



**Republic v Wefofwa (Criminal Case 11 of 2020)  
[2023] KEHC 20751 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20751 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL CASE 11 OF 2020  
RN NYAKUNDI, J  
JULY 21, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOHN BARASA WEFOFWA ..... ACCUSED**

**RULING**

1. The accused person namely John Barasa Wefofwa is charged with the offence of murder whereas the particulars of the offence are that: On unknown date at Kapteret Village, Rugor Location, sub location in Marakwet West Sub County with Elgeyo Marakwet County, murdered Joshua Kaberi Muchiri. The accused pleaded not guilty to the charge compelling the prosecution to summon witnesses to disapprove the presumption to the right of innocence as provided for in article 50(2) (a) of the Constitution. The accused person was arraigned in court on 3<sup>rd</sup> March 2020 up and until 10<sup>th</sup> February 2023 no witness has ever attended to give evidence in support of the indictment as framed alleging an offence had been committed in which he was one of the perpetrators.
2. In the charge facing the accused person there are four critical elements to be proved by the prosecution within the ambit of Section 203 of the Penal Code. Thus: (a) the death of the Deceased Joshua Kaberi Muchiri (b) that his death was unlawfully caused (c) That the accused in causing the death of the deceased was actuated with malice aforethought manifestation contrary to section 206 of the CPC (d) That the perpetrator was none other than the accused person. This process of evaluating halftime evidence by the court its stipulated in Section 306 (1) & (2) of the CPC. The submission under this section for the threshold of motion of no case to answer does not delve into the merits of any evidence by the witnesses summoned by the prosecution. Unfortunately, despite the long wait by the trial court no positive steps were taken by the Director of Public Prosecution working in conjunction with the National Police Service to trace and bond witnesses to comply with constitution imperatives under



Article 50 (2) (a) (e). These two provisions states as follows: “Every accused person has the right to a fair trial which includes the right:

- a. To be presumed innocent until the contrary proved
- (e) To have the trial begin and conclude without unreasonable delay

## Resolution

3. The aspects of the prima facie relevance of the evidence admitted and which may be deemed necessary to establish the test in Section 306 (1) & (2) of the *CPC* has found its way in the overall case law. It is along this line of jurisprudence trial courts how to find the trajectory to rule in favour or against the prosecution. If at the conclusion of the prosecution case a case is made out with substantial evidence to establish all the elements of the offence charged in the information accused person shall be called to state his defence. Similarly, after careful attention to detail the evidence adduced is not sufficient to proof any of the elements that may result in a conviction a motion of no case to answer is distinguishable from a prima facie case. The value of that ultimate refinement is truly obvious from the comparative case in *R v Galbraith* (1981) 1.W.L R. 1039 where he said:
  1. if there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
  2. The difficulty arises where there is some evidence but it is of a tenuous nature for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty upon a submission being made, to stop the case.
  3. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability or other matters which ae generally speaking within the province of the jury and where on one possible view of the fact there is evidence upon which a jury could properly come to conclusion that the defendant is guilty then the judge should allow the matter to be tried by jury. There will of course, as always in this branch of the law be borderline cases. They can safely be left to the discretion to the judge.
4. Unfortunately, implicit to the facts of this case the *Galbraith*(Supra) context is not applicable to the accused person circumstances. This is because the prosecution failed to prosecute the accused person by putting forth evidence of arguments in support of the charge of murder contrary to Section 203 of the *Penal Code*. In order to save face the prosecution counsel on the scheduled date before the session Judge did not present any witnesses or offer an explanation as to their non availability. The task of the session Judge was to then to decide whether criminal proceedings should continue hanging as a cloud over the head of the accused person indefinitely.
5. The major issue to be determined in this case is whether the accused’s right to a fair trial within a reasonable time has guaranteed by Article 50 (2) (e) of the *Constitution* has been infringed by the delay experienced in this case. The subsidiary question is whether the delay can be excused as a result for the need of the court to exercise discretion to allow the prosecution to discharge its mandate of providing witnesses within a scheduled reasonable time. The primary purpose of Article 50 (2) (e) of the *constitution* is for the protection of the individual rights of an accused person. While the second interest mirrors the Public as a whole to address society’s interests within the scope of criminal justice administration. The essence of the constitution lies in the spirit not its letter for the letter is significant only as being the external manifestation of the intention that underlies it. Salmond. So what do I see as



the Spirit in Article 50 (2) (e): Protection of the Rights to a fair trial, in Article 50, the right to Human Dignity in Article 28, the right to Freedom and security of a person in Article 28 of the *Constitution*. The societal interest are in the rubric of seeing to it that suspects are held culpable for the offences committed and punished appropriately as provided for in the relevant penal statutes. In this respect society also shares the interests that trials be held promptly for the sake of confidence of the public to the judiciary whose mandate is clearly defined in Article 159 of the *constitution*.

