REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

Criminal Appeal 44 of 2004

(As consolidated with Criminal Appeals Nos. 45/2004 and 46/2004 from the Original

Conviction in Criminal Case No. 1403 of 2000 of

Chief Magistrate's Court at Eldoret)

1. JACOB KIPRONO MAIYO

2. FRANCIS KARANJA NJUGUNA

3. MUNGA MUNGUTHU :.....APPELLANTS

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

This is a consolidated appeal against the decision of the Senior Resident Magistrate at Eldoret, Mr. V. W. Wandera delivered on 28th July,2004, The Honourable magistrate convicted and sentenced the appellants as follows:-

1. First Appellant, Jacob Kiprono Kimaiyo, found guilty of the charges of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. Also found guilty of the charges of rape contrary to section 140 of the Penal Code and sentenced to 10 years imprisonment.

2. Second Appellant, Francis Karanja Njuguna found guilty of the charges of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. Also found guilty of the charges of rape contrary to section 140 of the Penal Code and sentenced to 10 years imprisonment.

3. The Third Appellant, Munga Muguthu was found guilty of the charges of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death.

The appellants have appealed against the said convictions and sentences and want the same quashed and set aside respectively. One of the grounds of appeal was that the Learned magistrate erred both in law and fact by convicting and sentencing the appellants based on proceedings conducted and evidence tendered to the court by an incompetent prosecutor contrary to the provisions of section 85 Criminal Procedure Code.

At the hearing Ms. Oundo for the State/Respondent, told the court that they would not oppose the appeal

on the ground that the case had been prosecuted and evidence lead by Police Constable Mwangi who under the provisions of section 85, Criminal Procedure Code, was not qualified to prosecute. Under the said provisions the lowest rank of a police officer who is capable of being appointed to be a public prosecutor is an Assistant Inspector.

Ms. Oundo, however, submitted that despite this fact and the resultant mistrial, the prosecution had proved its case beyond any reasonable doubt. Ms. Oundo proceeded to analyse some of the evidence adduced against the appellants including:-

Ø Sufficiency of light for identification.

Ø Length of time taken during the robbery

Ø Recovery of firearm e.t.c.

Counsel for the State applied for an order for the retrial of the Appellants. She added that the witnesses are available and within the jurisdiction of the court. And that all exhibits are intact and available.

She said judgment was delivered on 28th July,2004 and a retrial would not prejudice the appellants.

On their part, the Appellants who chose to act in person in the appeal opposed the application for retrial of the case on the following grounds:-

1. The trial took 2 years.

2. Exhibits may have been destroyed.

3. The prosecutor was not chosen by the Appellants who had no control over the proceedings.

4. The trial magistrate knew about the Law and should not have allowed P.C. Mwangi to prosecute the case.

We have considered the concession by the Respondent in not opposing the Appeal. We agree that the trial amounted to a mistrial on the ground that the prosecutor did not have the capacity or qualification to prosecute. The prosecution ought to have avoided this since the law is statutory and clear. The trial magistrate ought to have been vigilant and inquired into the rank of the prosecutor before starting the trial.

On this ground the appeal ought to be allowed. Should this court order a retrial on the basis of the reasons given by the Respondent/Prosecution?

First and foremost, we would like to state categorically that once the Respondent placed it on record that there was a mistrial and they did not oppose the appeal they should have stopped there without submitting on the findings of the trial magistrate and how good their case was and will still be in the event of a retrial. Once the prosecution formed the opinion that there was a mistrial and desired a retrial, all they should have referred to is the availability of witnesses, exhibits and the question of the time the proceedings took, how long a possible retrial would take, whether there would be any prejudice to the Appellants, and whether there would be any prejudice to the Appellants, and whether there would be any prejudice to the Appellants etc. This is because once there is a mistrial and then this court is asked to quash the conviction and set aside the sentence, the prosecution should look at and consider the Appellants as innocent until proven guilty. The previous conviction which the prosecution concedes in effect was illegal and unlawful cannot be used as a basis for the re-trial.

This right of an accused person is so important that the presumption of innocence continues until an appeal against conviction is concluded. Hence a convict who has a pending appeal in is still presumed to be innocent in the eyes of the law, until the appeal is determined. In **HALBURY'S LAWS OF**

ENGLAND, 4th Edition, Reissue, Vol.8(2) (at para.142,P.152) it is stated:

" **Everyone charged with a criminal offence must be presumed innocent until proved guilty according to law. The presumption applied until the end of any appeal proceedings against conviction....."**

For the said reasons, we cannot and shall not consider the purported conviction by the trial magistrate and the basis thereof in this application for a re-trial. That conviction is no more and must be totally disregarded. The presumption of innocence is a fundamental right and protected by section 77 (2) (a) of the Constitution.

