REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 3 OF 1982

SAMUEL CHERUIYOT ARAP LANGAT...APPLICANT

VERSUS

REPUBLIC...RESPONDENT

RULING

The applicant, Samuel Cheruiyot Arap Lang'at is charged with conspiracy to defraud contrary to section 317 on the Penal Code. It is alleged against him that on January 1, 1978 and on divers days between that date and August 31, 1981, he, with others not before the court, conspired together to defraud the Jomo Kenyatta Foundation of Ksh 3,820,500. The applicant was arrested on December 14, 1981, and on December 18, 1981, he appeared in the chief magistrate's court where his bail application was refused. On December 24, 1981, the applicant's counsel John Khaminwa received information that the applicant had collapsed while in the cells suffering from high blood pressure and heart conditions. He then unsuccessfully applied for bail pending the trial of the applicant. I may point out that medical examinations and tests carried out on the applicant by his private physician Dr. Patel and at Kenyatta National Hospital did not show any high blood pressure or heart problem/illness in the applicant. Dr. Patel found him to have low blood pressure and suffering from anxiety. On December 31, 1981, Mr Khaminwa renewed his bail application, but bail was again refused by the chief magistrate, and Mr Khaminwas' similar application on January 14, 1982, met with same fate. The prosecution's reason for opposing the bail application on all those four occasions was that investigations were still going on.

The applicant's counsel pointed out that at the first application for bail on December 18, 1981, the Senior State Counsel who then appeared for the Republic informed the court that the charge of conspiracy was merely a holding charge. In the application for bail pending trial made before this court under section 123 (3) of the Criminal Procedure Code Mr Khaminwa has submitted that under the laws of this country there is no animal known as'"a holding charge". With respect, I agree with Mr Khaminwa. There seems to be a dangerous precedent being introduced in our legal system by the prosecution of bringing an accused person to court on what has been referred to by the prosecution as a "holding charge". Neither the constitution nor the criminal law of Kenya provides for such a charge. That being the position it is necessary to point out that the courts are not going to allow an accused person to be indefinitely held in custody because he is on what the prosecution call a holding charge, a phrase which is meaningless in the legal language of Kenya. The of this country permits the prosecution to amend a charge and/or even substitute a new charge for the original charge. The impression one gets from the phrase "a holding charge" is that the prosecution has not decided the offence with which charge the accused but they would like him to be kept in custody on a provisional charge while the prosecution make up their mind, and in the ultimate they may not even charge him. If such practice were allowed to go on it would grossly infringe the citizens' freedom and fundamental rights. The police would slaggen down in their investigations which would lead to many persons being brought before the court before investigations are complete and the exact charge laid.

In the present case, however, Arap Lang'at has been charged with a specific offence as Mrs Chana for the Republic pointed out, and, it may be said that the use of the phrase " a holding charge" when the first appeared before the chief magistrate, might have been nothing more than verbal superfuity.

I do not think section 77 (2) (a) of the Constitution of Kenya is relevant in the manner Mr Khaminwa sought to rely on it. It is agreed that in Kenya every person who is charged with a criminal offence is presumed to be innocent until he is proved or pleads guilty. That does not mean that such person cannot

lawfully be detained in custody for trial, if he is charged with a criminal offence. Denying an accused person bond or bail pending his trial in no way means that he has been found to be guilty without being proved to be so. The constitution recognizes the fact that a person may be arrested or detained as a suspect. Thus section 72 (3) of the constitution says this:

“72. (3) Any person who is arrested or detained —“ (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, “and who is not released, shall be brought before a court as soon as is reasonably practicable,….”.

The constitution emphasizes speedy trial. Further reference to the constitution was made by Mr Khaminwa, when he called in aid of his application section 72 (5), which provides that:

“72. (5) If any person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally“‘or’ upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

The constitution does not define what it seems by “reasonable time”, but I would say that reasonable time cannot be uniform in every case. It depends on the nature and complexity of each case, and what is reasonable time in one case may not be so in another case. The court determines what is reasonable time after taking into account all the circumstances on the case. Section 72 (5) of our constitution tells the purpose and origin of bail. The system of bail which we have in this country inherited from the English legal system developed in England during the first thousand years A.D. During that time the judges travelled on circuits to hear cases and their visits to one area was normally several years apart. Prisoners were, therefore, held in the custody of the local sheriffs for years awaiting the judges’ arrival. Prison conditions were atrocious, insecure and prisoners frequently escaped and like to-day it was a financial burden to maintain prisons. The system, therefore, developed for use when the prisoners could not be tried within a reasonable time.

Counsel for the appellant further submitted that his client would not abscond if released on bail and his passport was in police custody.

The primary purpose of bail is to guarantee the appearance of the accused at his trial. In this case it is a month since the applicant was arrested and on the date of delivery of this ruling it is a month since the date he appeared in court for the first time. Mrs Channa has stated that investigation is still going on and some of the investigating officers have had to go overseas for information. Whether or not some other persons may be subsequently charged with the applicant is irrelevant and so is the fact that the applicant may be charged with mere offences. The court cannot keep an accused person in custody indefinitely on speculative reasons. A hearing date has not been set down. A large sum of money is involved and the prosecution do not at this stage have to prove any loss for the court to refuse bail, as Mr Khaminwa seemed to contend. There is no evidence that the applicant will not be tried within a reasonable time, although there is too no evidence that he will be so tried. Taking all the circumstances of the case into account, the nature of the offence charged and the large sum of money involved I am not inclined to grant bail at this stage, but if the case is not fixed for hearing within the next 21 days from the date of this order I may not be of the same mind. My mention of the 21 days is no bar to any court including a subordinate court granting bail earlier should it see it fit so to do. In the result the application fails and bail is refused. Order accordingly.

Dated and Delivered in Nairobi this 18th day of January 1982.

Z.R.CHESONI

JUDGE