspector Mwangi.

(xciv) 24th May, 2006 – Chief Inspector Mukui.

(xcv) 25th May, 2006 – Inspector of Police Mwangi.

(xcvi) 23rd June, 2006 – Inspector of Police Mwangi.

(xcvii) 31st August, 2006 – Inspector of Police Mwangi.

(xcviii) 8th September, 2006 – Inspector of Police Mwangi.

(xcix) 6th October, 2006 – Inspector of Police Mwangi.

(c) 20th October, 2006 – Inspector of Police Mwangi.

(ci) 9th November, 2006 – Inspector of Police Mwangi; [*this was the occasion of Judgment and sentence*]

From the foregoing catalogue, the full extent of learned counsel's submission on both sides may be appreciated. True, ***Police Constable Simiyu*** appeared before the trial Court in the capacity of a prosecutor on *21st June, 1999*; *28th June, 1999; 10th May, 2000; 22nd September, 2000; 3rd November, 2000; 7th December, 2000; and 30th January. 2001*. Although on account of the nature of the proceedings taken on the days above-mentioned most of ***Police Constable Simiyu's*** appearances in Court may have had no more that a nominal significance, there were crucial days during which he was an *active prosecutor*: for example, *10th May, 2000* when he appeared *alone*, and when the testimony of *PW8* was taken; *22nd September, 2000* when he appeared with ***Chief Inspector Kimanzi***, and when the testimony of *PW12* was taken; *30th January, 2001* when ***Police Constable Simiyu*** appeared with ***Chief Inspector Kimanzi***, and when the testimony of *PW13* was taken.

The record also carries an unascertained entry showing that on *22nd August, 2000* the prosecuting officer was ***Inspector of Police Simiyu.*** It is not clear whether in this instance, the designation of the prosecuting officer was correctly given.

The argument of learned counsel ***Mr. Ondieki***, which learned State Counsel ***Ms. Gakobo*** too restated, was that the conduct of prosecution was *irregular,* and consequently the trial proceedings themselves too were, on account of the role therein of a person below the rank of Assistant Inspector of Police (contrary to s. 85(2) of the Criminal Procedure Code (Cap. 75)) which was then in force (though now amended by *Statute Law (Miscellaneous Amendments) Act, 2007 (Act No. 7 of 2007)*.

Ms. Gakobo submitted that whereas by s.72(3) of the constitution the appellant should ordinarily have been brought before the Court within 24 hours of his arrest, it took ***45 days*** between arrest and arraignment in Court. Learned State Counsel submitted that even though delay in bringing an accused

person to Court within the general period prescribed under s.72(3) of the Constitution need not be fatal to the prosecution case, any delay is required by law to be *explained*, and in the absence of an explanation, there would be a breach of the accused's trial-rights (s.72(3)(b) of the Constitution; and ***Albanus Mwasia Mutua v. Republic*** Crim. Appeal No. 120 of 2004). Learned counsel submitted that the contention made for the appellant in this regard was inapposite; in her words: "The proceedings show that violation of the appellant's rights was never raised throughout the proceedings; it's being raised only this morning, and it was not even in the petition of appeal; and so the prosecution had no opportunity to offer an explanation. It is not [right to urge] that every undue delay must [lead] to an automatic acquittal." On this point, learned State Counsel relied on another Court of Appeal decision, ***Eliud Njeru Nyaga v. Republic***, Criminal Appeal No. 182 of 2006 in which it was thus stated:

"***While we would reiterate the position that under the fair-trial provisions of the Constitution, an accused person must be brought to Court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal"***

In the *Eliud Njeru Nyaga* case, the Court of Appeal made specific reference to the *Albanus Mwasia Mutua* case, and stated the *special fact* in that earlier case, which dictated that the outcome be in favour of the accused:

"……..**in *Mutua's* case the prosecution had had an opportunity to explain the cause of the delay but failed to offer an explanation. In the appeal before us [the *Eliud Njeru Nyaga* case] the ground raising the violation of the constitutional right was raised only on the morning of the hearing when the Court granted leave to *Ms. Mwai* to file the supplementary memorandum of appeal out of time. We are, accordingly, unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity ……."**

***Ms. Gakobo* urged that, just as in the *Eliud Njeru Nyaga* case, though there was a delay in the instant case in bringing the appellant before the Court, the prosecution had been accorded no opportunity to explain the same, and so, "the prosecution should not be condemned unheard, in respect of that delay".**

Learned Counsel urged the Court to attach merit to the foregoing argument, and, on that basis, to order that the instant case should go for *retrial.* She urged that the charges in question were of a grave nature, and involved various amounts of money being obtained by fraud. Although the trial had been a protracted one, running from *1999* to *2006,* counsel urged that it was in the interests of justice to order a *retrial,* so that both the complainants and the appellants may be accorded fair treatment. Counsel urged that the evidence in the hands of the prosecution was cogent, and was likely to return a conviction; and as the appellant was free, on bond pending appeal, a retrial would cause him no prejudice. Counsel stated that all witnesses in the case are Kenyans, and will be available if retrial were ordered.

