REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL CASE NO. 28 OF 2017

REPUBLIC ..... PROSECUTOR

=VERSUS=

HANNINGTON ALOO OYIER ..... ACCUSED

Coram: Hon. Justice R. Nyakundi

Ms Kirenge for State

RULING

Historical foundation of the Case

1. The Accused person Hannington Oloo Oyier was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on 22nd August 2006 at Langas Estate, Eldoret Town within Uasin Gishu District of the Rift Valley Province murdered JMM (Deceased).
2. After hearing the case, the High Court upon finding that the charge was proved, convicted and sentenced the Appellant to death. Dissatisfied with that decision, he preferred an appeal to this court on several grounds, of which we will not address save for the one ground which we consider will be sufficient to dispose of the appeal. The ground in question is that the trial Court erred in law and in fact by conducting an unconstitutional trial without the participation of the duly appointed Court empaneled assessors.
3. The Court in its decision ruled as follows:

> *During the trial in the instant case, the record reveals that there were a number of missteps concerning the assessors in particular. To begin with, instead of the mandatory three*

assessors being appointed in terms of Section 263 of the Criminal Procedure Code, there were four. Then, midway of the trial, by consent of counsel for both the State and the appellant, the court discharged the assessors following the amendment of the Criminal Procedure Code that dispensed with the requirement to appoint assessors in murder trials. The line of authorities above stipulate in unequivocal terms that, atrial which had commenced with the aid of assessors before the amendment had to be concluded with the participation of three assessors, and further, that the number of assessors empaneled shall be three. In discharging the assessors prior to conclusion of the trial, the learned judge misdirected himself, and in so doing rendered the trial a nullity. And, it mattered not that the parties had consented to their discharge. The provisions of the law at the time were spelt out in mandatory terms, and neither the parties, nor the court had the latitude to override or dispense with the laid down requirements.

The circumstances of the case are that the appellant was charged with the offence of murder in October 2006, and the proceedings in the trial Court were concluded some three years later. At this point, it would be about 10 years since the case commenced. Without going into its merits, the case involved the brutal and senseless murder of a young girl aged 16 years, where it remains to be determined whether or not the appellant was responsible for her death. A decision, one way or the other still requires to be rendered for good order, and for the sake of all persons involved. It is for this reason, and the finding of an error on the part of the Court, the interest of justice demands that we order a retrial. That said, we allow the appeal and set aside the orders of the trial Court on conviction and sentence, as they were based on a nullity. We direct that the Appellant be

presented to the High Court at Eldoret within 14 days of this order for expeditious hearing and disposal of the case before any Judge. For this purpose, he shall remain in custody. The retrial shall proceed without the aid of assessors.

4. This order of the Court of Appeal for a retrial has never been complied with by the High Court due to the exceptional circumstances if I may call them as such for the State has never been able to trace and bond any witnesses who recorded statements in support of the charge as against the Accused person. The witness summons have been religiously issued by this Court but none of it has ever been successful of availing a witness before this Court. This Court in its discretionary powers issued a last adjournment which the Prosecution never honored to demonstrate why the proceedings shall continue being held in limbo in anticipation that one day there will be a success story that an appropriate witness has been traced and ready to take the witness stand towards discharging the burden of proof of beyond reasonable doubt of the indictment under Section 107, 108, 109 and 112 of the Evidence Act so that a finding of guilty or not guilty can be made in this longstanding complaint that the Accused caused the murder of one JMM.
5. This therefore is both a constitutional imperative under Section 50(2)(a) of the Constitution which commands the constitutional organs of the State including the Judiciary that the Accused person has a right for his or her trial to begin and concluded within a reasonable time. The question to be answered by this Court is whether an application for adjournment made by the State through the Prosecution merited discretion of this Court.

Decision

6. The decision to grant an adjournment is a discretionary power of the court that must be exercised judicially and judiciously, not arbitrarily.

While court rules often encourage day-to-day hearings to avoid delays, they also allow for adjournments when sufficient cause is shown, typically balanced against the need to avoid unfair trials and undue delay.

