



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 5 of 2004

RONALD SIMIYU NAMASAFU:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

(This is an appeal from the conviction of Ms. Lucy Gitari, Principal Magistrate and sentence of J. N. Njage Principal Magistrate read on 26th January 2004 Eldoret Chief Magistrate's Court Criminal Case No. 6297 of 2000)

The Appellant jointly with a co-accused Sospeter Mwangi were found guilty of the charge of rape contrary to section 140 of the Penal Code. Each was sentenced to serve ten (10) years imprisonment.

Both accused filed appeals against the said decision but due to some inadvertence the two appeals were not consolidated to be heard together. It was placed on record by the State that the co-accused, Sospeter Mwangi's appeal was heard and allowed. However there was an order for re-trial.

One of the grounds of appeal here was that the proceedings having been partially conducted by a police constable were fatally defective and incompetent and they ought to be declared a nullity. This was contrary to the provisions of section 85 Criminal Procedure Code.

The Respondent, at the hearing of this Appeal did not oppose the same on the said ground. However, the State applied for an order of re-trial. Counsel for the State told the court that the trial took four years. However, since the charge was bailable, the Appellant was out on bond. The Appellant has been in custody since conviction serving the ten (10) year sentence. The state argued that, rape is a serious offence and the modesty of the victim had been infringed upon.

Counsel for the Appellant opposed the application for retrial on the grounds that:-

- It would be unfair.
- The Respondent know of the Appellant's defence and weaknesses.
- The Respondent would beef up their case and cover up shortcomings.
- It is 6 years since the trial commenced.

This court has considered the concession by the Respondent in not opposing the Appeal. On this ground the appeal ought to be allowed. Now, should this court order a retrial on the basis of the reasons given by the Respondent/Prosecution? What matters should this court take into consideration when faced with an application for a re-trial? This court in a Two-Judge Appeal set out the principles which ought to apply in such a situation – in the case of **CRIMINAL APPEAL NO. 44 OF 2004 – JACOB KIPRONO MAIYO & 2 OTHERS –V- REPUBLIC** (unreported)

Section 77(1) of the constitution of Kenya provides that:-

“ 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 is a constitutional provision and no order for re-trial ought to be made without applying this provision to the case.

Following the English case of **BELL –VS- DIRECTOR OF PUBLIC PROSECUTIONS OF JAMAICA AND ANOTHER** (1985) 2 All E.R. 585 which was itself inspired by the judgment of Powell J. of the Supreme Court of the United States in **BARKER –VS- WINGO** (1972) 407 US 514, four factors should be assessed in determining whether an accused is right to a speedy trial has been or is likely to be deprived. These are:-

1. Length of Delay.
2. The reasons given by the prosecution to justify the delay.
3. The responsibility of the accused for asserting his rights.
4. Prejudice to the accused.

I proposed to apply and assess the said four factors to this case.

1. Length of Delay

The Appellant was arraigned in and charged in court with the offence of rape on 23rd October, 2000. The date of arrest appears to be 16th October, 2000. The trial took 3 years and two months. The Appellant was released on bond until his conviction on 26th January, 2004. The Appellant has been in custody for 2 ½ years serving sentence. This means that the Appellant has faced the trial and served custody. The entire period he has endured the foregoing is 5 years and 8 months. There is no doubt that the said period is very long.

If a retrial is ordered, there will definitely be a further delay in the trial of the accused person. The trial took place for 3 years and 2 months. Considering this it's my experience and the circumstances in Kenya, such a period by itself cannot be said to be "unreasonable". I have taken into account that the Appellant continued to enjoy his liberty despite the hazards of enduring the trial. However, if a fresh trial were to start and assuming it would take another 3 years, this means that the entire "trial" process would have taken almost a period of 9 years. This cannot amount to a reasonable time.

2. The reasons given by the Prosecution to justify delay

The prosecution has conceded that the trial was a mistrial. This was because the prosecution appointed a person who was not legally qualified to prosecute the appellants. The cause of this is clearly due to the omissions or errors of the Prosecution. The law is clear yet it was violated. The court was not vigilant to insist to know the qualification of the Prosecutor in order to comply with section 85 of the Criminal Procedure Code.

The Appellant has been compelled to go through and endure an illegal and unlawful trial for no fault of his own. He had no control over the prosecution and the court.

3. The Responsibility of the appellants for asserting his rights.

This does not apply in this case. The application for retrial was opposed immediately.

5. Prejudice to the Appellants.

When assessing this factor the court ought to take into account the interest of the Accused to protect the right to a fair trial within a reasonable time. These interests are;-

- i. To prevent oppressive pretrial incarceration.
 - ii. To minimize anxiety and concern of the Appellant
 - iii. To limit the possibility that the defence will be impaired.
- (i) To prevent oppressive pretrial incarceration.

The Appellant has been incarcerated for 2 ½ years. To aggravate the situation the said imprisonment was illegal and unlawful due to the mistrial. The Appellant has served 2 ½ years of his life and been denied his liberty due this process. However, serious an offence, an accused is innocent until proven guilty.

- (ii) To minimize anxiety and concern of the appellant.

Any new trial will take at least 3 years if not more. Considering the experience of the appellant for the last 5 years and 8 months, an order for retrial will only increase his anxiety and concern for another three years or more.

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

This is difficult to assess. However the Prosecution stated that all witnesses are available and the exhibits are still intact.

The court has considered all the factors which need to be assessed when considering an application for retrial. The court has also considered the nature of the offence and the possible effect any order herein will bear upon the complainant and victim.

I do hereby hold that no accused person should face a trial for a period of 9 years. This is the likelihood if an order for re-trial is made in this case. The Appellant has already endured a period of 5 years and 8 months facing the law. Out of the said period, he has been imprisoned and his liberty unconstitutionally taken away for a period of 2 ½ years. He has served such period of “**sentence**” when he was illegally convicted. Strictly he was and is still innocent until he is lawfully and legally convicted. For him to face a new trial will be aggravating the situation. I am of the view that both the complainant and the Appellant are victims of our imperfect legal system.

All hope should not be lost. This is a price we must pay as we aspire and endeavor to perfect our legal system and administration of justice. It is a long road but we have to reach the destination one day. A long the way, sacrifices will be made. It is the duty of this court to minimize such sacrifices on both sides as much as possible.

As a result, I do hereby allow and quash the appellant’s conviction and set aside his sentence. I also disallow the application for a retrial of the case against the Appellant. I consequently order that he be set to liberty and released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET ON THIS 5TH DAY OF JULY,2006

M.K. IBRAHIM

JUDGE

Coram - Ibrahim J

C/C - Chelang'a

Ms. Oundo for the state

Mr. Okara holding brief for Mr. Momanyi for the Appellant

Judgment delivered in their presence.