REPUBLIC OF KENYA

IN THE HIGH CURT OF KENYA AT NAIROBI

CRIMINAL APPLICATION NO 472 OF 1996

ELIPHAZ RIUNGU ……APPLICANT

VERSUS

REPUBLIC…….....…… RESPONDENT

RU L I N G

This is an application by one Eliphaz Riungu who is one of the accused persons in Chief Magistrate Criminal Case No.2208. of 1995. This application is brought under Section 84(1} of the Constitution of Kenya as read with sections 70, 77(1) and 77(2) of the Constitution of Kenya. The applicant is seeking the following reliefs from this court: -

> *"1. A declaration that continued hearing of Chief Magistrate Criminal Case No.2208 of 1995 Republic versus Kamlesh Mansukhalal Damji Pattni, Wilfred Karuga Koinange, Eliphaz Riungu, Michael Wanjihia Onesmus and Goldenberg International Limited now pending in the Court of the Chief Magistrate at Nairobi on the basis of the indictment laid in the. charge sheet has, is likely to contravene the provision of Sections 70, 77(1) and 77(2) of the Constitution of Kenya in relation to the Applicant herein.*
>
> *2. Issuance of an order of prohibition directed at the Chief Magistrate prohibiting her or any other Magistrate from further proceeding to hear the above criminal case on the basis of the indictment as laid.*
>
> *3. An order to stay the proceedings in the said criminal case until the determination of the application in respect of which this originating motion has been filed.*
>
> *4. For such further or other orders as this Honourable Court may deem fit".*

This application is supported by the sworn affidavit of the applicant Eliphaz Riungu. In that affidavit the applicant depones as follows: -

> "1. THAT I am Accused No.3 in Criminal Case No. 2208 of 1995 Republic versus Kamlesh *Mansukhalal* Damji Pattni, Wilfred Karuga Koinange, Eliphaz Riungu, Michael Wanjihia Onesmus and Goldenberg International Limited.
>
> 2. THAT in that case the prosecution has laid 93 counts as more particularly set out in the charge sheet (annexed hereto and marked "ER-1" is a copy of the charge sheet).
>
> 3. THAT only three of those counts namely counts· 91/ 92 and 93 affect me.
>
> 4. THAT on my instructions my Advocate applied for severance of charges and or reduction of the counts which application was dismissed by the Chief magistrate on 12th November, 1996.
>
> 5. THAT as a result of the pendency of this trial, I am unable to plan my affairs and having had the same hang over my head for the last one and a half (1 1/2) years. I am anxious that the same be concluded without delay.
>
> 6.THAT it is obvious from the circumstances surrounding this case that:
>
> (a) That when the trial does eventually start, it will take months if not years to conclude due to the magnitude of charges and the number of accused persons involved in the trial:
>
> (b) The trial will prove extremely expensive due to the length of the same, the complexity of the charges and the evidence to be led:

(c) That if the charges are not severed and the counts reduced, I will be made to remain in court for an unnecessary period of time, thus incurring consid2 r able unnecessary expenses which I can ill afford.

7. THAT I am a person of Limited means and hard put to raise t h e necessary 1e gal fees. I am presently unemployed living on my pensions which is not adequate to cover the legal costs involved.

8. THAT I verily believe that if the trail proceeds on the basis of the charge sheet as it is it will contravene the provisions of Sections 70, 77 (1) and 77(2) of the Constitution of Kenya and will be such as to affect a n d or be seen to affect a fair trial and I hereby humbly request this Honourable Court for redress and have filed an originating motion and a statement in support thereof the contents of which I verily believe to be true and hereby verify.

9. TH AT what is deponed herein is true and except where otherwise stated within my knowledge information and belief".

We would on the outset thank counsel appearing in this application (Mr. Muthoga for the applicant and Mr. Chunga for the Respondent)" for their clarity in their arguments before us. We are most grateful for the authorities cited and if we do not refer to some of them it is not because we have not looked at them but rather due to the fact that some of the points and principles of law are already covered in the authorities referred to. We hasten to add that Mr. Ngatia's contribution has not been overlooked.