Key Principles on Exercising Discretion

- **Balance of Justice:** Courts must balance the applicant's right to a fair hearing (e.g., proper representation) against the need for expeditious disposal of cases and the rights of other litigants.
- **"Sufficient Cause":** Adjournments are generally granted only when a "good cause" or "sufficient reason" is shown.
- **Judicial Review of Discretion:** An appellate court will generally not interfere with a lower court's decision to refuse an adjournment unless it is shown that the decision was unreasonable, arbitrary, or resulted in a miscarriage of justice.
- **Limitations:** Courts are often constrained by rules limiting the number of adjournments (e.g., a maximum of three in some jurisdictions) to prevent abuse of the process.

Decided Cases on Adjournment Discretion

- ***Joannes Mutua v Republic [2022] eKLR (Kenya Law):*** The High Court held that when an advocate takes over a case and needs to make fresh contacts with witnesses, an adjournment should be allowed. Denying it is a failure to exercise discretion properly, violating the right to a fair trial.
- ***Mugema v Republic EA 676:*** The appellate court held that if an accused took proper steps to engage counsel, but counsel failed to appear through no fault of the accused, an adjournment should have been granted to allow for representation.
- ***Bilta (UK) Ltd v Tradition Financial Services Ltd [2021] EWCA Civ 221:*** The Court of Appeal emphasized that the key principle is

whether refusing an adjournment will lead to an unfair trial, particularly when a witness cannot attend due to illness.

- ***Donald Panton and Others v Financial Institutions Services Limited (Jamaica CA, 2006):*** A trial judge must consider all circumstances peculiar to the case to achieve justice when deciding to grant an adjournment.
- ***Abraham Kamakil & another v Kipturgo Amdeny [2021] eKLR:*** The court refused an adjournment and dismissed the suit, finding no "good cause" was shown for non-attendance on the hearing date.
- ***Chellarams Plc v Pashtun Nigeria Limited [2014]:*** The Supreme Court held that the judge must state their reasons for granting or refusing an adjournment on the record.

7. The Courts both in Kenya and in the region have spoken firmly on the issue of adjournment and the exercise of discretion to be extended to a party who has sought leave of the Court to have the case rescheduled to a future date. Some of the fundamental principles are as illuminated in the case of **Peter M. Kariuki v Attorney General [2014] eKLR**, thus:

> *In Savannah Development Company Ltd V Merchantile Company LTD, CA No 120 of 1992, this Court stated that there may be reasons for seeking adjournment of a case set down for hearing on a particular day and that where there are valid reasons to justify granting of an adjournment, the Court always has unfettered discretion to grant the adjournment. The Court further stated that elements to be taken into consideration in an application for adjournment include the adequacy of the reasons given for the application for adjournment; how far, if at all, the other party is likely to be prejudiced by the adjournment; and whether the other party can be suitably compensated by award of costs. The Supreme Court of Uganda, in Famous Cycle Agencies Ltd & Others V Masukhalal Ramji Karia, (1995) Kampala*

Law Reports 100, was of the same mind when it stated that granting an adjournment to a party is left to the discretion of the court and the discretion is not subject to any definite rules, but should be exercised in a judicial and reasonable manner and upon proper material. Such discretion, the court continued, should be exercised after considering the party's conduct in the case, the opportunity he had of getting ready and the truth and sufficiency of the reasons alleged by him for not being ready. Also in Lolwe Agencies Ltd V Midland Emporium LTD, HCCC NO. 25 of 1998 (KSM), the High Court appropriately stated that, although the granting of adjournment is discretionary, it is like all judicial discretion which should be exercised judicially, and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion. While bearing in mind that whether to grant an adjournment or not is discretionary, the appellate courts are loath to readily question the exercise of discretion by the trial court, nevertheless it must never be forgotten that the right to an adjournment to enable a party to adequately prepare his or her case in a criminal trial is underpinned by no less an instrument than the Constitution. The authorities cited above relate to exercise of discretion to grant or refuse an adjournment in a civil dispute. We are of the opinion that although the same principles are relevant in respect of applications for adjournments of criminal trials, nevertheless because of the constitutional basis of that right and the potential impact on a citizen's liberty, the court is obliged to be more circumspect in rejecting an application for adjournment and to specifically consider whether denial of such a right guaranteed by the Constitution would result in miscarriage of justice."

