



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)

CRIMINAL CASE NO. 42 OF 2006

REPUBLIC..... PROSECUTOR

-VERSUS-

JOSEPH NDIRANGU NUNGARI.....1ST ACCUSED

STEPHEN IRUNGU NUNGARI.....2ND ACCUSED

RULING ON A PRELIMINARY OBJECTION

The two applicants were arraigned before the Court on a charge of murder; plea was taken before **Apondi, J** on 16th May, 2006, and trial commenced before me on 26th September, 2006.

Just as the prosecution case was coming to a close, with the eighth witness having been heard, learned counsel for the accused persons, **Mrs. Maina**, gave notice that she intended to file a notice of preliminary objection, to be heard in priority before directions would be given on the trial proceedings.

On 4th February, 2008 counsel filed the said notice, of objection, in which it was contended that the accused persons' fundamental rights to a fair trial had been breached. The particulars of the objection were that –

“JOSEPH NDIRANGU NUNGARI and **STEPHEN IRUNGU NUNGARI** were arrested on the 19th of October, 2005 and were kept in Police custody without trial for 7 months, thereby breaching section 72(3) of the Constitution of Kenya – right to trial within a reasonable time.”

This objection came up for hearing on 17th April, 2008. **Mrs. Maina** on that occasion submitted that the accused persons had been arrested on 19th October, 2005, and held in Police custody for more than 14 days, being arraigned in Court seven months later. Invoking the Court of Appeal decision in **Albanus Mwasia Mutua v. Republic**, Criminal Appeal No. 120 of 2004, learned counsel urged that there had been a breach of the fundamental rights of the accused, as provided for in s.72(3)(b) of the Constitution, which entitled them to be acquitted outright, at this early stage in the trial proceedings. Counsel made special reliance on another Court of Appeal decision, **Eliud Njeru Nyaga v. Republic**, Crim. Appeal No. 182 of 2006 which incorporated the principles in the **Albanus Mwasia Mutua** case.

The Investigating Officer in the case herein had, on 22nd February, 2008 filed an affidavit, in which he

gave explanations for the delayed arraignment of the accused persons in Court. The accused persons had been brought before him, at Thika Crime Branch Office, on 19th October, 2005, and he held them in custody. Thereafter, the Investigation Officer, **P.C. James Karugu** commenced investigations; and in the process, he recorded statements from witnesses, some of whom were peripatetic street boys always on the move, and difficult to trace. A lady who was the key witness was difficult to trace, as she had relocated from Kiandutu Slums in Thika to an unknown place in Nairobi. It was not till 16th November, 2005 that the post mortem examination was performed on the body of the deceased; and it was in the course of December, that the investigations file was forwarded to the Attorney-General; the Attorney-General's office returned this file for prosecution only as late as March, 2006, and at the time requested that more witness statements be recorded. It was on 13th April, 2006 that the deponent then received the formulated charge- information from the Attorney-General; and it is soon thereafter, that the applicants were brought before the Court for plea-taking.

Essentially, the prosecution is pleading management time-lags, possibly occasioned by inherent complications in the investigations and preparations, as having occasioned the seven-month delay between arrest and arraignment in Court. Can such be a *reasonable* explanation? It is learned counsel's contention that "explanation", if it is to provide valid excuse for the prosecution's failure to bring an accused person before the Court within fourteen days, in the case of a capital charge, must meet *certain preordained criteria* which have been judicially defined. Counsel contended that the test of reasonableness has been prescribed in case law, specifically in the Court of Appeal decision, **Eliud Njeru Nyaga v. Republic**, Crim. App. No. 182 of 2006. A pertinent passage in that decision reads as follows:

"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...So in [*Albanus Mwasia Mutua v. Republic*, Crim. App. No. 120 of 2004] 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 ground raising the violation of the constitutional right was raised only on the morning of the hearing when the Court granted leave...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, and, therefore, that there was no reasonable explanation for the delay. Even section 72(3) of the Constitution, which deals with the period of bringing an accused person to Court, recognises 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, though arrested on 6th June, 2005 was only brought to Court on 11th August, 2005."