This application is brought une9r section 84(1) of the Constitution of Kenya which provides as follows:

"84(1) Subject to subsection (6) if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress".

The learned DPP (Mr. Chunga) was of the view that the application was incompetent and that this court had no jurisdiction to entertain the application. He argued that the application should have been brought to this court under section 84(3) of the Constitution and he relied on the decision of *Republic V. Clement Muturi Kiaano* (High Court Misc. Crim. Application No. 375 of 1995. In dealing with the issue of jurisdiction we wish to refer to both subsections (1) and (3) of Section 84 of the Constitution. We have already set out the provisions of Section 84(1) and we now proceed to set out what section 84(3) states: -

"(3) If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may and shall if any party to the proceedings requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous and vexatious".

In view of the foregoing it would appear that there are two ways in which a party may make an application for constitutional remedy. Under Section 84(1) of the Constitutional there is what we may call direct application to the High Court and under section 84(3) the applicant would come to High Court by way of reference by a subordinate court. In the present application the applicant came to High Court by direct application under section 84 (1) of the Constitution. In our view we thought that if the learned DPP wanted to challenge the jurisdiction of this court to entertain this application, then that should have been raised as a preliminary point of objection, and by so doing save everybody' time in event that this court has no jurisdiction. Mr. Chunga, however, had his own reasons for raising the issue of jurisdiction at the end of his submissions. He argued that by raising it as the last issue to be dealt with that gave the applicant the opportunity to argue his application without being shut out at the commencement of the application. While this approach might have been justifiable in all the others cases he referred us to we are of the view that the circumstances of this case are different. Mr. Change's argument sounds laudable, but we think that if an application is incompetent for want of jurisdiction this should be determined as a preliminary point in order to save time. There would be no point to allow a party to address the court at length with all the authorities cited in full only to dismiss the party at the end by simply saying that the court had no jurisdiction more so in a constitutional matter.

On our part, we have carefully considered the issue of jurisdiction and we are satisfied that this application brought under Section 84(1) of the Constitution is properly before this court and hence the court has jurisdiction to hear this matter.

We now move to the application itself. The applicant comes to this court complaining about Chief Magistrate Criminal Case No.2208 of 1995 in which the applicant (Eliphaz Riungu) is Accused No.3. In that Criminal case the prosecution has laid against the applicant generally 93 counts in which the applicant is named as participant jointly with others in three counts - Nos. 91, 92 and 93. In other words, in the charge sheet the applicant is facing only three counts out of the 93 laid against the other accused persons. The applicant complains that the charge is overloaded and that he will be forced to sit in court waiting for his turn to answer the three counts laid against him. He envisages a long trial which will last not only months but years since the nature of the charges is complex making it difficult for him to understand and properly meet the case against him.

Mr. Muthoga for the applicant started his submissions by clarifying that his client was not refusing to be tried but rather asking for a speedy trial so that he may know his fate without undergoing a long trial which he thinks might run into years. Hence the applicant is seeking a declaration from this court to the effect that his trial charging him with others on 93 counts is likely to violate protection of law as per sections 70 and 77 (1) of the Kenyan Constitution. It is the applicant's case that overloading of indictment would render a fair trial impossible.

Section 77(1) of the Constitution of Kenya provides: -

"*(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 applicant's complaint in this application is that a fair trial would be rendered impossible if the criminal, case in the Chief Magistrates Court proceeded on the indictment as laid with the 93 counts. Mr. Muthoga for the applicant argued that his client and the other accused persons are bound to be prejudiced because the charge was overloaded. Mr. Muthoga went on to argue that overloading of an indictment deprives an accused a fair trial. In setting out the scenario that the applicant is to face if the trial is proceeded with on the charge as laid Mr. Muthoga argued that each Count will be presented by one or two witnesses called to testify, He pointed out that the counts relate to forgery, theft, attempting to obtain by false pretence etc. hence the indictment as laid will be tried for period not less than a couple of years. For these reasons, Mr. Muthoga was asking for a separate trial for the, applicant. This has been opposed by Mr. Chunga for the respondent who argued that it would not be possible to try the applicant separately since it will be necessary to hear this whole case at once. Mr. Chunga went on to argue that the accused persons in the criminal case No.2208 of 1995 cannot be separated and charged in different cases as the charges were inseparable and that it was in interest of justice to try the accused persons jointly. Mr. Chunga was of the view that it was merely speculative for the applicant to complain that the trial will take a long time to be completed. It was Mr. Chunga's argument that all the witnesses will come and give one story, the accused persons answer one story and the court would then rule on it only once.