What matters should this court take into consideration when faced with an application for a re-trial? In our view, we must start from the constitutional provisions securing the protection of the law. Section 77 (1) of the constitution stipulates:-

" **77(1) 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."**

This provision of the constitution must always be adhered to and enforced by any court before which a person is arraigned and has been charged with a criminal offence. When considering an application for a re-trial as in this case, we must ask ourselves whether in the circumstances of the present case the appellants right to a fair hearing within a reasonable time will be infringed if an order for re-retrial is made.

This question was considered in the decision by the then East African Court of Appeal**, FATEHALI MANJI –V- THE REPUBLIC** (1966) E.A 343 in which the court stated:-

" **The question for decision in this appeal is whether the order for retrial was justified or not. Section 319 (1) (a) of the Criminal Procedure Code of Tanganyika, under which the order for retrial must have been made, appears to give the High Court on appeal an unlimited discretion as to ordering a retrial but, as was pointed out in Ahmedi Ali Dharamsi Sumar –v- Republic (1) (1964) E.A 481 at P.482), quoting excepts from the judgement in Salim Muhsin v. Salim Bin Mohammed and Others (2) ".....discretion must be exercised in a judicial manner and there is a considerable body of authority as to what is and what is not a proper judicial exercise of this discretion" We will not quote the other passages in full but we will content ourselves with stating the principles which emerge from them. They are the following: in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person. "**

Some guidance is also provided by the judgment of the Privy Council read by Lord Templeman

in the case of **BELL –V- DIRECTOR OF PUBLIC PROSECUTIONS OF JAMAICA AND ANOTHER, (1985) 2 AII E.**R. 585, who were themselves inspired by the judgment of Powell J. of the Supreme Court of the United States in **BARKER –V- WINGO** (1972) 407 US 514.

"**.....**

' **Powell J. then identified four factors which in his view the court should assess in determining whether a particular defendant has been deprived of his right.**

(1) Length of delay (at 530-31):

'Until there is some delay which is presumptively prejudicial, there is no necessity for inquiring into the other factors that go into the balance. Nether the less, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime considerably less than a serious complex conspiracy charge'.'

In the present case it cannot be decided that the length of time which lapsed since the appellants arrested is at any rate presumptively prejudicial.

(2) The reasons given by the prosecution to justify the delay (at 513):

' A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but never the less should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay'.

In the present case part of the delay after arrest was due to overcrowded courts, part to negligence by the authorities, and part to the unavailability of witnesses.

(3) The responsibility of the accused for asserting his rights (at 531)

' Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.'

Their Lordships do not consider this factor can have any weight in the present case.....

(4) Prejudice to the accused (at 552):

' Prejudice of course, should be assessed in the light of the interest of defendants which the speedy trial was designed to protect. This court has identified three such interests: (i) to protect oppressive pretrial incarceration, (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last..... if witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown'.

The appellant did not allege the death or disappearance of a witness. Where, as in Jamaica a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory, which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless, in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account. The fact that the appellant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted.

.....

Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in Barker –v- Wingo. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any constitutions written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight attached to each factor however vary from jurisdiction to jurisdiction and from case to case."

We do note that both cases of **Bell –v- DPP** and **Barker –vs- Wingo** involved the enforcement of constitutional rights , however, it is our view that both the two cases and the present one before us involve an accused's right to a fair hearing within a reasonable time. According to the principles and criteria applied in the two cases in this regard, are appropriate. We hold that it is desirable in case of applying the same or similar criteria in applications made by the prosecution for re-trial of an accused person in Kenya. As a result, we propose to apply the four factors established by Powell J in to the application for an order for re-trial:-

1. Length of delay

The first Appellant was arrested on 26th April,2000 and held in remand until 15th May 2000 when he was arraigned in court and charged.

The second Appellant was arrested on 10th February,2000 and held in remand until 15th May,2000 when he was charged. The third Appellant was arrested on 24th April, 2000 and held in remand until 15th May,2000 when he was arraigned in court and charged.

In its entirety, the trial took four years and two months (50 months) before it was concluded on 28th July,2004. After their conviction and sentence the Appellants lodged their respective appeals. They have been in custody in the meantime for another one year and ten months and a half (22 ½ months). The prosecution have now conceded to the appeals and want a re-trial instead. In total the Appellants have been incarcerated for the last six(6) years (72 months). Without doubt this length of time is an extremely long time at any rate in the life of any one individual.

(2)The reasons given by the prosecution to justify the delay

In the present case before us, if a re-trial is ordered, there will certainly be a delay in the speedy trial of the accused. Already, it is 6 years since they were arrested and charged in court. It took 4 years for the trial itself to be concluded. How long the proposed trial will take is as a factor to be taken into account. Unfortunately the prosecution did not give any opinion or make any submissions on this question. No indication was given whether the re-trial will take a similar period of 4 years or a lesser period. It is not enough to state that the exhibits are intact. This does not take care of the accused's rights, namely, to have a fair trial within a reasonable time.

