REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPLICATION NO. 633 OF 2007

BEN AMOS NJAU……...……..……. APPLICANT

-VERSUS-

REPUBLIC……...RESPONDENT

RULING

Learned counsel ***Mr. Njenga*** for the applicant in the Originating Notice of Motion dated 10th September, 2007 has cited before this Court authorities of the High Court and the Court of Appeal, to demonstrate that whenever the prosecution detains a suspect for inordinately long periods, before charging the suspect in Court, then automatically there is a breach of the law which entitles the suspect to be freed and be not subjected to trial. A close examination of such cases, ***ANN NJOGU v. REP.*** Misc. Crim. Appl. No. 551 of 2007; ***REP. v. JAMES NJUGUNA NYAGA Crim. Case No. 40 of 2007; ALBANUS MWASIA MUTUA v. REP.,*** Crim. App. No. 120 of 2004; ***GERARD MACHARIA GITHUKU V. REP.*** Crim. App. No. 119 of 2004 – will show that they are by no means identical in every detail.

I take those cases to be stating a general constitutional and legal principle only. They by no means derogate from the clear statement in s.72(3) of the Constitution – that the deadline for bringing a charge in Court for a bailable offence is 24 hours, and for a non-bailable offence, 14 days – subject to the rider that the Prosecution is allowed to give satisfactory explanation for longer detention.

In the instant case, did the prosecution satisfactorily explain the delay in prosecution which is acknowledged to have taken place?

Learned counsel ***Ms. Gakobo*** has cited the Court of Appeal decision in ***Eliud Njeru Nyaga v. Rep.***, Crim App. No. 182 of 2006 to show that the *opportunity* should be available for an *explanation* to be offered for delay in charging the accused; and that there was no opportunity in the instant case.

I do not understand learned counsel ***Mr. Njenga*** to be affirming that such an opportunity to explain did, in fact, exist before the learned trial Magistrate; he urges only that there was a legal duty placed upon the Prosecution to explain the delay to the Magistrate of own motion.

Mr. Njenga also urges that it is 10 days since the instant application was lodged; so, why didn't the State Law Office respond by stating those required reasons?

This Court holds that the law is clear, and it is well set out in s.72(3) of the Constitution; it has been

restated in case law; and learned counsel before me today have no doubts about the law.

I cannot conclude this application by simply looking at and applying that black-letter law which is well known. The justice of any particular case demands a sensitive interpretation of black-letter-law and its application on the basis of the real facts, and any relevant judicial policy considerations.

True, the accused has rights which must be given effect in the trial process. I think the accused is aware of those rights. Of course, the Magistrate would also be aware of them. The Prosecution, too, would be aware of them.

But a reminder on those rights would clearly activate the presence of mind that generates the explanation required. It is clear that nobody has ever spoken before the trial Magistrate, about those rights – and the prosecution has given no explanation for the delay in initiating the trial process.

Does this merit the applicant departing from that forum of complaint, before the trial Magistrate, and moving over to the High Court to ***stop*** the trial Magistrate and to ***stop*** the trial process?

I take judicial notice that the trial Magistrate is a conscientious judicial officer, and will not overlook a legitimate complaint brought to his or her attention.

I also take judicial notice that the trial Magistrate will have a feeling of discomfiture in the due discharge of his or her judicial duties if the High Court off-handedly dishes out Court orders stopping her from exercising her lawful judicial d*iscretion*.

It must be the *judicial policy* to be pursued by the High Court, to *create harmony* in the relations between the superior Court and the Subordinate Courts – in the due discharge of administration-of-justice functions, in accordance with the constitutional mandate.

On those principles, I must hold it to be unacceptable in law, that a grievance that *could* be resolved before the trial Court, is brought before the High Court to issue orders compelling the trial Court to act in a particular way.

These principles lead me to refuse the Originating Notice of Motion of 10.9.2007, and to order that the applicant shall return *before the learned Magistrate*, and in the first place, make his prayers there. Only after the trial Court has made orders, can the appellant file a matter before the High Court.

I direct that, on the next scheduled hearing date for the relevant case, KIKUYU SPMCR 1032/06, the learned Magistrate shall first dispose of the applicant's complaint, before giving directions as may be necessary.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 19th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Njenga

For the Respondent: Ms. Gakobo