REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 100 of 2004

REPUBLIC ……..…….PROSECUTOR

VERSUS

1. JOSEPH WAMALWA WANYONYI

2. JULIUS WANYAMA WANJALA ….....…..ACCUSED

3. GEORGE WANYONYI SIMIYU

R U L I N G

On 8/7/2004, the accused/applicants herein – JOSEPH WAMALWA WANYONYI; JULIUS WANYAMA WANJALA and GEORGE WANYONYI SIMIYU were charged with the murder of CLEOPAS JUMA BARASA contrary to Section 203 as read with Section 204 Laws of Kenya.

The offence is alleged to have been committed on 5/3/2004 at Kangemi Mau Bridge in Nairobi.

On 7/7/08, the three accused filed a Preliminary Objection, challenging the legality of the proceedings against them, on the grounds that the same violates their Fundamental Rights as enshrined in Section 72 (3) (b) of the Constitution in that they were brought to court long after the expiry of the 14 days stipulated in the above Constitutional provision.

Accordingly, they urge this court to declare the proceedings illegal, null and void and release them forthwith.

The grounds upon which the application is brought are, inter alia that the police held them in custody for 120 days before bringing them to court, the 1st accused having been arrested on 11/3/04; the 2nd accused on 12/3/04 and the 3rd on 11/3/04. The three were brought to court on 14/7/04.

The case by the applicants is simply that by failing to bring them to court within 14 days of their arrest, the police violated the rights of the accused as provided in Section 72 (3) (b) of the Constitution. That Section is to the effect that every person arrested upon reasonable suspicion of having committed a capital offence must be brought to court as soon as is reasonably practicable and at any rate not later than 14 days of his/her arrest.

Any prosecution instituted outside the above period of 14 days is illegal, null and void, and the accused must be released forthwith unless the prosecution (police) can satisfactorily explain the delay to the court.

In support of their application, the accused cited and relied on the following authorities: Albanus Mwasia Mutua Vs. Republic Cr. Appeal No. 120 of 2004; David Muthotho Kamau Vs. Republic Cr. Appeal No. 17 of 2007, and Gerald Macharia Githuku Vs. Republic Cr. Appeal No. 119 of 2004

In opposition to the application the prosecution did not file any Affidavit to explain the delay. Instead, the Learned State Counsel submitted that: the Preliminary Objection is belated; mischievous; frivolous and should be dismissed on the grounds, inter alia, that the proceedings were first commenced before Ombija J and it was declared a mistrial when Ombija J. was transferred to Bungoma Court. Throughout the trial before Ombija J. the issue of delay was never raised. The case commenced afresh before Ojwang J. and was part heard until 11/6/07. Up to that date no one raised the issue of delay. The proceedings were once again declared a mistrial by Ojwang J.

On the basis of the foregoing the prosecution submitted hat the proceedings before this court today are not an extension of those before Ojwang J. or Ombija J. The prosecution concluded by stating that when a case is declared a mistrial, it starts afresh, before a new Judge, and all the evidence is adduced afresh. The right time to raise the Preliminary Objection was before Ombija J. failure to do so, the opportunity was lost.

Having carefully considered the pleadings and the submissions by both sides I have reached the following findings and conclusions.

The prosecution does not dispute the fact that there was a delay in that the accused were not brought to court within 14 days stipulated by the Constitution. Their case is that the accused are time barred or lost the opportunity to challenge the delay when they failed to raise the issue before the two Judges who first heard the case, not fully though. To the prosecution this is a fresh case – a trial after a mistrial where the case starts afresh and the evidence is adduced afresh.

With all due respect, I am unable to agree with the line of thought advanced by the prosecution, and on the following grounds. First, it is a general legal position that crimes never go stale, as is the case with civil matters where there is a limitation period, the length of which depends on whether the claim is based on a contract or a tort. There is no such limitation period in criminal cases, as a general rule.

Secondly, it is not quite correct that after proceedings have been declared a mistrial, the proceedings "commence afresh". That is not strictly the case or the law. For example, the accused is not re-arrested when the proceedings are declared a mistrial; nor are fresh witness-statements recorded by the police. The unspoken notion that the period of 14 days, stipulated in Section 72(3) (b) of the Constitution does not apply is a misconception. This point needs underlining.

When proceedings are declared a mistrial, the accused is neither released nor is he/she acquitted. The trial is not completed and all that happens is that the case is heard afresh, to the extent that whatever evidence that might have been adduced up to the time of declaration of mistrial has to be re-adduced all over again.

Since the accused is not released by the act of a declaration of a mistrial, the question of arrest or re-arrest does not arise. Put differently, the accused remains in custody (by order of the court) and the time of arrest and being brought to court remains as per the initial date of arrest and the initial information – when the accused was charged with the alleged offence. The actual date of taking of the plea by the accused often differs from the date in the information.

The third point arising from the prosecution's submission which is also a misconception, is that the application comes too late. That submission is legally and factually incorrect.

An accused person can challenge the legality of the proceedings against his/her, as in this application,

any time in the course of the proceedings, but before the prosecution has closed its case. See ELIUD NJERU NYAGA VS. REPUBLIC Cr. Appeal No. 182 of 2006; ALBANUS MWASIA MUTUA VS. REPUBLIC Cr. Appeal No. 120 of 2004, and ARAFAT DAUDI VS. REP. Cr. Case No. 91 of 2005.

The ratio decidend, in the above cases, is that the prosecution must be given reasonable opportunity to explain the delay, if any, in not bringing the arrested person to court within 14 days, but before they close their case.

In the present application, the prosecution has never closed its case – either before Ombinja J. or before Ojwang J – otherwise the case would not be before me a Judge with parallel jurisdiction, today.

In light of the foregoing, and taking into account the analysis above, I find and hold that the prosecution violated the Fundamental Rights of the three accused/applicants herein, by not bringing the accused before court within 14 days; and by failing to satisfactorily explain the delay.

The retrials are not, and cannot be, a cure to the illegality of the initial proceedings.

I accordingly declare these proceedings illegal, null and void and order the immediate release of the three accused persons, unless they are otherwise lawfully held.

DATED and delivered in Nairobi, this 29th Day of October, 2008.

O.K. MUTUNGI

JUDGE