Republic v Munga & 2 others (Criminal Appeal E011 of 2023) [2025] KECA 812 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 812 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E011 OF 2023

KI LAIBUTA, FA OCHIENG & GWN MACHARIA, JJA

MAY 9, 2025

BETWEEN

REPUBLIC .... APPELLANT

AND

AHMED NJEKA MUNGA .... 1ST RESPONDENT

RUMBA CHIGAMBA .... 2ND RESPONDENT

NGAO TSUMA .... 3RD RESPONDENT

(Being an appeal against the ruling of the High Court of Kenya at Mombasa (Ong'injo, J.) delivered on the 24th day of October 2022 in Criminal Case No. 32 of 2015)

JUDGMENT

1. The background leading to this appeal is relatively simple and straight forward. The respondents, Ahmed Njema Munga, Rumba Chigamba and Ngao Tsuma, were charged with the offence of Murder contrary to section 203 as read with section 204 of the *Penal Code*. The information dated 12th October 2015 states that, on 2nd June 2015 at Dzivani Village, in Gandini Location within Kwale County, the respondents and others not before the court murdered Harrison Bekanga Munga.

2. On 26th October 2015, the 1st and 2nd respondents pleaded not guilty. Vide a ruling dated and delivered on 30th November 2015, the 1st and 2nd respondents were granted bond. Later, upon consolidation of the criminal files together with that of the 3rd respondent, all the respondents took a fresh plea on 17th May 2017 and denied the murder charge. A plea of not guilty was entered. The 3rd respondent was likewise granted bond.

3. The hearing was slated for 3rd February 2017 but, due to numerous adjournments, the first prosecution witness who was marked as a protected witness was to testify on 10th December 2019. On the said date, the hearing aborted because the defence was not supplied with the protected witness' statements. He

was stood down. The second prosecution witness testified, but was equally stood down on the basis that there was no original handwritten witness statement to enable the prosecution to proceed further. By this time, two years had lapsed since the respondents took plea.

4. On 13th February 2020, the two prosecution witnesses testified but, the court understandably being fatigued, had to adjourn at 3.30 p.m. having sat from 9.20 a.m. The next hearing was slated for 25th March 2020 but, for unknown reasons, the court did not sit again until 16th December 2020. There was no appearance for any of the respondents on this date. On 11th February 2021, the matter was mentioned and the hearing scheduled to proceed on 27th September 2021, 28th September 2021 and 29th September 2021.

5. On 27th September 2021, the trial court did not sit as the trial Judge (Ong'injo, J.) was away on official duties. The matter was mentioned by the Deputy Registrar and taken out. On 7th October 2021, fresh hearing dates were given for 7th December 2021 and 9th December 2021 respectively. The hearing did not take off on 7th December 2021 as anticipated, and a new hearing date of 10th February 2022 was scheduled. Come this date, the prosecution was not ready to proceed with the hearing on 10th February 2022, indicating that it did not have its witnesses in court. Mr. Gakuhi and Mr. Mushele, counsel appearing for the respondents, opposed the request for adjournment on the grounds that this was a relatively old matter which was spanning 7 years, and that only 2 witnesses had testified since 2015.

6. The trial court was of the view that the matter being old, with the prosecution having had its fair share of adjournments without any proper reasons, it ought to close its case. The prosecution did not argue on the suggestion by the court that it should close its case, but left the decision to the court. The prosecutor responded as follows:

> " I leave it to the court"

7. The court ordered that the prosecution's case be closed as follows:

> " Prosecution's case is closed."

8. The trial court decided to extend an olive branch to the prosecution and re-opened the case. It is not clear how this happened as no order for re-opening the case is on record.

   However, it is clear that on 9th June 2022, parties were in court for purposes of taking a hearing date for the evidence of the investigating officer who, it was indicated, was the remaining witness. Witness summons was issued to the investigating officer, CPL. Adan Roba Kinango DCI office, and a hearing date was set for 6th September 2022.

9. On 6th September 2022, the prosecution was unable to secure the attendance of the investigating officer, the firearms examiner, the criminal ballistics officer and three other witnesses. The application by the prosecution to adjourn the trial was once again strenuously opposed by counsel representing the respondents.

10. In handing down the ruling dismissing the prosecution's application for adjournment, the learned Judge ordered"

> " This court re-opened the prosecution's case to enable it avail its witnesses considering the evidence that had been adduced by the 3 prosecution witnesses. In consideration of the above this court has no otherwise than to order the prosecution's case closed."

