



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL CASE NO.33 OF 1998

REPUBLIC.....PROSECUTOR

V E R S U S

1. BENSON OTSIENO

2. BENJAMIN WESONGA.....ACCUSED

R U L I N G

On 1.9.1998 Benson Otsieno and Benjamin Wesonga, both accused in this case appeared before Judge, Hon. Waki, J., and pleaded not guilty to the offence of murder contrary to Section 203 read with 204 of the Penal Code in that on the night of 10th/11th March, 1998 they jointly murdered STEINMATZ GERTIE. The plea was taken after committal proceedings in subordinate court in Case No.44/98.

On 4.5.99 the case was before court but did not proceed because the advocate appointed to represent the accused did not turn up on that day. The court ordered the brief to be allocated to another counsel. The hearing fixed for 9.9.99. On that date the hearing was before court Commissioner Shah when hearing was adjourned to 19.10.99 for reasons that hearing could not be reached on that day. On that day hearing commenced before Hon. Justice Hayanga.

On several occasions the trial was delayed because of the absence of defence counsel Mr. Ngombo. There was also change of State Counsel prosecuting. The trial proceeded intermittently throughout the year 1999, 2000, 2001 up to May 2002 when on 20th of that month the trial was placed before Hon. Justice J.W. Onyango Otieno. On that day the court was informed that one of the assessors was dead. It is also on record that the dead assessor was one of the remaining two assessors. The trial was now in the hands of one assessor. Therefore court ordered the hearing to start denovo and fresh assessors to be selected. This exercise took place

On 18/6/02 the trial was placed before Ouna J., who proceeded to select the remaining 2 assessors. The selection of assessors proceeded on 26/6/2002 before Hon. Justice Onyango Otieno. On 18/9/2002 this case was placed before me and the court was informed that the case was to start afresh according to earlier orders made.

Trial was set down for 2/10/2002. It was again adjourned by Hon Onyango Otieno to 20th & 21st October, 2002 when it came up before Onyancha, J. 21.1.2003 it was before Hon. Onyango Otieno. Again the case was before court on 5/2/2003 when it was fixed for hearing on 9th & 10th April, 2003 on which date the State applied for adjournment to enable them to prepare. It is to be noted here that the court expressed concern that this suit has been pending for a long time. The next hearing date was 24/6/2003. Ms Kwena applied for adjournment.

The application for adjournment was opposed and the Hon. Judge (Sergon, J.) wrote a lengthy Ruling setting out the circumstances that has led to the delay in this trial. He fixed hearing for 6th, 7th August 2003. Before those dates the matter was again before court on 1/8/2003 when State Counsel requested for adjournment and fresh hearing dates. Defence counsel was not present. It is not clear if he had notice of this date in view of the early fixing order. This time the hearing was pushed to 6th, 7th, 8th and 9th days of the month of October.

Come 6th October, 2003 and the court ordered adjournment because only one (1 assessor was present. Hearing was ordered for 7/10/03, the following day. On that day State Counsel Ms Kwena informed the court that only one witness was available and requested for adjournment. On that day Mr. Kithi now in the defence opposed the application submitting that the trial had been set down for hearing on several occasions before several judges and no witness had turned up. It would be difficulty to trace them and it would be unjust to keep the accused in custody. He further submitted that evidence in committal bundles was circumstantial and therefore not strong. The court nevertheless granted adjournment and ordered a mention on 16/10/03 on which date the matter was again before Sergon, J.

Ms Mwaniki for State informed the court that she was seeking a further mention date to get instructions from D.P.P. upon which information and request the court adjourned the case to 5th November, 2003.

Again on that date the court was informed that the file had been sent to D.P.P. and has not been returned. The court granted adjournment and ordered hearing on 2/12/2003. Unfortunately before that date Hon. Sergon J., had left the Station and the matter came to this court. On that date one assessor not present. State Counsel informed the court that no instructions had been received and the court granted adjourned to 11.2.2004.

On 11/2/2004 the matter was in this court for hearing. Mrs. Mwangi appeared for State Mr. Kithi appeared for defence.

The State Counsel submitted a fresh information for taking a fresh plea. This step by State was strongly opposed by defence counsel saying that the first information was still on record and had not been discharged or withdrawn and that the accused should not be requested to plead twice for the same offence. He also submitted that there had been too long delay in trying the accused of this offence and all this is in contravention of the accuseds rights granted by the Constitution for a speedy trial. I have considered the provisions of the Criminal Procedure Code. The accused is required to plead to information under Section 274 of the Criminal Procedure Code Section 278 requires that on a plea of Not Guilty the accused shall *“be deemed to have put himself upon the country for trial.”* It would be illegal and unlawful to request an accused person to put himself twice upon the community for trial. Section 283 empowers the trial court:-

“If, from absence of witnesses or any other reasonable cause to be recorded in the proceedings, the court considers it necessary or advisable to postpone the commencement of or to adjourn a trial the court may from time to time postpone or adjourn it on such terms as it thinks fit for such time as it considers reasonable.”

It is to be noted that the adjournment or postponement of trial has to be on reasonable grounds if the court considers it necessary or advisable the court may (discretionary power) adjourn trial on such terms as it thinks fit. For such time as it considers reasonable.

In this case the court has expressed great concern (Sergon, J.) (Khaminwa, J.) for the delay occasioned in this case. It is true that when only one assessor are prevented from attending (by death or otherwise) the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors. It is my view that this means evidence will be taken afresh before fresh assessors. There is no requirement to plead twice.

From the above it is clear that the trial commencement postponement and adjournment, is entirely in the hands of the trial court. The discretion thus granted is to be exercised by the trial court on judicial

principals of reasonable cause such as absence of witnesses and reasonable time. On the issue of reasonable time Section 77 of our Constitution provides:-

“If a person is charged with 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.”

In the circumstances of this case the trial has taken several years over 5½ years. Before the commencement of this trial there were committal proceedings when the accused were in custody for about 5 months. The reasons which have occasioned this delay are enumerated above but not one of them can be attributed to the accused persons. The time taken already is an unreasonable delay by any standard. For the last 2 years no steps have been taken to finalize this trial. Injustice is occasioned to the accused persons and their Constitutional rights are continuing to be breached.

For these reasons I order that no fresh information shall be filed by the State in this matter. No adjournment shall be granted. The prosecution shall close its case if no witnesses are present to give evidence.

Dated at Mombasa this 16th day of February, 2004.

JOYCE KHAMINWA

J U D G E

Ms Mwaniki:

I can call evidence on 27/2/04 under protest because the time is too short to avail witness.

Mr. Kithi:

I agree to that date.

Court:

Trial of this case shall be on 27/2/04.

JOYCE KHAMINWA

J U D G E

Production Order to issue.

JOYCE KHAMINWA

J U D G E

Assessors to be paid today's attendance