



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 63 OF 2014

REPUBLIC PROSECUTOR

VERSUS

SHITANDA CHIVELI ACCUSED

RULING

1. The case came up for hearing on the 20/2/2020 when the state prosecutor Mr. Mutua sought for adjournment on the grounds that there were no witnesses present in court neither had he received the police file. Miss Wilunda appearing for the accused opposed the application on the grounds that the case was filed in 2014. That the accused has been in custody ever since. That there has been many adjournments most of which have been at the behest of the prosecution on the grounds that the police file is unavailable. That it appeared that the prosecution had no case against the accused. That the constitution requires the accused to be accorded a fair trial. That the delay in the hearing of the case against him is a denial of his right to fair trial. That justice is not just to the victim but also to the accused. Counsel prayed that the accused be acquitted.

2. I have perused the court file. The accused was arraigned in court on 15/12/2014. The case is therefore on its fifth year. During this time the case has had about a dozen hearing dates. In none of these dates did the prosecution witnesses turn up. The story has been that the police file was unavailable. At one time the court granted last adjournment on 11/6/2018. On the 25/9/2018 the court summoned the OCS Kakamega Police Station to come and explain why the case has never taken off. The explanation given was that they were not sure from which police station the file emanated from. He sought for time to find out. Even after that the case never took off on subsequent hearing dates on 23/9/2019 and 20/2/2020.

3. The trial court reserves the discretion to allow or decline an application for adjournment. Section 205 of the Criminal Procedure Code provides that:-

“(1) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present.....”

4. The provisions of the above section were emphasized by Ouko J. (as he then was) in **Republic –Vs- Meshek Muyuri (2007) eKLR** where he stated that:-

“There is, therefore legal basis for adjournment of criminal trials. However, in granting an adjournment, the court must not do so as a matter of course. There must be sound justification for granting an adjournment in a criminal case as the suspect is entitled under Section 77 of the Constitution to a fair and speedy trial.”

5. The Court’s discretion to grant or refuse an adjournment has to be exercised judiciously depending on the circumstances of each case. In **Republic –Vs- Paul Mutuku Magado (2019) eKLR** Njoki Mwangi, J. considered factors that a court has to bear in mind before granting or declining to grant an adjournment. She observed that:-

“It is therefore necessary for a trial court to look at the bigger picture and consider many factors in order to determine if it is in the interest of justice to grant or to deny either the prosecution or an accused person an adjournment. Whereas each application for adjournment depends on its own special circumstances, some of the common factors to guide a court in making a decision are:-

(i) The length of time a case has taken undergoing hearing from the time the plea was taken;

(ii) Whether the accused person is out on bail/bond pending hearing or if he/she is in custody;

(iii) The number of applications for adjournment an accused person or the prosecution has made;

(iv) If the reasons given for adjournment are plausible;

(v) The commitment of the parties to have the case heard expeditiously;

(vi) If any exogenous factors have contributed to delay in the hearing of a case;

(vii) If new or additional compelling evidence has come to the attention of the prosecution or the accused person in the course of hearing the case; and

(viii) The nature of the charge and consequent sentence if an accused person was to be convicted.”

6. Article 50 (2) (e) of the Constitution of Kenya 2010 grants an accused person the right to have his trial begin and conclude without unreasonable delay. The accused herein has been in custody for over 4 years during which time witnesses have never appeared in Court. The police file also has never been availed to the prosecutor all that time. Such delay in a trial of an accused person is not excusable. It is apparent that the accused herein has been denied a speedy and expeditious trial. The prosecution has not given a proper explanation for the delay.

7. Going by the history of this case as outlined above, I am not in favour of granting yet another adjournment. A last adjournment has previously been granted in the case but still the prosecution did not wake up. The prosecution has not shown any commitment to have the case heard expeditiously. The application for adjournment is therefore declined. The case is dismissed under section 206 of the Criminal Procedure Code.

Delivered, dated and signed in open court at Kakamega this 5th day of March, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Accused

Miss Omondi for State/Prosecutor

Accused – present

Court Assistant - Polycap

14 days right of appeal.