11. The court then directed that it would deliver a ruling on 29th September 2022. We are unable to fathom why the date of the ruling is different from the date it was indicated it would be delivered. In a brief ruling dated and delivered on 24th October 2022, the learned Judge held, inter alia, as follows:

> " 2. This case has been pending in court for a very long time and evidence tendered in court was taken before another Judge before I took over the conduct.
>
> 3. It is unfortunate that even after the court re- opened the prosecution's case to avail other witnesses they were not able to take the opportunity seriously this ending up with their case being closed again without tendering further evidence.
>
> 4. This court finds that the evidence by PW1 and PW2 does not meet the threshold to place accused persons on defence.
>
> 5. The prosecution's case is therefore dismissed and accused persons acquitted under section 210 *Criminal Procedure Code*"

12. Aggrieved by the ruling, the appellant filed the instant appeal before this Court. We do not have the grounds of appeal proffered but at the plenary hearing, Ms. Ongeti, learned State counsel for the appellant relied entirely on the submissions dated 4th July 2024. Mr. Gakui, appearing for the respondents, informed us that he had filed submissions on 16th October 2024 but we have not been able to trace them even after making an inquiry from the registry.

13. On behalf of the appellant, it was submitted that on 27th October 2015, the investigating officer swore an affidavit opposing the release of the respondents on bond on the basis that they were interfering with the witnesses; that, on 10th December 2019 when PW2 testified, she was visibly distressed and appeared intimidated; and that the implication thereof was that, failure by the State to produce the witnesses was occasioned by the respondents and not by the State's negligence. The appellant pleaded with us to re- open the case and allow the prosecution to call all the witnesses for justice to be seen to be done.

14. In urging us to dismiss the appeal, Mr. Gakui orally submitted that the assertion by the State that there was interference with the witnesses was unfounded as was observed by the trial court in its ruling when granting bail to the respondents; that, furthermore, the investigating officer did not testify; and that, for this reason, it cannot be concluded that the evidence on record was sufficient to sustain a conviction. We were urged to dismiss the appeal.

15. We have considered the record of appeal, the submissions and the law. The central issue in this appeal is whether the trial court properly exercised its discretion in dismissing the prosecution's case on account of delayed presentation of prosecution witnesses.

16. In the present appeal, the nature and the seriousness of the offence revolves around the sanctity of life which is guaranteed under *the Constitution* as a fundamental right under Article 26(1) of *the Constitution*. This is supported by the fact that the respondents were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* Cap 63.

17. Article 50(2)(e) of *the Constitution* provides that an accused person has a right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay. The right of an accused person to a fair trial requires fairness, not only to him, but also to the public as represented by the State. A criminal trial must strive to instil public confidence in the criminal justice system, including those close to the accused persons, as well as those distressed by the horror of the crime. This does not

mean that the rights of an accused person should be subordinate to the public interest, but that the purpose of a fair trial is not to make it impractical to conduct a prosecution.

18. It is common ground that the prosecution sought several adjournments before the trial court so as to enable it present witnesses, but to no avail. This led to the trial court's decision to close the prosecution's case and eventually acquit the respondents. Commenting on the rights of an accused person to be afforded a speedy trial under section 72(6) of the defunct Constitution, this Court's decision in Julius Kamau Mbugua vs. Republic (2010) KECA 109 (KLR) is instructive. It was held thus:

> " ...the right to a trial within a reasonable time guaranteed by Section 77(2) is trial – related. It is related to the trial process itself and is mainly designed to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court which has the control of the trial to ensure that the right to speedy trial is observed."

19. The Supreme Court in the case of Waswa vs. Repub*lic (Petition 23 of 2019*) [2020] KESC 23(KLR) (4 September 2020) (Judgment) had the following to say as regards to requirement for a speedy trial:

> "83. Article 14(3)(c) of the ICCPR entitles an accused person, as a minimum guarantee to be "tried without undue delay". The Human Rights Committee, in General Comment No. 32, article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, has explained that the right of the accused to be tried without undue delay, provided for by Article 14(3)(c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. The General Comment further states that what is reasonable has to be assessed in the circumstances of each case.
>
> 84. The benefits of an expeditious trial cannot be gainsaid. A speedy trial ensures that the rights of the accused person are secured; it minimizes the anxiety and concern of the accused; it prevents oppressive incarceration; and it protects the reputation, social and economic interests of the accused from the damage which flows from a pending charge. It also protects the interests of the public, including victims and witnesses, and ensures the effective utilization of resources. Additionally, it lessens the length of the periods of anxiety for victims, witnesses, and their families and increases public trust and confidence in the justice system."

