REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 2 OF 2001

REPUBLIC ……. PROSECUTOR

VERSUS

DANIEL MBURU TUTUA …….. 1ST ACCUSED

GILBERT NJUGUNA KAHUGI ……..…. 2ND ACCUSED

RULING

An unusual and distressing situation has arisen in this and 27 other Murder trials before this court. The trial Judge suddenly ceased to have jurisdiction after tendering his resignation as a Judge of the High Court thus throwing the trial into *Limbo.*

The murder charge arose from events that took place 31/2 years ago on 16th October, 1999. The plea was taken on 2. 2. 2001 and the trial commenced soon after in March 2001 with the assistance of three Assessors. The evidence of all 16 prosecution witnesses and one Accused person had been heard by April, 2002 before one of the Assessors left the country leaving two Assessors. The evidence of the second accused was then taken and submissions of counsel were recorded. The case was adjourned for summing up to the remaining Assessors on 18. 12. 2002. Then disaster struck!

On the available authorities in such event, the trial becomes a mistrial and has to commence de novo . I allude to *FURUGENCE VS REPUBLIC (1972) EA 161* where the Court of Appeal was considering Tanzanian provisions of Section 6A of the Judicature and Application of Laws (Amendment) Ordinance 1964, which confered upon a Judge "all the powers and functions conferred by law upon any class of Magistrate" and Section 196 of their Criminal Procedure Code which allows in certain cases "the continuation of a trial by a different Magistrate from the one who began the case."

A Judge of the High Court purported to take over from another Judge a murder trial after close of the prosecution case and concluded it citing the two sections of the law as empowering him to so proceed. It was held by the Court of Appeal that Section 196 was limited to trials before subordinate Courts and had no application in High court proceedings. The trial was declared a nullity. That decision made on 3. 2. 1972 does not appear to have been placed before Apaloo C. J. when he considered a similar situation on 30. 11. 93 in HC R C 41/1992 REPUBLIC VS JOHNAH ORAO ANGUKA (UR). The trial Judge had completed the hearing of all the 52 prosecution witnesses and was awaiting submissions of Counsel before summing up, when he died. Chief Justice Apaloo heard submission of both the defence and prosecution on the way forward, with defence Counsel urging that the trial should proceed from where the previous Judge left off otherwise a second trial would occasion great hardship to the accused. Upon considering the matter without recourse to any previous guidance of authorities, which he said were not available to him, he gave directions declaring the trial a mistrial and ordering that the Accused be discharged to enable the state to present a fresh charge if it so wished for the trial to commence de novo.

It is on these two authorities that Learned State Counsel Mrs. Murungi relied on urging me to make similar orders in this case. The directions given by Apaloo C. J. in the ANGUKA CASE, she submitted, were in accord with section 201 of the Criminal Procedure Code, Cap 75 Laws of Kenya. This case therefore suffers a similar fate and she called for an order accordingly.

For the two Accused persons, Learned Counsel Mr. Njanja made a passionate plea that the two authorities be ignored or rather distinguished. In his view, the Legal provisions considered by the Court of Appeal in the Tanzanian Case are not comparable to our provisions. Section 200 of the Criminal Procedure Code gives the power to a trial Magistrate to take over and continue with a trial from another Magistrate. It does not mention the High Court. It is Section 201, Criminal Procedure Code and Section 10, Judicature Act, which provide that the Chief Justice shall make Rules of Court to regulate trials in the High Court. But no Rules have been made and therefore the assumption is that the same procedure as in subordinate Courts obtains for uniformity of Justice.

Furthermore, Mr. Njanja submitted, the supreme law of this land provides protection under Section 77 (1), of the fundamental right to a fair and speedy trial. Any event that serves to make the trial unfair or to delay it should not be held against the Accused. And further delay in the circumstances of this case would amount to torture and degrading treatment which is another protection afforded by the Constitution under Section 74. In this case the Accused Persons have been waiting for the conclusion of their trial since February 2001 – more than 2 years ago. The Law presumes them innocent through-out but a retrial, which is bound to take a similar period, would mean they are serving an illegal sentence. He called for the matter to be placed before the Chief Justice for Directions. Alternatively this Court should uphold the supremacy of the constitution and find that there is no law that bars the Continuation of the trial from where the other Judge left it.

