



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION NO.195 OF 2003

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF
FUNDAMENTAL RIGHTS UNDER SECTION 84 (1) AND (6) OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL
REVIEW UNDER 65 (2) OF THE CONSTITUTION OF KENYA
BETWEEN MARGARET WANJIKU WANYOIKE APPLICANT**

AND

ATTORNEY-GENERAL..... RESPONDENT

R U L I N G

This application was brought by Originating Summons filed on 13.03.03. It was stated to be under sections 77 and 84 (1) and (6) of the Constitution of Kenya, Rules 2, 3, 5, 6, 7, 8 and 11 of the Constitution of Kenya (Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001 and all other enabling provisions of the law.

By the said Originating Summons the applicant sought the following declarations:

1. A declaration that the prosecution and/or trial of the applicant in Kiambu Magistrate's Court Criminal Case No.2347 of 1993 for the last 10 years amounts to violation of the applicant's right to a fair hearing within a reasonable time as provided for by section 77 (1) of the Constitution of Kenya and is a degradation of the applicant's fundamental right under the said section of the Constitution.
2. A declaration that the maintenance and prosecution of the said Kiambu Criminal Case No.2347 of 1993 against the applicant when a principal witness P.W.22 FESTUS WAGACHA gave evidence-in-chief and died before he was cross-examined by the defence is a violation of the applicant's right to a fair trial and a degradation of the applicant's fundamental right as provided for under section 77 (1) of the Constitution and is therefore unjust, inequitable and unconstitutional.
3. A declaration that the conduct of the prosecution in the said Kiambu Criminal Case No.2347 of 1993 whereby they have not tendered any other witness to the court since the last witness gave evidence in 1998 and yet they continue to maintain the prosecution of the applicant is an abuse of the court process and an improper exercise of the discretion to prosecute, it is oppressive, unjust, inequitable, against the public interest and a degradation of the applicant's fundamental right to a fair trial within a reasonable time under section 77 (1) of the Constitution.
4. A declaration that the unreasonable period taken to prosecute the applicant, in the course of which the complainant Co-operative Society has been disbanded in 1998 has irredeemably compromised and prejudiced the applicant's possible defence in the sense that she cannot access or find the Society's documents for the purposes of her defence and/or trace possible witnesses who

were on the staff of the Co-operative Society. This is a degradation of the applicant's fundamental right to fair trial as provided for the section 77 (1) (sic) of the Constitution.

5. An order of prohibition against the continued prosecution of the applicant in Kiambu Criminal Case No.2347 of 1993.

6. An order that proceedings in the said Kiambu Magistrate's Court Criminal Case No.2347 of 1993 be stayed providing (sic) the hearing and final determination of this application.

The applicant's application was stated to be based upon the grounds that:-

a) The trial court, on 20.11.02 gave leave to the applicant to file this reference on the basis of the annexed questions (see copy Exhibit "MWW1" annexed hereto).

b) The applicant was arraigned in court in Kiambu Criminal Case No.2347 of 1993 on 27.07.93 and all pleaded not guilty to 48 counts related to fraud i.e. forgery contrary to section 349 of the Penal Code, obtaining money by false pretences contrary to section 313 of the Penal Code, and conspiracy to defraud contrary to section 317 of the Penal Code.

c) Over the last 10 years the prosecution has been extremely lethargic in presentation of witnesses in court. d) The last time the prosecution presented a witness in court was in 1998 i.e. P.W.22, one MR. FESTUS WAGACHA, an Auditor, who gave evidence-in-chief and was stood over for cross-examination.

e) The said witness FESTUS WAGACHA was not presented for cross-examination since 1998. He subsequently died in a road traffic accident in the year 2001 before he could be cross-examined.

f) The complainant in the case, Gatundu Coffee Growers Co-operative Society Limited was dissolved and wound up in 1998. The applicant was an employee of the society.

g) Between 1998 and todate the prosecution has not presented any other witness and has not closed its case.

