Keter v Republic (Miscellaneous Criminal Application E054 of 2023) [2023] KEHC 20322 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CRIMINAL APPLICATION E054 OF 2023

RN NYAKUNDI, J

JULY 17, 2023

BETWEEN

GEOFFREY KIPKOECH KETER ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The accused person was on May 8, 2020 arraigned before court charged of attempted murder contrary to section 220 (a) of the *Penal Code*. He pleaded not guilty putting the prosecution on notice to proof the element of the offence beyond reasonable doubt. The trail commenced on March 18, 2021 in which the prosecution presented two witnesses. It was further adjourned to December 17, 2021 when two witnesses also testified in support of the charge.

2. The next scheduled session was on January 25, 2023 and similarly two witnesses gave their side of the story on behalf of the prosecution. It is apparent that the trial magistrate left the station on transfer necessitating take over proceedings by Hon Ireri (SPM). It's clear from the record that the trial magistrate brought to the attention of the accused the express provisions of section 200 (3) of the *Criminal Procedure Code* on the right to recall witnesses. In the accused's own words, he elected the case to proceed from where it had reached meaning there was no necessity of recalling witnesses before the session Magistrate Hon Areri.

3. On June 7, 2023 the prosecution summoned the last witness and at the close of the prosecution case, accused was placed on his defence under section 211 of the *Criminal Procedure Code* set to be heard on November 20, 2023. In the interim the accused filed a certificate of urgency dated June 29, 2023 expressed to be brought under article 47, 48 and 50(1) & (2) of the *constitution* seeking the following substantive remedy.

1. "That this honorable court be pleased to exercise its powers bestowed upon it by the *constitution* and the law to stay the proceedings before the lower court pending the determination of this petition. In support of the certificate and the motion is an affidavit sworn by the petitioner dated the same day which is couched in the following language.

2. That I am a Kenya male adult of sound mind and hence competent to swear this affidavit

3. That I was charged with the offence of attempted murder c/sec 220 of the *Penal Code*

4. That the trial court has denied my application under the provisions of section 200 of the *CPC* without offering a reason for it.

5. That the trial court has violated my constitutional rights as provided by article 50(4) by disallowing my application to recall and further cross –examine the prosecution witnesses.

6. That the trial court has violated my constitutional right by raising my bond and cash bail without informed reason form Kshs 70,000 – to Kshs 200,000 which made me to be placed in custody as a result of that alteration

7. That I humbly pray that since the matter is scheduled for a ruling on June 26, 2023 may this honorable be pleased to issue and order pending the trial proceedings at the trial magistrate court until his petition is heard and determined

8. I humbly pray to be accorded an opportunity and argue my petition during the hearing thereof.

9. What I have deposed herein is true and correct to the best of my knowledge, information and belief.

Determination

4. This is an interlocutory reference to the High Court in terms of article 165(6) & (7) of the *constitution* as read with section 362 & 64 of the *Criminal Procedure Code*. The main complaint in the notice of motion as premised in the affidavit is about non- compliance with section 200 of the *Criminal Procedure Code* by the trial magistrate and cancellation of cash bail of 30,000 and in its place a substitution of a personal bond of Kshs 200,000 with a surety of identical amount was ordered by the court. As the petitioner did not raise the condition precedent of a surety he has been in custody since the resultant order.

5. The issues raised by the petitioner are hinged within the protected rights in article 50 of the *constitution* on the right to a fair hearing. What the provision envisages is that in the determination of the petitioners rights and obligations on any of the criminal charge by an independent and impartial tribunal, entitled by law he has guarantees to fair trial rights in a public hearing within reasonable time, to be presume innocent unless the contrary is proved beyond the reasonable doubt by the state, and in the interest of justice in independent tribunal has a duty not to exercise discretion likely to occasion prejudice or a miscarriage of justice.

6. In furtherance of the right to a fair hearing, legal representation has been made one of the co-rights to be enforced by the independent and impartial tribunal provided for in article 50(1) of the *constitution*. Therefore, the interpretation of article 50 on a right to a fair hearing cannot be the subject of a single unvarying rule but must be read as a whole and applied appropriately in the circumstances of each specific case.

7. In each case it's the trial court's primary mandate to evaluate the overall fairness of the procedural tenets of the proceedings in compliance with the requirements of article 50 of the *constitution*. It must be

examined at every stage of the trial to give effect to the spirit of the law as a whole and not the basis of an isolated consideration of one particular incident. It is incumbent upon each independent tribunal to monitor any procedural defects in the cause of proceedings and have it remedied to meet the threshold of pretrial and fair trial rights in article 49 & 50 of the *constitution*. Before an accused person can be held to have waived out of his or her own free will either expressly or tactly his or her entitlements to the right to a fair hearing such a waiver must if it is to be effected by the court be established to be unequivocal, and the tribunal to attend to it by minimum safeguards, protections, commensurate with the letter and spirit of the fundamental rights in the supreme law.

