



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

Criminal Case 55 of 2006

REPUBLIC.....PLAINTIFF

-VS-

THOMAS PATRICK GILBERT CHOLMONDELEY.....RESPONDENT

R U L I N G

On 25<sup>th</sup> July 2007, this court delivered a Ruling which stated that the prosecution had established a prima facie case against the accused. Thereafter, the court explained to the accused his rights to enable him prepare his defence. In response, the Defence Counsel viz, Fred Ojiambo intimated that the accused will give an unsworn statement and later call seven witnesses to support his case. The defence counsel was even ready to proceed with their case on the same day. It was at that stage that the Mr. Keriako Tobiko, the Director of Public Prosecutions, interjected and stated that he appreciated the readiness of the defence to defend themselves at that stage since they had been supplied with the statements of the prosecution on witnesses in advance. He further submitted that the defence knew their case in advance as required by the constitution. Mr. Tobiko lamented the fact that they had very little idea of what defence the accused had to offer. Besides the above, he also submitted that the rights to a fair trial is not the monopoly of the accused person. He urged the court to give the prosecution and defence equal chances. Apart from the above, he also applied for an order directing the defence to make a full disclosure of their witnesses, copies of all ballistic and scientific reports that they intend to produce. He explained that, the above will enable them decide whether to call rebuttal evidence as allowed by the law.

In reply, Mr. Ojiambo wondered whether his learned colleague was making an application for the interpretation of Section 77 of the Constitution. He concluded by stating that there was no such pending application.

This court has carefully considered the submissions by both Counsels. No doubt, Section 77 of the Constitution of Kenya clearly lists the provisions to secure the protection of the law. Specifically, Section 77 states as follows:

**“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”**

Besides the above, my research has revealed that case law has supported the above position strongly.

In the Matter of an Application under Section 84 of

**REPUBLIC OF KENYA**

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 345 OF 2001

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CHIEF MAGISTRATES COURT

CRIMINAL CASE NUMBERS 849 OF 2001, 850 OF 2001, 851 OF 2001 AND 852 OF 2001.

BETWEEN

GEORGE NGODHE JUMA .....1<sup>ST</sup> APPLICANT

PETER OKOTH ALINGO ..... 2<sup>ND</sup> APPLICANT

SUSAN MUTHONI NYOIKE ..... 3<sup>RD</sup> APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

In their Ruling at page 15, the two bench composed of Hon. J. Mbogholi Msagha and Hon. J. Richard Kuloba (Rtd) stated that the minimum elements in a fair hearing are as follows:

- 1 Where the accused's legal rights are safeguarded and respected by law.
- 2 Where a lawyer of the accused's choice looks after is defence unhindered.
- 3 Where there is compulsory attendance of witnesses, if need be;
- 4 Where allowance is made of a reasonable time in the light of all prevailing circumstances to investigate, properly prepare and present one's defence;
- 5 Wherein an accused person's witnesses, himself, or his lawyer are not intimidated or obstructed in any improper manner;
- 6 Wherein no undue advantage is taken by the prosecutor or anyone else, by reason of technicality or employment of a statute an engine of injustice.
- 7 Wherein witnesses are permitted to testify under rules of court within proper bounds of judicial discretion, and under the law governing testimony of witnesses;
- 8 Where litigation is open, Justice done, and justice seen done by those who have eyes to see, free from secrecy mystery and the mystique.

The million dollar question is whether the prosecution is also entitled to reciprocal rights. Assuming that the prosecution, are not entitled to the same, will the playing field be level? At the outset, it is apparent that Parliament has not provided similar provisions in favour of the State during a criminal trial. It is not clear why such rights have not been conferred on the prosecution. In the above Ruling, the two Judge bench also stated the following:

**“There can be no true equality if the legal process allows one party to withhold material information from his adversary, without a just cause or peculiar circumstances of the case”.**

**We are fully aware that in the adversary process of adjudication the element of surprise was formerly accepted and delighted in as a great weapon in the arsenal of the adversaries. But in the civil process this aspect has long since disappeared, and full discovery is a familiar feature of civil practice”.**

**Opponents to such disclosure sometimes say that the duty should be RECIPROCAL, (the emphasis is mine) so that the accused, too, should disclose his case before trial. This will be considered when an occasion presents itself for its consideration.”**

My keen observation in this case clearly show that the court was able to hear the thirty eight witnesses expeditiously since the defence knew from the outset the case that their client was facing. They had the statements of all the witnesses and copies of various reports that had been made by different experts. It was on the basis of the above information that the defence team was able to do commendable research which resulted in meaningful and incisive cross-examination. Given the above and my inherent powers, I hereby direct the defence team to supply the prosecution with the following:

**(a) Statement and particulars of the 7 witnesses.**

**(b) Copies of any documents or forensic reports.**

The same should be supplied to the prosecution within the next 15 days. I am sure that if the above is complied with, then the defence case will be heard expeditiously without any room for any unnecessary adjournments. This Court is of the considered opinion that a full disclosure of the defence case will not prejudice the rights of the accused. I am also alive to the fact that the accused is innocent unless proved otherwise.

Lastly, I do wish to observe that the court has conceded to the request by State in the belief that the same was made in utmost good faith. The Court does not expect nor anticipate any complaints from the said witnesses.

The Court hereby issues summons against Chief Inspector Musonge to produce a Master Card of France Tundo together with any temporary permits.

Those are the orders of the Court.

Hearing on ..... 2007.

**MUGA APONDI,**

**JUDGE.**

Ruling read signed and delivered in open Court in the presence of the accused.

MR. TOBIKO.....**for Republic**

PATRICK GUMO

MR. FRED OJIAMBO

MRS SHAW.....**for Accused**

MR. MUTHUI

**MUGA APONDI,**

**JUDGE.**

**DATED: 27<sup>TH</sup> JULY, 2007**