8. The Constitution of Kenya has firmly provided the pathway of rights that are protected and guaranteed with regard to the right to a speedy trial as provided in Article 50 (2)(c), Article 27 on equality before the law free from non-discrimination, Article 159 (2) (d) justice shall not be delayed and Article 26 on the rights to life and Article 30 on the rights to liberty all about our Constitution 2010. In the case of **Ajay Kumar Choudhary vs Union of India Thr Its Secretary & Anor AIR 2015** in which the Court made the following observations:

> *Protracted periods of suspension, repeated renewal thereof, have regrettably become the norm and not the exception that they ought to be. The suspended person suffering the ignominy of insinuations, the scorn of society and the derision of his Department, has to endure this excruciation even before he is formally charged with some misdemeanour, indiscretion or offence. His torment is his knowledge that if and when charged, it will inexorably take an inordinate time for the inquisition or inquiry to come to its culmination, that is to determine his innocence or iniquity. Much too often this has now become an accompaniment to retirement. Indubitably the sophist will nimbly counter that our Constitution does not explicitly guarantee either the right to a speedy trial even to the incarcerated, or assume the presumption of innocence to the accused. But we must remember that both these factors are legal ground norms, are inextricable tenets of common law jurisprudence, antedating even the Magna Carta of 1215, which assures that - "We will sell to no man, we will not deny or defer to any man either justice or right." In similar vein the Sixth Amendment to the Constitution of the United States of America guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. Article 12 of the Universal Declaration of Human Rights, 1948 assures that - "No one shall be subjected to*

arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". *More recently, the European Convention on Human Rights in* *Article 6(1)* *promises that* "*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time....*" *and in its second sub article that* "*everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*".

9. The constitutional jurisprudence on the right of an Accused person to be tried and his or her trial be concluded within a reasonable time is based on a single principle that innocent persons should not be harassed by legal system to an unreasonable period and the victim should get justice as early as legal system can provide it. From the American legal system, the sixth amendment of the Constitution provides for a right to a speedy trial to an accused and this should further be ensured by the Federal Speedy Trial Act 1974. The Court in **Baker v Wingo** the US Apex Court discussed the various aspects of speedy trial in which Justice Powell made the following observations in summary as:

    I. *The right to a speedy trial is a more vague and generically different concept than other constitutional right guaranteed to accused persons and cannot be quantified into a specific number of days or months, and it is impossible to pinpoint a precise time in the judicial process when the right must be asserted or considered waived;*

    II. *While a defendant's assertion or non-assertion of his right to a speedy trial is one of the factors to be considered in an inquiry in to the deprivation of such right, the primary burden*

remains on the courts and prosecutors to assure that cases are speedily brought to trial;

III. *A claim that a defendant has been denied to his right to a speedy trial is subject to balancing test, in which the conduct of the both the prosecution and the defendant are weighed, and courts should consider such factors as length of the delay, reason for the delay, the defendant's assertion or non-assertion of his right, and prejudice to the defendant resulting from the delay, in determining whether a defendant's right to a speedy trial has been denied;*

IV. *While the petitioner's case, involving as it did such extra ordinary delay, was a close one, the facts that prejudice to him was minimal and that the petitioner himself did not want a speedy trial outweighed the deficiencies attributable to the state's failure to try the petitioner sooner; and*

V. *The petitioner was not denied his right to a speedy trial.*

10. What is the importance of an Accused person having his or her trial beginning and concluded within a reasonable time? The Court in State of **Maharashtra v Champalal Pumjaji AIR 1981 SC 1675** in which the Court stated as follows:

> *That delay is a known defense tactic. With the passage of time, witnesses cease to be available and memories cease to be fresh. Vanishing witnesses and fading memories render the onus on the prosecution even more burdensome and make a welter weight task a heavy weight one. Sure, court does not mean to suggest that the responsibility for delaying criminal trials is always to be laid at the door of the rich and the reluctant accused. Court held that we are not unmindful of the delays caused by the tardiness and tactics of the prosecuting agencies. Court knows of trials which are over delayed because of the indifference and somnolence or the deliberate inactivity of the prosecuting*

agencies. Sometimes when the evidence is of a weak character and a conviction is not a probable result, the prosecuting agencies adopt delaying tactics to keep the accused persons in incarceration as long as possible and to harass them. This is a well-known tactic in most conspiracy cases. Again, an accused person may be seriously jeopardized in the conduct of his defence with the passage of time. Witnesses for the defence may become unavailable and their memories too may fade like those of the witnesses for the prosecution. There are many reasons which can be responsible for delay in trial; some of the popular reasons can be identified as followings heads:

I. Non availability of counsel.

II. Non availability of accused.

III. Belated service of summons and warrants on the accused/witnesses.

IV. Non production of under trial prisoners in the court. V. Presiding judges proceeding on leave, though cases are fixed for trial

V. Counsel engaged by the accused declining to appear or seeking an adjournment.

11. Speedy trial is both a constitutional imperative and also a fundamental right in Kenya which embodies the principals in the Constitution and also International Law as incorporated to be part of the sources of law in Kenya under Article 2(5) & (6) of the Constitution. It is a fact that the Kenyan legal system is yet to have a policy or an Act of Parliament which outlines the actualization of anyone who is charged before a Court of law for a crime to have him or her tried within a reasonable time. This is a jurisprudential question which can no longer wait for this constitutional right protects both people accused of crimes and the society. There is no dispute that long criminal trials in our legal system cause suffering and frustration for everyone involved. That is the

people accused of crimes under the various penal laws who often sit in pretrial detention while waiting for their trials to be heard and determined. The victims and their families have also not been left behind in negatively being impacted with long trials which indefinitely are processed in the various Courts and forums of adjudication with no predictable date when the case will be concluded.

12. The delay in processing criminal cases within a reasonable time is a global problem but fortunately countries like Canada have addressed the issue firmly and precisely within the Canadian charter to give effect and guarantees on the rights and freedoms to its citizens. This was the observation made by the Court in the case of **R. V Jordan, 2016SCC 27, [2016] S.C.R 631:**

> *The right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific; its application to specific cases is unavoidably complex. The relevant factors and general approach set out in R. v. Morin, [1992] 1 S.C.R. 771, respond to these complexities. With modest adjustments to make the analysis more straightforward and with some additional clarification, a revised Morin framework will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations. In order to do so, the Morin considerations should be regrouped under four main analytical steps.*
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> *First, the accused must establish that there is a basis for the s. 11(b) inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length merits further inquiry.*
>
> *Second, the court must determine on an objective basis what would be a reasonable time for the disposition of a case like the*

one under review — that is, how long a case of this nature should reasonably take. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed, and is determined in accordance with the administrative guidelines for institutional delay set out by this Court in Morin: eight to ten months before the provincial courts and six to eight months before the superior courts. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse. The guidelines should not be understood as precluding allowance for any sudden and temporary strain on resources that causes a temporary congestion in the courts. The inherent time requirements of a case, on the other hand, represent the period of time that is reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court, and are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence. In estimating a reasonable time period, the court should also take into account the liberty interests of the accused.

Third, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay. When the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to

demonstrate that this period is waived, that is, that the accused's conduct reveals something more than mere acquiescence in the inevitable, and that it meets the high bar of being clear, unequivocal, and informed acceptance. Delay resulting from unreasonable actions solely attributable to the accused must also be subtracted from the period for which the state is responsible, such as last-minute changes in counsel or adjournments flowing from a lack of diligence. It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state, including unavoidable delays due to inclement weather or illness of a trial participant.

Fourth, the court must determine whether the actual period of time that fairly counts against the state exceeds the reasonable time by more than can be justified on any acceptable basis. Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can show that the delay was justified. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. The accused still may be able to demonstrate actual prejudice. Although actual prejudice need not be proved to find an infringement of s. 11(b), its presence would make unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable. As a result, justification may be found to be lacking.

13. In my view, the Accused in this case has had a torturous experience due to the long delay for any positive step to be undertaken to have his retrial begin and concluded within a reasonable time following the decision of the Court of Appeal which gave such orders in their judgment dated 27th April 2017. It is nine years down the line and there are no signs that the criminal justice system will come through for him in putting in place a legitimate roadmap of having his case heard and determined within a reasonable time. Given the magnitude of delay, I hereby exercise discretion to decline any further adjournments as requested by the State through the Office of the Director of Public Prosecution and towards this end dismiss the charges of murder for want of prosecution and the Accused be released forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED VIA CTS AT ELDORET THIS 11TH DAY OF

MAY 2026

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R. NYAKUNDI

JUDGE