The Court of Appeal, in the **Eliud Njeru Nyaga** case, also cited possible examples of situations that *might well* provide a justification for delay in arraigning a suspect before the Court; the same was taken from the earlier decision in **Albanus Mwasia Mutua v. Republic**:

"He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for the delay. 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 for the eight months, as a result of which 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 [another], [he] was discharged, and subsequently re-charged afresh. Constitutionally, the burden was on the Police to explain the delay."

Learned counsel contended that the examples of "reasons" above set-out, represented the valid case which the prosecution could make in their explanation of delay, but that the kind of explanation contained in the prosecution's affidavit, just didn't stand up; in counsel's words: "The explanation fails to meet the test of

reasonableness, of the kind referred to in *Eliud Njeru Nyaga*.” The explanation given, counsel urged, was “invalid”.

Learned counsel urged that the delays occasioned by the transactions between the Police investigator and the Attorney-General’s office, would not constitute “reasonable explanation”, and that for the purposes of the conduct of the prosecution case, the Attorney-General and the Police are to be seen as falling in one department. By proffering that aspect as justification for the delay, counsel urged, the explanatory affidavit was only seeking to compromise the applicants’ trial-rights under s.72(3)(b) of the Constitution.

Mrs. Maina urged that the prosecution’s explanation of the delay be dismissed, and that the accused persons be acquitted at this stage.

Learned counsel for the respondent, **Mr. Ndemo**, while conceding that the accused persons had not been arraigned before the Court within fourteen days of being held in custody, submitted that the defence was raising this question belatedly – a fact which would be inconsistent with the design of s.72(3)(b) of the Constitution, as the issue of explanation-of-delay had not been addressed at the right time. **Mr. Ndemo** urged: “*The defence should have brought up this [complainant] much earlier; there were several opportunities – at plea-taking, at the commencement of testimonies, and during examination-in-chief for the Investigation Officer. [Defence counsel] asked the Investigation Officer why he did not bring the accused before the Court in fourteen days, and his answer was that, he did not complete investigations within fourteen days. The defence did not use that [cross-examination] occasion properly. The issues now in the affidavit could have been the subject of cross-examination*”. Counsel wondered whether the defence was not now, at a belated stage, trying to re-introduce the evidence of the Investigation Officer who had already testified; in his words: “*The defence has an opportunity to cross-examine...a witness called by the prosecution. Should the defence fail to take advantage of that opportunity, it cannot now seek to examine that witness by a different route, through application.*”

Mr. Ndemo submitted that the accused persons had invoked the Court of Appeal decision, in *Albanus Mwasia Mutua*, Crim. App. No. 120 of 2004 out of turn; for, the Court had found in that case that the prosecution had “never sought to explain” the delay in arraigning the accused person before the Court; but in the instant case the Investigation Officer had responded to questions in cross-examination, and stated that he was not able to complete the investigations within the period of fourteen days – and there was no further cross-examination on that point. The words of counsel on this point, may be set out: “The explanation was given by the Investigation Officer, and was accepted on its terms by the defence; therefore it was reasonable in the circumstances.”

Learned counsel urged that there was a significance to certain depositions of the Investigation Officer: the accused persons had first been arrested by irate members of the public, and officers at the Police Station then re-arrested them and held them in custody; and thereafter, it proved difficult to trace a key witness who had relocated from her usual abode.

Mr. Ndemo contested the applicants’ contention that the Police department and the Attorney-General’s office operated as one department, and so delays in communications between those two units would not constitute good explanation of a failure to arraign accused persons in Court timeously.

Mr. Ndemo submitted that a case had not been made for early acquittal of the accused persons on grounds founded on s.72(3)(b) of the Constitution; but that if it should be found there was an infringement on their rights to liberty, then their ideal recourse was an application for *compensation* by virtue of s.72(6) of the Constitution. Counsel urged that this Court if it should find that, indeed, the rights of the accused persons had been violated, may *declare* so; but the applicants would then have to come to Court by a suitable application, for compensation for the injury they have suffered. Counsel submitted that the drafters of the Constitution “would have had it in mind that the redress for unlawful detention was compensation, but not acquittal.” **Mr. Ndemo** urged that the Court ought to balance the rights of the accused person against the rights of the victim; and that the question at issue, in any given circumstances, should in principle be solved by hearing the prosecution case.

