

REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL CASE NO. 5 OF 2020

REPUBLIC
PROSECUTOR

=VERSUS=

PHILIP WEKESA WAFULA
ACCUSED

Coram: Justice R. Nyakundi
Ms Sidi for the State

RULING

BACKGROUND

1. Before this Court is an Accused person by the name **Philip Wekesa Wafula** charged as follows:

STATEMENT OF THE OFFENCE

Murder contrary to Section 203 as read with Section 204 of the Penal Code.

PARTICULARS OF THE OFFENCE

Philip Wekesa Wafula on the 27th day of December 2019 at Teleview Estate within Uasin Gishu County, murdered **Hillary Kipkurui Koech**.

2. From the record the Applicant pleaded not guilty to the offence on 8th January 2020 placing the burden of proof of beyond reasonable doubt on the State through its Directorate of Public Prosecution under Article 157 of the Constitution. What this means is that the Accused person has a right to be presumed innocent until the contrary is proved.

3. It is crystal clear from the record that several sessions properly constituted under Article 50(1) of the Constitution proceeded in earnest and as scheduled within the procedural protocols of the Criminal Procedure Code. In circumstances which are not very clear no witness has ever been availed to tender evidence both oral, physical, documentary or electronic as to the allegations of murder as provided for in the information as against the Accused person. The takes judicial notice that several adjournments were granted by the High Court presided over by various session Judges but to the disappointment of the Accused the murder charge remains mere allegations not yet proven since 8th January 2020. During a status conference on the 4th of November 2025 the lead Counsel for the State Ms Sidi Kirenge applied for an adjournment to avail witnesses tailored to prosecute the Accused person as per the law established. The Defence Counsel M/S Koech opposed the application that no sufficient grounds have been adduced by the Prosecution to warrant the exercise of discretion of the Court to grant an adjournment.

4. The components of this application on adjournment is to be considered within the import of the law more developed in the realm of Civil Law as demonstrated by the following principles;

*“The Court of Appeal has pronounced itself on this aspect severally. Recently, in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR** the Court of Appeal while referring to other authorities observed (at paragraph 12):*

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take not that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether

the matter raises issues of public importance. In Henry Mukora Mwangi v Charles Gichina Mwangi – Civil Application No. Nai 26 of 2004, this Court held:

“It has been stated time and again that in an application under Rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi v Kenya Airways Ltd. [2003] KLR 486 in which this Court stated: “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the applicant is granted.”

5. The above principles are foundational whenever a grant of an adjournment which is within the discretion of a trial Judge is being asked by a litigant, although that discretion must be exercised judicially and fairly by the very Court considering all the particular circumstances of the case in question. This means the Court has unfettered discretion to enlarge time for a particular event in the case management to effect and allow both parties to be heard on the merits under Article 50 of the Constitution. The constitutional imperative in

criminal cases mandates the stakeholders in the justice sector more so the State to undertake and invest resources to ensure the Accused rights to have his or her trial begin and concluded within a reasonable time is guaranteed.

6. In determining whether the delay is unreasonable trial Judges and Magistrates are required to apply the above framework flexibly and contextually, bearing in mind case complexity, the exceptional circumstances which assessment involves a qualitative exercise.
7. It is now settled law on the various decisions made by the Superior Courts that for a Court to grant adjournment it must be based on a good reason or valid grounds which may include:
 - ***Illness of a party or Counsel:*** Evidence of a medical emergency or other valid health issue affecting a key participant may justify a delay.
 - ***Non-availability of a crucial witness:*** If a material witness is unavailable, a Court may grant an adjournment to secure their attendance.
 - ***Incomplete evidence or documents:*** The need for time to file or complete necessary documents can be a valid reason, provided it is not caused by unreasonable delay.
 - ***Case complexity and fairness:*** In highly complex cases, an adjournment may be granted to ensure that parties are on an equal footing and the case is dealt with fairly.
 - ***New evidence:*** If new evidence arises during proceedings that requires review, and adjournment may be granted.
 - ***Unexpected emergencies:*** Unforeseen external events can also lead to an adjournment.

8. **What will be consideration against granting an adjournment?**

The Courts are mandated to weigh certain factors before exercising discretion in granting an adjournment. Thus;

- **Delay and unpreparedness:** An Attorney's lack of preparedness, especially after previous adjournments, is viewed very negatively by the court and can lead to wasted costs.
- **Prejudice to the innocent party:** A judge will weigh the prejudice that an adjournment would cause to the litigant who is ready to proceed. The court considers the effect of the delay on all litigants, not just the applicant.
- **Efficient use of Court resources:** The court will consider the impact of an adjournment on the limited resources of the judicial system and other litigants.
- **Abuse of process:** Seeking an adjournment for an improper purpose can be considered an abuse of the court's process.
- **History of non-compliance:** Past non-compliance with timetables and court orders will weigh against a request for a delay.