On the issue of prohibition, Mr. Chunga argued that it has to be shown that there is abuse of the court process or unfair trial before prohibition is granted.

In this application we find that the charge sheet complained of contains 93 counts in which the applicant is facing the last three counts (counts 91, 92 and 93). As the indictment is laid the applicant is to participate in this anticipated long trial waiting to answer the case against him as per the last three counts. A quick look at the indictment would reveal that in some of the counts, only two of the accused persons are mentioned and indeed quite a number are alternative to other counts. We agree that drafting of charge sheet is a matter of procedure but we must emphasize that an accused person must be in a position to understand the cases against him. That is part of what is meant by a fair trial.

We now turn to some of the authorities cited to us. In *Carless and Another [1934] C.A.R 43* the Lord Chief Justice referred to observations of Mr. Justice Hawkins in *King [1897J ·1 Q. B. 214* at p.216 in which Mr. Justice Hawkins said: -

> *"The defendant was tried for obtaining and attempting to obtain goods by false pretences upon an indictment containing no fewer than forty counts; · and I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing as these do several distinct charges. Though not illegal, it is hardly fair t9 put a man upon his trial on such an indictment for it is almost impossible that be should not be grievously prejudiced as regards each one of the charges by the ev1aence which is being given upon the others. In such a case, it would not be unreasonable for the defendant to make an application that each count, or each set of counts should be taken separately"*

In Carless case (supra) the indictment contained twenty-five counts relating to various alleged offences of obtaining money by falsa pretences and conspiracy to defraud. In concluding his remarks, the Lord Chief Justice said: -

> "*It is said that this kind of indictment is common, but in our view it ought to cease to be common. It is not fair to the accused, not fair to the jury/ not fair to the Judge…… It is to be hoped that an indictment like this will never again be brought in to this court"*

Then in *Novac [1977] 65 C.A.R. 107* the Court criticised the overloading of the indictment which contained 19 counts (out of an original 38) against four defendants and which led to a long end complex trial taking in all 47 working days which put an immense burden on judge and jury. In its judgment the court started at pp.118 and 119

> "*Quite apart from the question whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wide and mere important question has to be asked whether in such a case the interests of justice were likely to be better served by one very long trial, or by one moderately long and four short separate trials."*

The court in the above case was of the view that whatever advantages are expected to accrue from one long trial they were heavily outweighed by the disadvantages.

Pausing here for a moment it would appear that the authorities already cited are against an overloaded indictment. Coming back home we refer to the case of Peter Ochieng v. Republic [1982-88] 1 KAR 832 in which the appellant had been charged with 44 counts. The Court of Appeal observed that it was undesirable to charge an accused person with numerous counts in one charge sheet which could lead to embarrassment and prejudice to the defence, confusion in the presentation of the prosecution and in the decision of the court. The Court of Appeal went on to observe that prosecution should limit the counts in a charge sheet to only twelve while the remainder be withdrawn but to be revived should it be necessary.

We were referred to Blackstone's Criminal Practice) 1992 on the issue of joinder of counts and indictment. At paragraph D8.29 at p.1119 it is stated:

> *"Two or more accused may be joined in one indictment either as a result of being named together in one or more counts· on the indictment or as a result of being named individually in separate accounts, albeit that there is no single count against them all."*

And then at p.1153 we find the following: -

> *"The authorities cited above indicate that the decision whether or not to grant severence is one within the discretion of the trial judge, and that the decision should be in favour of joint trial unless the risk of prejudice is unusually great".*

Mr. Chunga relied on Reg. V. Ludlow r1971) AC 29 in support of a joint trial. In that case Lord Pearson stated inter alia: -

"In my opinion this theory - that a joinder of counts relating to different transaction is in itself so prejudicial to the accused that such a joinder should never be made - cannot be held to have survived the passing of the Indictments Act 1915…….. Also in most cases it would be oppressive to the accused, as well as expensive and inconvenient for the prosecution to have two or more trials when one would suffice".