***Mr. Ondieki* in his reply, maintained that the terms of s.72(3) of the Constitution were mandatory, and that the effect of delay in prosecuting the appellant herein, *ought* to lead to acquittal. He also urged that subjecting the appellant to another trial would not be in the interests of justice. He urged: "The appellant has suffered enough, and conviction should be quashed, and he be acquitted; and judicial notice may be taken that he is no longer a young a man".**

On the question whether the authority of *Albanus Mwasia Mutua* dictates that the appellant be acquitted, because there had been *delay* in bringing him before the Court, a plain reading of s.72(3)(b) of the Constitution shows that a delay in prosecution *can* be explained away. This point keeps coming up before the Courts, but I suspect this is because whenever accused persons have complained about the length of time during which they have been held by the Police, counsel have been tempted to make the promise that, there exists a template which will win their freedom from being prosecuted. Such a promise is, however, and in my opinion, more psychological than forensic; as it fails to address the terms of s.72(3)(b) of the Constitution, and of the Court of Appeal

jurisprudence. In a claim of such a kind, in *Dickson Ndichi Kago v. Republic,* High Court Misc. Crim. Application No. 639 of 2007 I had the occasion to make pertinent observations on this point:

"What is not stated in the Constitution is, must it always be the detaining authority who *begins* voluntarily to justify the extended detention? Does that authority wait to be called upon to explain the extension? Is it unnecessary for the subject to demand to be released and to invoke the limited period of detention provided in s.72(3) (b) of the Constitution? Is the trial Court required to remain always mindful of the terms of s.72(3)(b) of the Constitution, and to enter upon the trial task only *after asking* if the limitation in the detention period had been complied with?"

I had in the *Dickson Ndichu Kago* case held that the complaint about delayed prosecution ought to have been brought *in the first place,* to the attention of the trial Magistrate. I thus stated:

"*Such a claim, I believe, can – and indeed should – be placed before the trial Magistrate who has the fullest authority to determine the question, as an inherent part of the trial process; and an accused who remains dissatisfied thereafter, may file an application in the High Court*".

And the foregoing reasoning gave rise to a corollary which itself contains additional justification.

"As a corollary, and as a practical consideration, the grievance now brought before this Court ought to have been laid before the trial Court. It is clear from the depositions and from the submissions, that hardly any reference at all was made to the right of the accused not to be detained for longer that was provided for; and so the purely-factual question whether there was *cause* for longer detention, was not at all considered. The trial Court is the *tribunal of fact* in this matter, which ought to have the first opportunity to deal with that question".

I am in agreement with learned State Counsel, that the appellant's ground of appeal instantly raised, and based on s.72(3)(b) of the Constitution, cannot stand, for that provision has been *improperly invoked*.

There is no doubt, however, that the trial proceedings were irregular, in view of the role of an unqualified prosecutor.

Consequently, I will declare the trial Court proceedings a nullity. I have to take the decision, however, on whether or not to order a re-trial.

Although learned Counsel *Mr. Ondieki* urged this Court to take into account certain circumstances in this case and refuse re-trial, there are recognized principles that guide the Court, in determining whether there should be a re-trial. These principles are stated in *Ahmedali Ali Dharamsi Sumar v. Republic* [1964] E.A. 481; in *Braganza v. Regina* [1957] E.A. 152; and also considered in the scholarly work, *Procedures in Criminal Law in Kenya* (Nairobi: EAPH, 1994) by *Mr. Momanyi Bwonuong'a,* who writes (p. 251):

**"*There are instances in the course of an appeal hearing when it comes to light that the trial of the appellant was either illegal or unsatisfactory for one reason or [another]. In cases of [this] nature the appellate court, depending on the nature of the defect, may either acquit or order a re-trial. In general, a re-trial should only be ordered when the original trial was illegal or defective.*

*"…..However, a re-retrial will not be ordered unless it can be shown from the record that, on a proper consideration of the potentially admissible evidence, a conviction might result."***

From the *11 counts* of the charge, which turns on *fraud* and *wrongful obtaining of money* from complainants, the record shows the makings of a complex case which closely touches on *property rights* and on the *protections of the law for the citizen*. From the large number of witness (seventeen) called by the prosecution, I have noted that there *is,* indeed, evidence which seeks to establish a case

against the appellant herein. Learned Counsel *Ms. Gakobo* urged that the ends of justice call for a proper *hearing,* and *determination* of the criminal case, and that the prosecution is ready with the evidence and would recommence trial if the Court allows.

Learned counsel *Mr. Ondieki* was more concerned with the best interests of the appellant herein; he urged that the trial in question had taken long, and this has compromised the appellant's happiness in his life.

It is clear to me that this Court is in the first place to be guided by *ends of justice*; and by a commitment to the satisfactory functioning of the *legal process*; and only in a secondary place, is the personal convenience of parties to be ranked.

Being guided by the foregoing principles, I will now hold and make orders as follows:

1. The trial proceedings and the Judgment in Criminal Case No. 1423 of 1999 at Makadara Law Courts are hereby quashed and set aside.

2. A re-trial of Criminal Case No. 1423 of 1999 shall take place.

3. **This matter shall be *mentioned,* for trial directions, before the Chief Magistrate at Makadara Law Courts on *Monday, 10th March, 2008.***

4. Directions shall be given by the Chief Magistrate at Makadara, on the question of bond.

5. Deputy Registrar to effect necessary service.

Orders accordingly.

DATED and DELIVERED at Nairobi this 3rd day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Ondieki

For the Respondent: Ms Gakobo