h) In the aforesaid circumstances –

i. The applicant will not have the opportunity to cross-examine the said witness FESTUS WAGACHA. He was a principal witness who was an Auditor from the firm that was auditing the complainant's accounts, and who claimed in his evidence to have found irregularities in accounts resulting in this case. It was extremely important that the applicant be offered the opportunity to cross-examine this witness. In view of his subsequent death in 2001 before he was cross-examined the applicant has been irredeemably compromised and prejudiced in their (sic) defence.

ii. The complainant Co-operative Society was dissolved in 1998. The applicant would therefore be unable to access or trace documents in her possible defence or to trace defence witnesses who were workmates in the C-operative Society.

The applicant supported her case with a supporting affidavit sworn by her on 13.03.03 which is along similar lines.

Learned counsel for the applicant, Mr. Kimathi addressed the court and sought the grant of prayer 5, i.e. an order of prohibition against the continued prosecution of the applicant in Kiambu Criminal Case No. 2347 of 1993. He observed that the trial has taken more than 10 years, contrary to section 77 of the constitution of Kenya which provides that an accused shall be tried within a reasonable time. He submitted that 10 years is not a reasonable time; that the delay was not caused by the applicant; and that she should not continue to wait for results of a trial likely to take so long.

Applicant's counsel pointed out that the complainant, Gatundu Coffee Growers Co-operative Society Ltd has since wound up. That the applicant will not have access to documents she may require for her defence and she cannot, therefore, prepare for her defence. Counsel added that the principal witness, Festus Wagacha died after giving his evidence-in-chief in 1998 but before being cross-examined by the applicant. That after his evidence-in-chief, the said Festus Wagacha was stood over for cross-examination but was not availed until he died in the year 2001. That as a result the applicant has lost an opportunity to cross-examine the said principal witness to unveil any truth and/or any doubt regarding his evidence.

Because of the foregoing reasons, the applicant's counsel submitted that the continued trial of the applicant might compromise her defence. Applicant's counsel urged this court to grant prayer 5.

Learned counsel for the respondent Mr. Monda conceded the applicant's application. He said it is true that the criminal case against the applicant has taken over 10 years to prosecute and that this offends section 77 of the Constitution of Kenya requiring a prosecution to be conducted within a reasonable period. Respondent's counsel noted that the charge sheet shows that the applicant with others were charged with 48 counts and that this contravenes the principle laid down in *Ochieng vs Republic* [1985] KLR 252. He conceded that the applicant and her co-accused were prejudiced by the multiplicity of charges and that drawing a proper defence will not be possible. He confirmed that the complainant Cooperative Society wound up in 1998 and that in the circumstances a prosecution cannot be carried out since the complainant has no locus standi to sue. In view of this combination of factors, the respondent's counsel agreed that the applicant will be prejudiced if the prosecution was to resume. He conceded that this is a proper case for an order of prohibition to be granted.

The following facts emerge from the record of Kiambu Chief Magistrate's Court Criminal Case No.2347 of 1993, Republic vs (1) Joseph Njoroge Kamathi (2) John Njuguna Ngugi (3) **Margaret Wanjiku Wanyoike** (4) George Gitau Warimbo (5) Martha Wanjiru Mwema (6) Esther Njoki Nganga and (7) Salome Njeri Wanyoike. That the applicant herein was accused 3 in the lower court. That she and her 6 co-accused faced various charges individually revolving around forgery and obtaining by false pretences which totaled 47 counts against them in combination while all the 7 accused jointly faced, in court 48, a charge of conspiracy to defraud. That in all the 48 counts the complainant was the same, i.e, Gatundu Coffee Growers Co-operative Society Limited.