6. The question is at what point does the court determine that the prosecution as designed to prosecute an accused person has infringed, threatened, or violated Article 50 (2) (e) of the *Constitution*. A great deal of the relevant factors on this Article can be traceable to the province of Civil Law and it is instructive to note that they can apply *Mutatis Mutandis* in the case at bar. The general and specific approaches are in consonant with the principles in *Birket v James* (1978) A.C. 297 in which Lord Diplock held as follows:
  1. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case
  2. Whether the delay is intentional, contumelious and therefore in excusable
  3. Whether the delay gives rise to substantial risk to fair trial of causes serious prejudice to the defendant.
  4. What prejudice will the dismissal occasion to the plaintiff?
  5. Whether the plaintiff has offered a reasonable explanation for the delay
  6. Even if there has been delay what does the interest of justice dictate: lenient exercise of discretion by the court.
7. Similarly testing our local circumstances Chesoni J *Ivita v Kyumbu* (1984) KLR 441 enunciated the following guidelines to achieve the just resolution of actions which may adjudicated within Article 50 (2) (e) of the *constitution*. “When the delay is prolonged and inexcusable, such that it would cause grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties the plaintiff, the Defendant and any other third or interested party in the suit, lest justice should be placed too far away from the parties.
  2. Invariably what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues (i) whether the delay has been intentional and contumelious (2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court (3) Whether the delay is inordinate and inexcusable (4) Whether the delay as one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent but rather it is serving the interest of justice, substantive justice on behalf of all the parties.
8. In analyzing this constitutional provision to determine if it is overboard a means of deference must be paid to the means selected by the drafters of the constitution. A court should not construe or interpret the provision because a judge might have chosen a different means of accomplishing the objective of the provisions which defines the scope of Article 52(e) of the *Constitution*. In light of the constitution imperative the wording of the Article and the reasoning employed by this court should be in line with Article 20 (4) which reads as follows: “In interpreting the Bill of rights a court tribunal or other authority shall promote: (a) the values that underline an open and democratic society based on human dignity equality and freedom (b) the spirit purport and objects of the Bill of Rights.



9. The Kenyan constitution on the Bill of Rights and Freedoms is part of our constitution which places a general duty on every court, tribunal or forum to promote the spirit purport and objects of the Bill of Rights while making any decision as compelled by Article 10 on values and principles of governance. The message is under Article 50 (2) (e) of the *constitution* anyone charged with a crime has the right to be tried within a reasonable time. The degree of fairness required of the Article is that the right protects both those accused of crimes and also society as a whole who hold a legitimate expectation on timely and expeditious delivery of justice. Lengthy criminal trials cause suffering and frustration to the victims and all witnesses. The financial and human resources tend to be overstretched due to the inordinate delay. It is a fact that the right to be tried in a reasonable time is fundamental and a constitutional imperative. In the instant case the accused was arrested and arraigned in court on the 3<sup>rd</sup> of February 2020. The trial following his entry of not guilty has never commenced nor sufficient reasons provided to the court in this context on the unreasonable delay. As at 10<sup>th</sup> February, 2023 the case was 2 years and he spent it in waiting in jail. Most of the delay in this case happened to be attributable to the conduct of the prosecution and not the defence. So one can conclusively state this was an institutional delay in the part of prosecution. It is also necessary to make a finding that the administration of justice was undermined as a result of the impact of the delay on the liberty and other fundamental rights and freedoms guaranteed for the accused and the society interests. It would therefore be imprudent for courts to continue violating that right in broad language of granting a series of adjournment with a hope that the prosecution in the future would be able to prosecute the suspects in response to the indictment.
10. The specific right to equality before the courts in Article 27 of the *constitution* is a fundamental principle underlined the right to a fair trial and can be found expressly in Article 50 of the same *constitution*. As noted by the *Human Rights committee in General Comment No 13*, the principles of presumption of innocence means that: “the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.
11. The meticulously formulated right to fair administrative action in Article 47 and Section 7 & Section 4 of the *Fair Administrative Action Act* 2015 has a strong procedural component in informing the interpretation of Article 50 (2) (e) of the *Constitution*. Broadly speaking addressing the core issue in this case I am satisfied that the accused’s persons right designed to be tried within a reasonable time so as to achieve adequate protection to achieve fair trial rights as been infringed to call upon this court to exercise discretion to grant a declaration to that effect. The upshot of it in so far as the application is concerned in addressing the question a declaration be and is hereby made to quash the proceedings and as a consequence order for an acquittal of the accused person.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET ON 21<sup>ST</sup> DAY OF JULY 2023**

In the Presence of

M/s Okara for Kagunza

Mr. Mugun for the State

.....

**R. NYAKUNDI**

**JUDGE**



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