The above authority supports joint trial unless it can be shown that such joint trial would be prejudicial or embarrassing to the accused person.

On this question of joinder of offenders, we find that the headnote of the case of Ismet Assim [1966] 50 cr. App. r 224 sums the position admirably as follows: -

"Question of joinder whet her of offences or of offenders are matters of practice on which the Court, has unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. There has never been a clear settled and general practice based on principle with regard to the occasions when joinder of offenders is in practice correct".

The above is what Hr. Chunga emphasized in his submission to this court. Mr. Chunga dwelt at length on the issue of public interest. It was his contention that public interest demands that the applicant and his co-accused, be tried jointly as per the charge sheet containing 93 counts. Mr. Muthoga countered that by telling us that public interest was an enduring concept which requires that the guilty be punished and the innocent not be punished, after being fairly tried. Mr. Muthoga contended that 93 counts were too complex and would lead to unfair trial.

We considered the issue of delay in the prosecution of this case but having considered the history of this matter we are unable to place blame on any side. This is a trial in which the accused persons are jointly charged in one indictment containing 93 counts. We have noted that there were numerous applications before the hearing proper could commence. These preliminary matters had to be dealt with before the trial commenced. But now the applicant says that taking into account this delay and looking at the charge sheet this trial is likely to take at least two years. Section 77(1) of the Constitution of Kenya provides that a person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court. The applicant herein believes that he is unlikely to be afforded a hearing within reasonable time. He thinks that 93 counts in which he is named in only three counts are too many to be determined in a fair trial and within reasonable time. We have considered various authorities and what emerges therefrom is that 38 counts were considered too many. Even 25 counts were considered to many. And in Ochieng's case (supra) the Court of Appeal observed that anything beyond 12 counts would be prejudicial. But as we have already observed there are no clear cut rules on this issue of number of counts. we suppose each individual, case should the considered on its own peculiar facts.

Coming now to the charge sheet ln the Chief magistrate's criminal Case No. 2208 of 1995 we find that the accused persons are jointly charged on 93 counts. We suppose that a witness or two will be called to introduce and testify in respect of each count. From the nature of the offences it is not unreasonable to assume that there will be very many documents to be produced in evidence. Recording of evidence even in respect of the first twenty counts will take a considerable length of time. As this taking of evidence in respect of the 90 counts continues, the applicant (Eliphaz Riungu) is expected to patiently sit in the dock waiting for his turn to listen to the evidence in the last three counts. We think that public interest demands that whatever goes on in a criminal trial should be in the interest of justice. And the constitution which is the mother of all laws clearly states that the accused shall be afforded a fair hearing within reasonable time. Justice demands that the guilt be appropriately punished and the innocent be let free. A long trial which is likely to lead into confusion of prosecution case as to result into acquittal of the guilty is certainly not in interest of public interest and justice.

We are conscious of the fact that Eliphaz Riungu is the only applicant before us. However, we note that there are four other accused in the indictment. These have been interested parties and are persons who would definitely be affected by orders made herein.

They were represented before us and supported the applicant's case as per submissions of Mr. Ngatia. It would, therefore, be a total waste of public funds and time as well as this court's time for any of these other accused to turn up and make applications similar to the one before us. For these reasons, we have found it necessary to categorically state that the orders which we hereby grant in terms of prayers 1 and 2 of the Originating Motion dated 23rd December, 1996 are applicable to all the accused named in the indictment subject matter of this Originating Motion.

Orders accordingly,

Delivered at Nairobi this 20th day of June, 1997

E. O'KUBASU

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J U D G E

E. OWUOR

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JUDGE