Learned counsel **Mrs. Maina**, in her response, contested the argument about delay in raising the objection as the accused persons had allowed; she urged that the State Counsel had no authority in support of his position, and that there could be no *limitation period* attached to the raising of an objection under s.72(3)(b) of the Constitution. Counsel urged that the breach complained about was so fundamental, that an acquittal was inevitable.

Applications such as the instant one have become commonplace; and many of the on-going capital trials have been interrupted at one stage or another, as accused persons have asked that they be acquitted prematurely, by virtue of the terms of s.72(3)(b) of the Constitution. The effect is that the Court has to come to three basic decision-stages by the time a trial is completed:

- i. the application for *very early acquittal* (based on s.72(3)(b) of the Constitution); (ii) the prayer for *moderately-early acquittal* at the end of the prosecution evidence (submission of no-case-to-answer, by virtue of s.306 of the Criminal Procedure Code (Cap.75, Laws of Kenya)); (iii) the *final judgement*, based on a hearing of all the evidence in the case.

The High Court and the Constitution: Principles to Guide Interpretation

The foregoing legal and pragmatic steps in a normal hearing have tended – and of this, I will take *judicial notice* – to prolong trials quite considerably. The Constitution carries certain principles to guide the High Court as it exercises its unlimited jurisdiction (s.60(1)) in the hearing and determination of criminal cases; these are found, in particular, in s.77(1) of the Constitution: *fairness of hearing; hearing within reasonable time; independence and impartiality* during the hearing.

Of the foregoing principles, the one that has tended to suffer most significantly, as shown by experience, and of which I will take *judicial notice*, is the one requiring *hearing within reasonable time*. There is a *duty*, therefore, placed upon this Court, to give meaning to the principles attached to the trial process, by seeing to it that *discrete provisions of the Constitution are not invoked in a mode that is contradictory, or in such manner as to render a criminal trial interminable*.

On another occasion, and which reflects on the foregoing point, this Court, in **David Karobia Kiiru v. Republic**, Nairobi High Court Misc. Crim. Application No. 863 of 2007, had thus stated:

“[Section 72(3)] of the Constitution is being cited as the basis for terminating a criminal trial which is in progress...

“When, in law, should the High Court put an end to the constitutional function of trying criminal cases, as a State function authorised by law (s.26 of the Constitution of Kenya)?

“It is clear that such a claim, when rested upon the constitutional document itself, must be thought through carefully: because criminal prosecution is a public-interest, governance process, itself founded on the constitutional document. So, if that process is ...being challenged by citing the same Constitution, then conflicts within the provisions of the Constitution become apparent: and in that case, it is within the jurisdiction of the High Court to interpret the Constitution, and to declare what its true meaning is.”

In the light of the foregoing thoughts on the subject of *constitutional interpretation*, I would not agree with learned counsel for the applicants, in the instant matter, that there is some *predetermined outcome*, to be pronounced by this Court once a prayer is made, on the basis of s.72(3)(b) of the Constitution.

The Court of Appeal Authorities Touching on s.72(3)(b) of the Constitution

Learned counsel has contended, in effect, that the leading Court of Appeal authorities ordain that the moment there is a delay in bringing an accused person before the Court, following the arrest and detention of such a person, then a constitutional right has been violated and, *ex facie*, it is a situation for orders of *acquittal*.

My reading of the two leading cases, ***Albanus Mwasia Mutua v. Republic***, Criminal Appeal No. 120 of 2004 and ***Eliud Njeru Nyaga v. Republic***, Criminal Appeal No. 182 of 2006, however, is different. The general principle in the two authorities, I believe, is that whether or not there has been inordinate delay in bringing an accused person before the Court, and whether or not a sufficient explanation has been given by the prosecution for any delay, in the terms of s.72(3)(b) of the Constitution, is a matter to be assessed on a case-by-case basis, by the High Court. And in the conduct of such assessment, the Court is to be guided by the principle, as stated in the ***Albanus Mwasia Mutua*** case, that:

“On the one hand it is the duty of the Courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the Courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution.”