9. The administration of criminal justice in Article 50 (2) (e) of the Constitution entails conducting trials in a fair and speedy manner. The essence of it is that it is a right guaranteed by the Constitution in favour of an Accused persons, a trial must begin and be concluded within a reasonable time. As a result the right to a swift trial is elevated to the status of a fundamental individual right. Kenya has also entrenched International Law in Article 2(5) & (6) of the Constitution and by dint of that provision the guiding principles are applicable in enhancing our jurisprudential discourse. For example the International Covenant on Civil and Political Rights in Articles 38 through 39 and 39A provide the regulatory framework for a trial to be commenced and concluded within a reasonable time. One can take judicial notice that without a trial being heard and determined within a reasonable time, it is likely to occasion a violation or infringement of Article 26 on the rights to life, Article 27 of equality and freedom from discrimination, Article 28 on human dignity, Article 29 freedom and

security of the person and Article 25(a) on the fundamental right on freedom from torture and cruel, inhuman and degrading punishment or treatment.

10. **How does a delayed criminal process impact the right to life and liberty?**

This is all about the enjoyment of all the rights accorded to a human being by virtue of being human. It is inherent both in nature, creation and in law that every individual has a legitimate right to happiness as well as to good health. In a trial process where the criminal justice system is not accountable in terms of ensuring existence of speedy trials there is always significant loss of resources in terms of finances, time, wealth creation which encompasses the social economic and cultural right in our Constitution. The inordinate delays in adjudication of cases do not just stop at the negative impact of economic social and cultural rights but they have a potential to inflict psychological and emotional trauma which eventually becomes a source of worry, anxiety, disruption of normal life and the overall impact of it is a legal system which contributes to the poverty index of the citizenry. It is my considered view having being in this space on dispute resolution for over three decades now, cases in Kenya in all branches of law can stretch on for several years some to decades with a score card of 25, 35 and 40 years. The circumstances in civil, succession and criminal cases is just as dire calling for complete legal reform.

11. The right to a trial within a reasonable time is absolutely necessary more specifically in criminal cases where sometimes in high economic crimes and homicides speedy trials provide victims with justice and protect the Accused persons from excessive pre-trial detention prior to conviction and sentence. As such applying the above mentioned formula in the above cited cases and going by the record in Criminal Case No. 5 of 2020 there has been inordinate delay which is inexcusable on the part of the State to give effect to the

constitutional right to a trial to be commenced and concluded within a reasonable time in favour of the Accused person. An excessive duration of proceedings in our courts remains one of the most frequent violations of Article 50 of fair trial rights between the Plaintiff and the Defendants and further between the State and the Accused persons.

12. As I said earlier the fair trial guarantees that has been enshrined in our Constitution in equal measure and also provided for in both International and Regional Human Rights instruments. (See Article 14 of the ICCPR, Art 6 of ECHR, Art 8(2) of ACHR) the most significant guarantee is the principle of equality of arms. This principle underpins the equal opportunities of the parties in criminal proceedings. It ensures the procedural equality of the parties to present their case during the course of trial. In criminal proceedings everyone charged with an offence must have an equal opportunity to defend himself with that of the prosecution. This principle includes certain specific rights and standards which ensure the equal opportunities of the parties. (See **Legal Network Series [2014] 1 LNS(A)** by **Shajeda Akther & Dr. Rohaida Binti Nordin. The Human Rights Committee** (hereinafter as HRC) in its General Comment 32 on the right to equality before the courts and tribunals expressed that:

“The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.”

13. In the case at bar the accused person has faithfully and religiously been attending Court sessions while at the same time serving pretrial detention for he was not able to raise the punitive bond terms mainly associated with capital offences. The State through the Director of Public Prosecution in the entire record has not

demonstrated with sufficient cause why the witnesses who recorded statements forming the trial bundle, to prosecute the accused person have never attended Court since the 8th of January 2020. The question therefore arises whether the Kenyan criminal justice system sufficiently caters for the fair trial of accused persons. It is implicit in the doctrine of equality of arms which is central in the criminal process that no party should have an unfair advantage over the other particularly the State which has the necessary resources to defend this Constitution as manifested in the law of the land. It is therefore doubtful whether there will be a day when such witnesses would be availed in the future given the surrounding circumstances of the entire proceedings since the accused person was arraigned in Court. The Criminal Justice system in this country derives its legitimacy from the constitutional foundations and in the context of Bill of Rights the unfettered discretion to extend time for the Prosecution to prosecute the accused person stands on sinking sand and it is therefore denied. For the last few years, the fundamental rights and freedoms guaranteed by the Constitution in favour of the Accused person have been infringed or violated all together. The charge sheet which formed the basis of the indictment is hereby struck out for being vexatious and frivolous to say the least. The accused person shall therefore be acquitted, set free unless otherwise lawfully held. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF
NOVEMBER 2025.**

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R. NYAKUNDI

JUDGE