Further, the affidavit evidence of the applicant, her application plus the submissions of the complainant's counsel as well as the submissions of the respondent's counsel establish that the principal prosecution witness was Festus Wagacha (P.W.22). That the said witness was an auditor from the firm that was auditing the complainant's accounts of which the applicant was an employee. That the principal witness (P.W.22) who audited the complainant Society's accounts claimed in his evidence-in-chief in 1998 that he had found irregularities in the accounts resulting in institution of the subject case against the applicant and her co-accused. That after P.W.22 testified-in-chief in 1998 he was stood over for cross examination but was not availed for cross-examination until his death in 2001 and that the applicant has lost the opportunity of cross-examining him. That the complainant society itself was subsequently dissolved and wound up in 1998.

Section 77 (1) of the Constitution of Kenya provides as follows:

“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.”

The criminal prosecution in question was instituted in 1993. By the time the principal witness (P.W.22) gave evidence-in-chief it was 1998, i.e. some 5 years later. Then he was stood over for cross-examination but was not availed for such cross-examination until his demise in 2001, i.e. after a further 3 years. That alone amounts to some 8 years from the inception of the case to the time the principal witness died without completing his testimony by being availed for cross-examination. No decision appears to have been taken for the next 2 years from the principal witness' death whether to continue with the case or terminate it. And so in March, 2003 the applicant sought the intervention of the High Court to put the case

to rest, hence the present application.

The death in 1998 of the principal prosecution witness, Festus Wagacha (P.W.22) before the applicant had an opportunity to cross-examine him means she has lost the opportunity of doing so. That is obviously prejudicial to the applicant's defence. The dissolution and winding up in 1998 of the complainant society, Gatundu Coffee Growers Co-operative Society Limited means the applicant cannot have access to such of the former society's documents or records as she might need for her defence. That is highly prejudicial to the applicant's defence. The flipside of the dissolution and winding up of the complainant Society also means there is now no complainant to prosecute the subject Kiambu Chief Magistrate's Court Criminal Case No.2347 of 1993.

The seriousness of the offences subject matter of the criminal case against the applicant and his 6 co-accused cannot be gainsaid. There is no time limit for the prosecution of such offences. The Attorney-General is, therefore, free to prosecute at any time provided he does not offend the fundamental rights conferred on an accused person by section 77 (1) as protected by section 84 (1) of the Constitution: see **Githunguri vs Republic** [1986] KLR 1.

The applicant herein and her co-accused faced a total of 48 criminal charges revolving around forgery, obtaining by false pretences and conspiracy to defraud. Such multiplicity of charges is clearly prejudicial to whatever defence any of them might wish to put up. In **Ochieng vs Republic** [1985] KLR 252 the appellant had been charged in the lower court with 44 counts alleging forgery, fraudulent false accounting, uttering and stealing by a person employed in the public service. The appellant was convicted on 11 counts of forging invoices, 8 of forging payment vouchers and 4 of stealing by a public servant. His appeal to the High Court was allowed in respect of 2 counts only, and he filed a second appeal in the Court of Appeal. At holding 2, the Court of Appeal had this to say:

“It is undesirable to charge an accused person with so many counts in once charge sheet as this may occasion prejudice. It is proper for a court to put the prosecution to its election at the inception of the trial as to the counts upon which it wishes to proceed.”

Continuation of Kiambu Chief Magistrate's Court Criminal Case No.2347 of 1993, inter alia, against the applicant has absolutely no leg to stand on and respondent's counsel quite properly conceded that the applicant's application is a proper case for an order of prohibition to be granted as called for in the applicant's prayer 5. The applicant's prayer 5 sought –

An order of prohibition against the continued prosecution of the applicant in Kiambu Criminal Case No.2347 of 1993.

This appears to have been the applicant's ultimate desire. He impliedly abandoned the other prayers.

Having come to the clear conclusion that there is no basis or justification for Kiambu Chief Magistrate's Court Criminal Case No.2347 of 1993 to continue against the applicant, I hereby issue the Order sought in the applicant's ultimate prayer 5, to wit:-

An order of prohibition against the continued prosecution of the applicant in Kiambu Chief Magistrate's Court Criminal Case No.2347 of 1993.

Delivered at Nairobi this day of, 2004.

B.P. KUBO

JUDGE