The fact that the Court is required to examine each case *on its facts*, before holding that there has been an unconstitutional infringement committed by the prosecution, in its delayed bringing of the accused to Court, is clear from the language of the Court, in the ***Albanus Mwasia Mutua*** case:

“The jurisprudence which emerges from the cases...appears to be that an unexplained violation of a constitutional right will normally result in an acquittal...”

In those words, the *discretion of the Court* in the determination of the question is embodied; and, as is well known, a proper exercise of such discretion is that which fully takes into account the relevant *facts and circumstances*. And it is precisely the variation in such facts and circumstances that determined the findings of the Court of Appeal in the ***Albanus Mwasia Mutua*** case on the one hand, and in ***Eliud Njeru Nyaga v. Republic***, Criminal Appeal No. 182 of 2006, on the other hand. This point comes out clearly in the following passage from the latter case:

“...[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 ground raising the violation of the constitutional right was raised only on the morning of the hearing...”

Is it the Case that an Objection to Trial Proceedings Under s.72(3)(b) of the Constitution may be raised at any Time?

The Court of Appeal’s position on the question is already noted, as stated in ***Eliud Njeru Nyaga v. Republic***. But when learned counsel **Mr. Ndemo** raised the objection to the applicants’ case, for being made only *at the very end* of the prosecution case, learned counsel **Mrs. Maina** made the riposte that the application was on a *constitutional question*, and was a legal point, therefore, which had no time-limitation. In theory, an objection on a point of law, in the course of proceedings, may be raised any time; but this is more true of *civil cases*, where the effect is sometimes severable and, often, does not derail the *entire proceedings*. That is different in a criminal trial, where the express object of the application is to *stop the trial* and occasion an acquittal. Trial in a criminal cause, moreover, as is noted in the ***Albanus Mwasia Mutua*** case, is a matter of *public interest*, the conduct of which is secured by the *Constitution* itself. In principle, therefore, it cannot be correct that technical objections may freely be raised at any time, at the inclination of an accused person, with the effect of terminating on-going proceedings. The Court’s assessment of the relevant facts and circumstances will be all-important, in such situations; but in principle, objections to criminal trial should be made *at the earliest* stage. Early lodgement of such objections would also give fulfilment to the terms of s.72(3)(b) of the Constitution, by creating an opportunity for the prosecution to provide such *explanation* as there may be, for the belated production of the accused in Court.

Reasonable Explanation of Delayed Prosecution: Are there Standard Criteria?

Although the Court of Appeal in ***Albanus Mwasia Mutua*** had mentioned examples of situations in which delayed prosecution may be taken to be reasonable, learned counsel **Mrs. Maina** portrayed the same as an ordained *check-list* of acceptable justifications. This argument, I think, is somewhat strained; I did not

think the Court of Appeal had set out to establish a check-list. It is already clear to me, indeed, that both decisions in *Albanus Mwasia Mutua* and *Eliud Njeru Nyaga* carry as their core principle, the requirement of *case-by-case assessment of facts and circumstances*.

After considering the submissions of counsel, and the relevant case law, as well as the depositions filed in Court, I have come to the conclusion that there is *no cause* to justify the termination of the trial proceedings, or the acquittal at an early stage of the accused persons. I have considered the *constitutional obligations* of this Court in the trial of criminal cases, the interests of the society in effective criminal prosecution, and the contentions of counsel on both sides; and I have come to the conclusion that the trial ought to proceed to a logical conclusion, on the basis of rules *of trial* laid out in the Criminal Procedure Code. (Cap.75, Laws of Kenya).

I dismiss the applicants' Notice of Preliminary Objection filed on 4th February, 2008, for the reasons, firstly, that it comes before the Court far too belatedly; secondly, that it presents a challenge to other constitutional principles which this Court ought to uphold; thirdly, that it is not weighty enough to match the merits of the trial process which has been running over a long period of time; and fourthly, that it is by the completion of the current trial process, that the *public interest*, and the *rights of all the parties* are likely to be safeguarded.

The part-heard criminal case shall be set down for continued hearing on the basis of priority, and on a time-table to be given in Court.

DATED and DELIVERED at Nairobi this 9th day of July, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Accused Persons/Applicants: Mrs. Maina

For the Respondent: Mr. Ndemo