What can be said to be "**a reasonable time"** in Kenya today?

In the **Bell –v- DPP** case from Jamaica, the Five Lords of the Privy Council (Lord Keith of Kinkel, Lord Elwyn – Jones, Lord Edmund – Davies, Lord Roskill and Lord Templeman) put light on how to answer this question: They said:

" **Their Lordship accept the submissions of the respondents that, in giving effect to the rights granted by SS13 and 20 of the constitution of the Jamaica, the courts of Jamaica must balance the fundamental right of the individual to affair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creation of new courts and the qualification of**

additional lawyers. Expansion of legal services necessarily depends on the financial resources available for that purpose. Moreover, an injudicious attempt to attempt to expand an existing system of courts, judges and practioners could lead to the deterioration in the quality of the justice administered and to the conviction of the innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the constitution and mindful of the advice tendered from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and what periods of delay explicable by the burdens imposed on the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within reasonable time falls on the courts of Jamaica and in particular on the members of the court of Appeal who have extensive knowledge of conditions in Jamaica. In the present case the full court stated that a delay of two years in the Gun court is a current average period of delay in cases in which there are no problems for witnesses. The court of Appeal did not demur. Their Lordships accept the accuracy of the statements, that in present circumstances in Jamaica, such a delay does not itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognize need to take all reasonable steps to reduce the period of delay whenever possible.

The courts of Jamaica must constantly balance the claim of the accused to be tried, notwithstanding the absence of witnesses, against the possibility, unproved and unprovable in many cases, that the absence of a necessary witness has been procured or encouraged by someone acting in the interests of the accused. The courts seek to prevent exploitation of the rights conferred by the constitution and to weigh the rights of the accused to be tried against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused can fairly be established by all the relevant evidence.. For reasons advanced, their Lordships would in a normal case accept the view of the courts of Jamaica that a delay of 32 months or thereabouts did not infringe the constitutional rights of an accused.

But their Lordships consider that in the present case the courts fell into error when they compared the delay which occurred after the order for re-trial with the average delay which occurs between arrest and trial. The appellant was arrested in May 1977. His trial was defective. The court of Appeal which heard his appeal against conviction at the first trial could have upheld the conviction if they had been satisfied, notwithstanding the defective conduct of the trial, there had been no miscarriage of justice involved in the conviction. The members of the court of Appeal must therefore have considered that the accused might be acquitted. The accused having been arrested, detained and submitted to defective trial and conviction had, through no fault of his own, endured two wasted years and must for the second time prepare to undergo a trial. In these circumstances, there was an urgency about the re-trial which did not apply to the first trial. A period of delay which might be reasonable between arrest and trial is not necessarily reasonable between an order for re-trial and the retrial itself. Far from recognizing any urgency, the full court excused delay which occurred after March 1979 on the ground that it was partly due, in their words, to ' bureaucratic burgling.' "

The Privy Council allowed the appeal lodged by the appellants. We found it absolutely necessary to set out a substantial portion of aforesaid decision due to relevance of the principles and law enunciated therein and the many similarities of the facts and circumstances in the trial. The major difference is that in the Jamaican case, an order for retrial had already been made. We also have considered the importance of the questions raised by this case into the enforcement of constitutional and human rights, the rights of an accused, the operation of the criminal justice and situation prevailing in Kenya.

The reasons for the application for an order of the retrial of the appellants is because the prosecution has conceded that the trial, conviction and sentence of the appellant's in the magistrates court was illegal under the provisions of section 85 of the Criminal Procedure Code. It is our view that an order of re-trial of the appellants' after 6 years since they were arrested and charged amounts to excessive and inordinate delay. If the retrial is ordered, the retrial process will proceed in the normal manner though the urgency required in a retrial must be of a higher degree than an ordinary trial. No guarantees have been assured by

the prosecution about this urgency and setting time limits. This is explicable since it is not practicable to give such assurances. It is not known whether the witnesses will avail themselves and co-operate with the prosecution. The courts still have their work cut out for them with the over-burdened work load, back-logs and bureaucracy in our legal system. This court takes judicial notice of the fact that the prosecution service in Kenya is lacks adequate personnel and institutional performance is below par due to lack of resources. The same applies to the judiciary and its performance or lack of it is the current topic today.

In summary, all things being equal, there are all chances that the re-trial of the appellants if ordered would take another 4 years, the same period the trial took. We do not think that this court can state with enough authority and data what would be a reasonable time for a normal trial to take place in order to conform to the provisions of the Constitution that protect the rights of an accused to a fair hearing within a reasonable time. This question perhaps ought to be decided in the future when both the prosecution and a represented accused place (the appellants here are unrepresented in the appeal) appropriate information and data for the court's analysis and decision. It may also be the subject of a reference to a Commission of Judicial Inquiry which can have the mandate and tools to make an empirical finding since the matter raises questions of the reforms of the system of legal administration and the economic, social and cultural conditions prevailing in Kenya.