I have anxiously considered the matter and the submissions of both Counsel. My sympathies are obviously with the two Accused who have been waiting for the last three years or so for the law to determine whether they are guilty of the offence charged or not. For until then they are presumed innocent. But the tragedy that has struck at this point in time is not blameable on them or the prosecution. It would have been such relief if statute law had expressly provided for a solution to the problem. Perhaps because it rarely arises. But it is not unthinkable and therefore either Parliament or the Hon. the Chief Justice under the powers granted to him for prescribing procedural rules should have dealt with such eventuality by now.

What I have before me for guidance are practical solutions invented under provisions of the Law that do not expressly prohibit the continuation of proceedings before another Judge. That is the Court of Appeal decision in the FURUGENCE CASE and the ruling of the Chief Justice in the Anguka case.

I am not persuaded that Section 196 of the Tanzanian Criminal Procedure Code which was considered in the FURUGENCE CASE is irrelevant or different from our Section 200 Criminal Procedure Code. They are indeed in Pari Materia and provide for continuation of Criminal trials between Magistrates. The Procedure is only applicable in Subordinate Courts which ordinarily try crimes of less serious gravity. Even at that level however there are safeguards under the section to ensure that the Accused is not prejudiced. They are in subsections (3) and (4) which state:

> ***"Section 200 (3). Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that a ny witness be re -summoned and re - heard and the succeeding Magistrate shall inform the accused person ofn that right.***
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> ***(4). Where an accused person is convicted upon evidence that was not wholly recorded by the convicting Magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

Those safeguards accord with universal notions of Justice. And in my view they become acutely

critical when the Accused is facing an offence of utmost gravity which only the High Court can try. There are also the fundamentals in the Constitution referred to by Mr. Njanja which must be observed. Those of "*fair* and speedy *trial*". Those considerations cannot however be made in isolation. The offence alleged to have been committed here is essentially against society and a member of that society has already lost his life. The only penalty for that, under current statutes, is the taking of the Accuseds' lives too. There cannot be any gamble therefore in ensuring that the trial meets the highest standard of proof required under the law.

Parliament in its wisdom has, for example, required under the law that the trial in the High court be conducted with the assistance of three Assessors. If two or more assessors are prevented from attending or they absent themselves at any stage of the proceedings however, a new trial must be ordered with a fresh bench of Assessors. That is Section 298 Criminal Procedure Code. Under the law, the opinions of the Assessors are not binding on the trial Judge. They make no final findings of fact like a Jury would. But the law holds them in such high regard that a trial would be a nullity without two or more of them.

By parity of reasoning, the trial Judge must be an even more indispensable part of that equation. He not only records mechanically all the evidence tendered but makes decisions and directs the Assessors on legal obstacles arising along the way. He observes and keeps in his mind, and at times records, the demeanor of the witnesses appearing before him. He forms an opinion on the credibility of those witnesses. At times, as in this case, he decides on the admissibility of extrajudicial confessionary statements. In the end the Judgment rendered must incorporate the totality of what transpired before the Judge. That sets apart a trial Judge from an Appellate Judge. Nay, the Appellate Judge must rely on the assessment of the demeanor and credibility made by the trial Judge as only the trial Judge can be a true Judge of it having seen and heard the witnesses.

In my view all that accords with the element of *"fairness and Justice "* in the trial and must have weighed heavily on the Courts in the decisions referred to above. It is the "speedy" aspect of the trial that causes me some concern. But this is not insurmountable if special directions are given for the disposal of the case.

In the end I come to the conclusion that the justice of the matter will be served by the declaration of the trial so far, as a mistrial. As in the *Anguka* case I discharge the Accused persons to give liberty to the Attorney General to decide, as is his constitutional mandate, whether the Accused persons should be re-arraigned for the same or similar offence or at all. If they are, then the formality of fresh committal proceedings shall be dispensed with. Any fresh charges shall be commenced before this Honourable Court within seven days of this ruling and the ensuing retrial shall proceed from day today, Unless it is adjourned for sufficient cause shown, until it is concluded.

Orders accordingly.

Dated this 24th day of March 2003.

P. N. WAKI

JUDGE

24. 03. 2003

Waki J.

Njanja for Accused

Bifoli for Republic

Court Clerk Ndung'u

Assessors present

Ruling delivered dated and signed in open Court.

Assessors are discharged. Payment to be made for their allowances.

P. N. WAKI

JUDGE