8. This application though on the face of it appears pedestal it arises serious constitutional questions flowing from the record of the criminal proceedings. The first requisite question to be determined by this court is the efficacy of article 50(2) (e) of the *constitution* on accused right to have his trial begin and concluded without unreasonable delay. The concepts embodied in these provisions are by no means of less weight to be entirely departed from under the guise or backlog and diary queuing system in our courts. The presumption of innocence unless the contrary is proved has for centuries a basic principle of our legal system and at the heart in the administration of criminal cases. In article 24(1) of the *constitution* a right of fundamental freedom in the bill of rights shall not be limited except by law and that only to the extent that the limitation is reasonable and justifiable in an open and democratic society, based on human dignity, equality, and freedom taking into account all relevant factors including the nature of the right, or fundamental freedom, In criminal matters adjudication the aim of article 50(2) (e) of the *constitution* by which every accused person has a right to a hearing without unreasonable delay is to ensure that accused persons do not have to lie under a charge for too long before that charge is determined conclusively.

9. How does the court determine the reasonable time criteria? The period to be taken into account begins from the day of arrest, and indictment before a court of law. Juxtaposing this position, the time period provided for is from the date plea, trial and final order of acquittal, or conviction. With regard to this issue, courts should endeavor on overall assessment not to render the provision an illusory. In giving meaning to the right of a trial to begin and concluded with a reasonable time. It is the responsibility of the courts purposefully to construe and interpret this provision to precisely guarantee the right to the accused persons.

10. Given the importance of this right even in complex cases, the court cannot regard length periods of non –prosecution and in activity in litigation which are not justified as a ground to render the trial "reasonable". On assessment and consideration of the right a trial commenced and concluded within a reasonable time in the proceedings further regard be weighed on these factors.

    a. The duration of the delay

    b. The reasons for the delay

    c. Whether the blame is on the side of the investigating agency, the police the prosecution, the accused person or the trial judge or magistrate.

    d. The contribution of the delay on the non availability of witnesses, any extenuating circumstances beyond the control of the actors in controlling the pace of the litigation

    e. The seriousness and extent of complexity, whether international connection is involved in correlating the evidence.

    f. The actual is potential prejudice caused by the prosecution upon the rights of the accused persons

g. The overall effect of the delay and import of infringement on the fundamental rights and freedoms as a result of the long delay upon the accused person.

h. Similarly, actual and likely adverse effect on the victims of the offence.

11. As it appears in the instant case, the prosecution has been litigating by way of instalments by calling witnesses on adhoc basis. To give effect to this finding the record demonstrates that the accused person was arrested on April 20, 2020 and arraigned in court for plea on April 18, 2020 for plea taking. It is also not in dispute that the 1st prosecution witness gave evidence on March 18, 2021. Thereafter the trial was adjourned to proceed in earnest on June 6, 2022. The next scheduled date was on January 25, 2023 and a further final hearing for the prosecution case on June 7, 2023. In totality the 7 witnesses for the prosecution have taken cumulatively over three years to present their evidence against the accused person. For those years no explanation for the delay has been offered or disclosed by the prosecution. I think when the delay is prolonged and in excusable such that it will cause grave injustice to one side or the other or both the courts have a duty to provide leadership under article 50 (1) to prevent the prosecution from doing injustice.

12. It's my view that justice is justice and therefore a two edged sword for both the accused and the victim or complainant. It is also established from the record that at the close of the prosecution case the petitioner was placed on his defence in accordance with section 211 of the *Criminal Procedure Code*. On his part the learned trial magistrate scheduled the defence of a single witness by the petitioner to the November 20, 2023 further prolonging the trial of the criminal case. That being the case, the petitioners bail terms of cash deposit of 30,000 was also reviewed suo moto and ultimately enhanced to cognizance personal bond of 200,000 with the surety of identical amount. First and foremost a trial within a reasonable time inconsonant with article 50(2) (e) is not only guarantee but is also aimed at preventing substantive injustice. The rights afforded to the accused should not be made a mere theoretical or idealistic incapable of being enforced. This is in imperative on article 159 (2) (b) &(d) respectively which states as follows:

b. Justice should not be delayed

d. Justice shall be administered without undue regard to procedural technicalities.

13. After taking this interpretive principle and in line with the scope of this petition I agree with the petitioner that a degree of significance exist for this court to exercise discretion with the objective of advancing the nature of proportionality test to protect and defend the petitioner from an erroneous interpretation of the terms of the *Constitution* and statute.

14. While a trial court has the jurisdiction and the discretion in law it is actually required to draw the line in every factual situation to successfully give effect to the principles and provisions of the *Constitution* so as not to impair the enjoinment of those rights.