For now, if a re-trial is likely to take a period of 4 years it will mean that the appellants' trial strictly, would have taken a total of 10 years from the date they were arrested and charged! Even if by some miracle the prosecution perform a miracle and cut down the period of retrial to 2 years, it would still mean that the entire trial process for the accused would have taken 8 years. In our view, whether it is 8 years or 10 years, such a period is and cannot be a reasonable time for a trial to take. This length of time by itself would make the trial unfair and the time unreasonable. It would lead to a gross violation of the appellants' Constitutional right to a fair hearing within a reasonable time.

We do not hesitate to take into account that all the three appellants faced inter, alia, capital offences which are not bailable. As a result, they were incarcerated in prison remand for the first 4 years during which the trial took place. After conviction and sentence and while waiting for the appeal to be heard, they were in prison custody for another 2 (two) years. This means that they have been denied their personal liberty for 6 years during which they had to endure the trial and the appeal process.

The prosecution has conceded that the trial was a mistrial. Why was this? This was because the prosecution appointed a person who was not legally qualified to prosecute the appellants. Who allowed this to happen? The answer is obvious. Initially, it was the Prosecution itself. This was due sheer negligence and recklessness in carrying out their prosecutional duties. The Law is statutory and known by the Prosecution. Strictly, there can be no excuse for this breach of a fundamental law. Subsequently, the trial court cannot escape culpability. We are of the view that the court which is required to apply the law ought to have been alert and vigilant. The trial court ought to have inquired into the qualification/capacity of the police officer purporting to prosecute the case under the provisions of section 85 of the Criminal Procedure Code. We hold that the court was overly complacent and lax in the discharge of its judicial duties of applying the law and enforcing the Constitutional rights of the accused in the case.

This court therefore takes into account these facts when considering the application for an order for trial. Once the prosecutor commenced the prosecution of the case and the court began to hear the case, they embarked on a defective trial. The whole trial was a nullity ab initio. The appellants have been compelled to go through an illegal and unlawful process for no fault of their own. They had no say or control over the prosecution and the court.

In view of the aforesaid, we see no justifiable reason for the appellants to be exposed to and to have to endure a new trial which will be wholly onerous and oppressive.

(2)<u>The responsibility of the appellants for asserting their right</u>

We do not think this factor has an application in the case before us. We note that the appellants opposed

the application for retrial as soon as it was made by the Respondent.

(3) Prejudice to the appellants

As stated in the **BELL –V- DPP** case, prejudice should be assessed in the light of the interests of the accused which the speedy right was designed to protect. We will deal with each of the interests identified:-

(i) To prevent oppressive pretrial incarceration.

The appellant's have been incarcerated for the last 6 years. With the concession of the prosecution to the appeal, the entire process was illegal, unlawful and a nullity. They have been wrongfully incarcerated for the said period yet they are up to now innocent until proven guilty. If a retrial took place, the Appellants would still remain in custody as they will face non-bailable charges (robbery with violence). The adverse conditions in our remand prisons are matters of public knowledge.

(ii) To minimize anxiety and concern of the appellants.

In the light of what the appellants have gone through, the length of time and illegalities which have taken place, there is no way that this court can minimize the Appellants anxiety and concern. A retrial will not ensure the protection of this interest but will only perpetuate it for another four years.

(iii) To limit the possibility that the defence will be impaired.

We cannot assess this aspect of possible prejudice in this case. We did not have the benefit of arguments in this regard substantially due to the fact that the appellants opted to act in person, despite the services of attorney having been offered by the court. In Kenya it is not mandatory in law for an appellant to have counsel in his appeal even if the charges on which he has been convicted has resulted in the death penalty. Be that as it may, it would suffice to state that prejudice cannot be ruled out due to the long lapse of time from the date of the alleged offences and the eventual date of retrial.

Finally, and in conclusion and upon considering all factors herein, we do hereby reject to grant the order for re-trial of the appellants' as sought by the Respondent. To grant such an order and for such retrial to take place would infringe on the rights of the appellants to a fair hearing within a reasonable time. We have attached weight to each of the four factors according to the facts and circumstances of this case.

We, therefore, do hereby allow and do hereby quash the appellants' their respective convictions and set aside their respective sentences. We consequently order that they be set to liberty and released forthwith unless otherwise lawfully held.

DATED AND DELIVERED ON THIS 15TH DAY OF JUNE,2006 AT ELDORET.

JEANNE GACHECHE

JUDGE

MOHAMMED K. IBRAHIM

JUDGE

In the presence of:.....for the state.

Appellants in person.