



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CRIMINAL APPEAL NO. 112 OF 2013

BETWEEN

ELIUD MUNENE KIRAGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Embu (Ong'udi, J.) delivered on 21st August, 2013

in

Misc. Appl. No. 10 of 2013)

JUDGMENT OF THE COURT

[1] This appeal concerns an interlocutory matter. We were told the matter being Kerugoya Chief Magistrate's Court ***Criminal Case No. 525 of 2009*** is still pending determination by that court. The appellant, Eliud Munene Kiragu, was charged in the said court with the offence of conspiracy to defraud contrary to ***Section 317*** of the ***Penal Code***. The particulars of the charge stated that Eliud Munene Kiragu (*with another person who has not appeared before us*), on diverse dates between 18th October, 2008 and 4th April, 2009, at Kerugoya Town in Kirinyaga District within Central Province with intent to defraud, jointly conspired and defrauded RICHARD NJAGI NDAKA Ksh. 1.5 M (One and half Million).

He also faced 3 other counts of obtaining various sums of money from Richard Njagi Ndaka by false pretence contrary to ***Section 313*** of the ***Penal Code***.

[2] While the hearing of the Criminal Case was ongoing before the Chief Magistrate's Court, the appellant filed a constitutional petition before the High Court Embu in which he sought for an order

declaring the criminal charges he was facing null and void. The criminal charges were challenged by the appellant on two main grounds; first, he contended the subject matter that gave rise to the complaint and the criminal charges was a sale agreement he entered with the complainant for a sale of Plot No. 53 Kagumo for a consideration of Kshs. 1.5 Million which was purely a civil and not a criminal matter. Secondly, he contended that his Constitutional rights were violated because he was arrested on 30th May, 2009, and was not arraigned in court until 2nd June, 2009.

[3] The Constitutional petition was heard by Ong'udi, J., who made the following conclusions while dismissing the petition for lacking in merit:

“I have considered the submissions by both Mr. Kinyua for the Petitioner and the learned State Counsel.

This petition is based on two main grounds:

- 1. Violation of the Petitioner’s Constitutional rights. It has been confirmed that the Petitioner was arrested on 30/5/2009, which was a Saturday. 1st June, 2009, was a Monday and was a public holiday. The earliest date he could be arraigned in court was 2/6/2009, which was the case here. I, therefore, find no violation of his Constitutional rights. Secondly, the Constitution he seeks to rely on was not in force in the year 2009. The law operates retrospectively and not retroactively.***
- 2. The second ground is that the cause of action was a civil matter and not a criminal matter. This court asked Mr. Kinyua if these issues were raised before the trial court and he answered in the negative. The issue he is raising about a civil matter etc is a matter of evidence. The best placed court to deal with it is the Criminal Court seized of the matter. This court has no idea what evidence is before that Court”.***

[4] Being aggrieved by that judgment, the appellant has appealed raising 4 grounds of appeal to wit:-

- a. The learned Honourable Justice erred in law in judgment that the raised could only have been addressed by the trial magistrates.***
- b. That the learned Honourable Justice erred in law determining that the issue of the maintainability of a criminal matter can only be raised and determined by the Magistrate.***
- c. That the learned Honourable Justice erred in law in judgment that the Appellant’s Constitutional rights had not been violated and that the particular Constitutional law operated retrospectively and not retroactively.***
- d. That the learned Honourable Justice erred in law in determining that the alleged civil nature of the basis of the charges facing the appellant was merely a matter of evidence because the prosecution has a duty ambition to determine what complaints before it were of civil or criminate nature.***

[5] In support of the above grounds, Mr. Gori, learned counsel for the appellant submitted that there is a clear distinction between civil and criminal matters. The appellant had entered into a sale agreement that was not disputed; if there was a breach, the complainant had recourse to seek a refund of the money paid or specific performance through a civil suit as was provided for in the said agreement: the complainant was faulted for reporting the matter to the police and instigating criminal proceedings for a contractual arrangement.

[5] On the other hand, this appeal was opposed by Mr. Kaigai, learned Assistant Deputy Director of Prosecution for the State. He submitted that the appellant was charged with an offence that is clearly provided for under the law; he was charged before a proper court with jurisdiction to try criminal cases. There was a basis upon which the complainant reported the matter to the police, as he had the option to do

so. In any event, under **Section 193(A)** of the **Criminal Procedure Code**, concurrent proceedings can be undertaken in both criminal and civil. Counsel urged us to dismiss the appeal as the judgement of the High Court was correct.

[6] We propose to deal with the two issues raised in this appeal seriatim. First, whether the Judge erred by declining to grant the order to quash the criminal proceedings that the appellant was facing before the subordinate court at Kerugoya. The appellant was charged with offences that are provided for under the Penal Code. He was also arraigned before a Chief Magistrate's Court that is established by law and given jurisdiction and power to try criminal matters as provided for by the law. We agree with the trial Judge, that the appellant's contention that the agreement did not give rise to criminal proceedings is within the province of the trial magistrate who will hear all the evidence and determine the issues. Neither the High Court Judge nor this Court can interfere with the independence of the trial magistrate and pre-empt the outcome. Once the magistrate has ruled on the matter, the appellant will be at liberty, if aggrieved to appeal before the High Court, and if dissatisfied, file a second appeal on matters of law.

[6] There was no evidence at all demonstrated before the High Court to show that the court lacked jurisdiction to try the appellant or the offences as stated in the charge sheet are not known to law. To stress this point further, we make reference to the provisions of;- **Section 193A** of the **Criminal Procedure Code**, which provides as follows:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue is in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings”.

In the instant case, there was no contention that there were concurrent civil proceedings, and even if there were, there is no bar at all according to the aforementioned provision of the law. For the foregoing reasons, this ground of appeal fails.

[7] On the second issue of whether the appellant's Constitutional rights under the retired Constitution, **Section 72(3) (b)**; were violated; the record shows and it is indisputable that the appellant was arrested on 30th May and arraigned in court on 2nd June, 2009, when plea was taken. Reasons were offered by the prosecution why the appellant was taken to court after 3 days. Both courts found the reasons were plausible. Moreover it has now been settled that prolonged detention of an accused person in police custody does not entitle him an automatic acquittal from criminal charges. The general approach taken by the courts is a determination of whether the rights of an accused person were violated such as to impede a fair trial. This is also done by balancing the accused person's rights with the rights of the victim and against other factors that inevitably lead to a delay. If the delay merely inconvenienced the accused person and did not affect a fair trial, the remedy lies in seeking damages from the State for illegal detention. See the Canadian Case of ***R R v Morin, 1992 1 SCR 771***, where Sopinka, J., considered the relevant factors as follows:

v. ***Length of delay,***

v. ***Waiver of time periods,***

v. ***The reasons for delay including inherent time requirements of the case, action of the accused; actions of the Crown; limits on institution's resources and***

v. ***Prejudice to the accused.***

[8] All those factors were taken into account by the High Court Judge who found the earliest time, the appellant could be taken to court was 2nd June, 2009, as he was arrested on a Saturday, and 1st June was a public holiday.

Having arrived at a similar conclusion with the High Court Judge, we find no merit in this appeal

which is dismissed.

Dated and Delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a
true copy to the original.

DEPUTY REGISTRAR