20. The South African Court of Appeal had an occasion to address the implications of a criminal trial which does not proceed speedily in McCarthy vs. Additional Magistrate, Johannesburg 2000 (2) SACR 542 (SCA), where the criminal trial had not taken place after 15 years. As per Farlam, JA:

> "...the fairness of the trial will be materially adversely affected, in at least the following respects: the applicant's recollection of events, the tracking down of such witnesses for the defence as may survive, the willingness of witnesses to testify, the recollection of those witnesses and the procurement of real evidence. At least some of the handicaps from which the appellant will suffer may well also render the prosecution's task more difficult, in particular those relating to the availability 15 years on, of witnesses and their recollection of events. Furthermore, these points which will all have a bearing on the question of proof

beyond reasonable doubt will be able to be brought to the attention of the jury with all the emphasis at the command of her legal representatives."

21. With the foregoing in mind, we note that the delay in the trial court spanned over a period of 8 years from the time when the respondents first took plea in the year 2015 to the date when the prosecution case was closed. There were of course intermittent adjournments occasioned by the State and/or when the trial court was attending to official duties. The 8 years' delay is certainly inordinate when one considers the complexity of criminal trials, such as the one of murder. There was little or no alacrity on the part of the State to proceed with the hearing. For instance, even when witness summons was issued to the investigating officer, there was no reason advanced as to why he did not attend court on subsequent days. Further, the prosecution was casual in the way it attended to the requests for adjournments, often just stating that there are no witnesses in court.

22. It is not lost to us that the prosecution was given another lease of life in its case when the court re-opened the trial when it was expected that it would take serious steps to avail its witnesses. Surprisingly, learned Prosecution Counsel, Mr. Ngiru, while seeking adjournment, still addressed the trial court in a casual manner to the effect that he could not trace some of the witnesses, including the investigation officer and other important players like the ballistics experts. In fact, counsel let the court know that the civilian witnesses they had bonded switched off their phones when they were to be picked.

23. Ms. Ongeti submitted that one of the main reasons why the prosecution's case did not take off was because the witnesses were being threatened, a fact which the trial court was privy to. Counsel did not offer an explanation as to why the prosecution did not take steps to place the witnesses under the Witness Protection Programme in accordance with section 3A of the *Witness Protection Act*, Cap 79. In fact, counsel submitted that, as at the time when she was preparing for this appeal, she contacted the Witness Protection Agency, and it was reported to her that the Agency had a problem with one witness.

24. The above explanation, coupled with the fact that there has been significant delay in the trial, leads us to conclude that re-opening of the trial proceedings would be a mere gamble. We emphasize that the reasons why the right to a trial within a reasonable time was prescribed as one of the fundamental rights of an accused person under *the Constitution*, was the enduring impact that the prosecution process may jeopardize or impair the benefits of the presumption of innocence. It is likely that a long-drawn criminal trial which does not seem to see the light of day will result to doubt being sown as to an accused's integrity in the eyes of his family, friends and the public.

25. The accused person will also be subjected to social prejudice, invasions of liberty that range from incarceration to onerous bail conditions, to repeated attendance in court. What the prosecution ought to have borne in mind was that a speedy trial works in favour of the State as well as it renders the criminal justice system more coherent and fairer by mitigating the tension between the presumption of innocence and the publicity of trial. Unfortunately, the prosecution failed to take its work seriously, ultimately prejudicing the respondents. And, as we have noted above, the right to a fair trial must be balanced in favour of all the parties in the trial, and in this case, for both the prosecution and the defence. It is now 10 years since the plea was taken. Given the stated circumstances, justice tilts against the re-opening of the trial.

26. We pen off by citing Jago vs. District Court (NSW) [1989] 168 CLR 23 (12 October 1989) where Deane, J. at 56-57 stated:

> "It is fundamental to the legal system that an accused be given a fair trial according to the law. The accused has 'a right not to be tried unfairly or as an immunity against conviction otherwise than after a trial'."

27. In the end, we find that this appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY, 2025.

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR