REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

-

Criminal Case 64 of 2006

REPUBLIC…………………………………………PROSECUTOR

VERSUS

CHARLES NJOROGE NJENGA………………………..ACCUSED

R U L I N G

[On whether or not the accused has a case to answer]

The accused, CHARLES NJOROGE NJENGA, was on 7th April, 2004, charged with the murder of JAMES NJENGA NJOROGE, contrary to Section 203 as read together with Section 204 of the Penal Code, Cap. 63 Laws of Kenya.

The charge reads that on 22/3/2004, at Magina Village, Kiambu District, within Central Province, Charles Njoroge Njenga murdered James Njenga Njoroge.

In the course of the trial, which commenced on 13/6/2007 and ran up to 30/1/2008, the prosecution called eleven – 11 – witnesses, at the end of which, the Defence counsel, Mr. Keengwe- submitted that the prosecution had not adduced sufficient evidence to warrant putting the accused on his defence.

The Learned Defence Counsel adopted a two pronged approach in his submissions. First, it is the case by the defence that the prosecution failed to link the accused to the death of the deceased; that the prosecution failed to prove the two core ingredients of the alleged crime – that is actus reus and mens rea**;** and that the evidence adduced was fraught with contradictions.

The Second approach adopted by the Learned Defence counsel was a challenge to the legality of the proceedings, given that the accused was (detained) held in police custody for three months before being produced in court and charged with the offence facing him. On that basis, the learned counsel submitted that there was a violation of the Fundamental Rights of the accused as enshrined in Section 72(3) (b) of the Constitution of Kenya. Accordingly, the proceedings are illegal, null and void, and the court should so declare and acquit the accused forthwith.

The Learned State Counsel, Mr. Ndemo, countered each and every submission by the defence counsel, including the authorities cited by Mr. Keengwe, and concluded by submitting that a **prima facie** case had been made against the accused, and there was a case against the accused to be put on his defence.

On the legality of the proceedings, Mr. Ndemo submitted that the prosecution had not been afforded reasonable opportunity to explain the delay before the accused was brought to court. He further submitted that the issue of delay and the consequent constitutional challenge of the proceedings had not been raised throughout the evidence by the prosecution. The issue had been raised when the state had concluded its case and it was not possible to call in fresh evidence.

I have very carefully gone through the entire evidence adduced by the prosecution, and considered the submissions by both learned counsels.

In my humble view, it is prudent to deal with the issue of the legality of the proceedings, as this has the potential of disposing off the entire case, if established.

In the recent past, a false impression seems to have developed that any delay in bringing an arrested/detained person before the court, outside the stipulated period of 24 hours, for non-capital offences and 14 days for capital offences, is a violation of the Fundamental Rights of an accused person and without more the proceedings are illegal, null and void **ab initio,** and the accused should be acquitted.

The view is a misconception and is a total misunderstanding of both the provisions of Section 72(3)(b) of the Constitution and runs counter to decided cases interpreting the said Section.

The provisions sought to be relied upon by the accused place the burden of showing that the accused was brought before the court as soon as is reasonably practicable. This does not mean that there cannot be delays in bringing an accused before the court. What is required is that if there is any delay, such delay must be explained. It is the failure to explain to the satisfaction of the court, the delay, **not the delay per se,** that contravenes the Constitutional provisions, and thus violates the Fundamental Rights of the accused person.

But to explain the delay, if any, the issue of violating the Fundamental Rights of the accused must be raised and the prosecution given reasonable opportunity to explain the delay. This point was extensively dealt with by the Court of Appeal, in Criminal Appeal No. 182 of 2006, ELIUD NJERU NGAGA VS. THE REPUBLIC, where the court said, at the relevant parts of the Judgment, as follows:

"**We however note that in MUTUA'S case the delay involved was raised right from the court of the Magistrate and the prosecution never sought to explain the reason for the….delay… In the present appeal ground four was only raised during the hearing [actually on the same day of the hearing of the appeal, with the leave of the court]**

While we would re-iterate 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."

Quoting from MUTUA'S case, the court gave a few instances over which an accused may be delayed in being produced in court. These include:

"….**.it could be that he fell ill during the fourteen days the police were entitled to hold him in custody; that he was admitted in hospital and was detained in hospital….as a result the police were unable to produce him in court. It could also be that the appellant had been presented to the court earlier but his case was terminated for one reason or the other, was discharged and subsequently recharged afresh. Constitutionally the burden was on the police to explain the delay."**

The Appellate court further said:

"**Even Section 72(3) of the Constitution….recognize that there can be a valid explanation for failure to bring an accused person to court as soon as reasonably practicable. By filing their complaint about the delay only in the morning of the hearing the appellant clearly deprived the**

prosecution of an opportunity to offer an explanation, if any, as to why the appellant….was not brought to court….. We reject ground four of the grounds of appeal."

In the case- Ruling – before me, at no time in the course of the evidence by the eleven prosecution witnesses, including the Investigating Officer, did the accused raise the issue of delay before being brought to court. The issue of delay was raised by the Defence Counsel during his submissions **as to whether the accused had any case to answer.** This was after the prosecution had concluded their case.

I find and hold that the issue of delay in the accused being brought to court came too late and it would be both unreasonable and unfair as well as improcedural to expect the prosecution to come up with an explanation for the delay, if any, when they have closed their case. It would be improcedural and unfair for the prosecution to introduce fresh evidence at that stage.

I totally reject the submission as a ground for not putting the accused on his defence.

For avoidance of doubt, and clarity, I wish to reiterate that whereas the fair trial provisions of the Constitution must be respected and lived up to, the same provisions apply with equal force to both the accused and the prosecution. Whereas, is the current position with Section 72(3) of the Constitution, the burden of proving compliance with the period for bringing an accused to court, lies with the prosecution – [actually the police], the prosecution must be afforded the opportunity to explain the delay, if any, at the earliest opportunity, and at any rate before the close of the prosecution case, **not later.**

Turning to the factual evidence adduced by the prosecution, as earlier on stated, I have closely and carefully gone through the testimony of all the witnesses, and considered the submissions by the Learned counsel for both sides, and taking everything into account, I have found and concluded that the prosecution has made a **prima facie** case to warrant putting the accused on his defence against the murder charge preferred against him.

Accordingly, I rule that the accused has a case to answer.

Hearing to resume on

DATED and delivered in Nairobi this 8th Day of April, 2008.

O.K. MUTUNGI

JUDGE