15. In light of the constitutional imperative in this case the learned trial magistrate acted in excess of jurisdiction to review an order on bail terms of cash deposit of 30,000 under article 49 (1) (h) of the *constitution* ordered by a court of concurrent jurisdiction without an application for review from any of the parties in the criminal proceedings. In addition to the above the notion of the backlog being an accumulation of pending cases in Kenya is precisely a case not determined within 365 days from the time of initiation. Progressively over time the judiciary policy on Performance Management and Measurement Understanding as identified the causes of backlogs through a qualitative and quantitative analysis which combines together statistical data related to court cases in the various hierarchy of courts. A concrete and goal oriented strategy which involves setting targets at different levels has been part of performance management contracting at different levels of judges and

magistrates. As much as each court has established its own time frames depending on case types, the human capital strength, and other compelling reasons to regulate the specific diarizing of cases the focus on cases like the one being pursued by the petitioner should receive high priority listing. I am of the considered view that case scheduling is not a mechanical function but a quest to be guided by the tools and principles of management geared towards backlog reduction. May be a first in first out model of case management in the context of scheduling cases should take precedence in approaching the so called workload. Let us take our example it is over 3 years the petitioner has been waiting in the queue to have case management process for an optimal scheduling of his case and turnaround time for the 7 witnesses summoned by the prosecution. To understand this issue, it was necessary for the scheduler or session magistrate to identify and appreciate this case docket to one of the oldest inventory in the courts system to warrant a first in first out model in order to have it processed within a reasonable time from the ruling of a case to answer. Effectiveness in case management is not a mere efficiency of cost cutting this to ensure that every step of the process contributes to a fair, just, expeditious and proportionate result for an accused person. That said the 5 months feature scheduling for the defence case of the petitioner to be heard on November 20, 2023 is at the odds with the quality of justice and defies Performance Management and Measurement Understanding of the judiciary. It might also be considered as an affront to the provisions of article 50 (2) (e) of the *constitution*.

16. This factual chronology in essence ordains this court to review the order on hearing date of November 20, 2023 to proper exercise discretion to direct a trial court to grant leave for the defence to be admitted on a priority basis. The court in taking this route considers that the case is neither complex nor involves evidence of a nature which stretch the trial beyond half an hour. This variance is determined from the record in which the petitioner elected to state his own defence without calling any witnesses.

17. Before penning off this application raises yet again issues as to constitutional mandate of the independent and impartial tribunal in article 50(1) of the *constitution* of the duty to give reasons and cannot be abrogated at anyone stage of adjudication. One of the characteristics of a court as an organ of the *constitution* is generally the duty to give reasons for its decision. The public explanation of reasons for final decision and importance interrogatory rulings is central to the judicial function. This is the position taken by the persuasive case of *AK Western Australia* (2011) (243) CLR (181) & 2015. The court held, first, the existence of the obligations to give reasons, promotes good decision making. As a general rule, people who know that their decision are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decision, Secondly the general acceptability of judicial decision is promoted by the obligation to explain them. Thirdly it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of that fellow citizen should be required to give in public, an account of the reasoning by which they came to those decisions"

18. The features in this case flow becomes the decisive of actors in rendering the court decisions by judges / magistrate. This consideration focuses on one of the grievances raised by the accused with respect to cancellation of cash bail and grievances raised by the petitioner with respect to cancellation of cash bail and having substituted with enhanced bail terms of 200,000 with a surety of identical amount. In Kenya, the right to bail is provided for in article 49 (1) of the *constitution* as read conjunctively with section 123 and 123(A) of the *Criminal Procedure Code*. The catch words of the article states as follows: "*to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released*" The article denotes that the right to bail should not be denied unless on existence of compelling reasons and the terms ought to be reasonable. The due process landscape should be viewed through the lens of a fair hearing, the bill of rights, in articles 28 & 29 of the *constitution*. article 29 dictates that every person must be not be deprived of freedom arbitrarily of without just cause. An act is arbitrary when its accompanied with caprice, or whim or lacks support

of the law in making the decision. The arguments and reasons for cancellation of the cash deposit bail terms of 30,000 primarily enjoyed by the petitioner since his indictment without any breach of the conditions outlined and having it substituted with enhanced personal bond of 200,000 from the onset falls within the class of factors in section 362 of the *Criminal Procedure Code* which demands of the High Court to exercise revisionary jurisdiction.

Resolution

(a) To that extent it follows that orders on variation and substitution of bail terms of cash deposit of 30,000 initially ordered by court of concurrent jurisdiction be and is hereby reinstated. Thus, the enhanced bail terms of personal bond of 200,000 with a surety be quashed as an error and mistake on the face of the record.

(b) That the provisions of article 50(2(e) of the *constitution* on the right of an accused to have his trial begin and concluded without unreasonable delay be complied with by the trial court.

(c) That a declaration be and is hereby made that the far flung five months period scheduled to admit the testimony of a single witness of the accused person is potentially a threat and or violation of his constitutional imperative on a timely resolution of his trial.

(d) That in the premises the earlier scheduled date of November 20, 2023 be and is hereby reviewed and substituted with an order for compliance by the trial court to reschedule the hearing within 35 days from today's ruling to receive and admit the defence case on a priority basis.

(e) That justiciable issue under section 200 (4) of the *Criminal Procedure Code* canvassed by the petitioner lacks merit and is therefore dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED ON THIS 17TH DAY OF JULY, 2023

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R. NYAKUNDI

JUDGE