



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL CASE NO. 25 OF 2007

REPUBLIC PROSECUTOR

=VERSUS=

SAMWEL MWAURA.....ACCUSED

RULING ON A PRELIMINARY OBJECTION

The accused is undergoing trial on a charge of **murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63, Laws of Kenya)**. The allegation is that the accused on diverse dates between 14th May, and 18th May, 2007, along Eldoret – Gilgil Road within the Rift Valley Province, jointly, with others not before the court, murdered **Peter Ngige**.

The plea was taken before **Ibrahim J.** on 12th July, 2007. The trial process has been in progress since. The 1st prosecution witness testified before **Ibrahim J.** on 6th December, 2007. The second and third witnesses gave their testimonies on 5th June, 2008 and on 4th February, 2009. The 4th witness commenced his testimony on the same 4th February, 2009.

Ibrahim J. was subsequently transferred from this station and **Osiemo J.**, (now retired) was set to proceed with the trial when, on 23rd June 2009, the accused raised a preliminary objection that his trial-rights guaranteed under sections 72 and 77(2) of the Constitution as it then applied had been contravened. The preliminary objection was argued fully before the said learned Judge but unfortunately, the learned Judge retired before preparing his ruling on the preliminary objection.

It would appear that **Ang'awa J.** took over the trial and indicated on 29th July 2010, that she would prepare a ruling on the preliminary objection. The record does not show that the learned Judge prepared the said ruling. The proceedings were in that state when the case was mentioned before me on 29th November, 2010 for directions.

Counsel for the accused proposed that he re-argues the preliminary objection and in fact did so on 31st January, 2011. Just before the said date, counsel for the accused on 24th January, 2011 lodged a chamber summons under articles 49 (f) (h) and 50 (2) (e) of the Constitution, section 203 of the Penal Code and section 123 of the Criminal Procedure Code. The chamber summons is supported by two affidavits – one

sworn by the accused and another by his counsel. The gist of the complaint made by the accused is that he was detained in police custody for a total of 42 days before he was charged and therefore his fair-trial rights under the Constitution were infringed. Because of the infringement, his trial should be declared a nullity. The accused has also made an alternative plea that in the event the trial is not so declared he be released on bond pending trial. He makes that plea on the grounds that he has a family and that his diabetic father depends on him.

The chamber summons is opposed on the basis of an affidavit sworn by **P.C. Samwel Jomo**, the investigating officer in this case. That affidavit was filed on 26/2/2010, no doubt in opposition to the original notice of preliminary objection aforesaid. The substance of the opposition is that the delay in charging the accused was caused by the circumstances surrounding the commission of the crime and the distances which were to be covered during investigations.

When the application was debated before me on 31st January, 2011, counsel for the accused reiterated the averments in the accused's and his own affidavit aforesaid. Counsel added that the accused had, while in custody suffered ill health, which fact had compounded the infringement of his fair trial rights under the Constitution. He placed reliance upon the case of **Paul Mwangi Murunga -vrs-Republic [CA. NO. 35 of 2006] (UR)** where the Court of Appeal found that an unexplained delay of ten (10) days to charge the appellant contravened section 72 (3)(b) of the Constitution.

In response, the learned counsel for the State, **Mr. Kabaka** sub-contended that the application was an afterthought given that the complaints were not made, at the commencement of the trial. Counsel further submitted that if the fair-trial rights of the accused had indeed been infringed, his remedy was compensation. He placed reliance upon the case of **Julius Kamau Mbugua-vrs-Republic [CA No. 50 of 2008](UR)**.

I have considered the record, the application, the affidavits filed both for and in opposition to the application and the submissions of counsel. Having done so, I take the following view of the matter. There is no doubt that indeed, the accused was brought before this court after the period prescribed in the Constitution. (Under the repealed Constitution 27 days later and under the new Constitution nearly 40 days later). The investigating officer blames the delay on the difficulties the investigators encountered in the course of their investigations. The offence was committed far away from their station to wit beyond Nakuru. The officers had therefore to cover long distances. The testimonies of witnesses who have already testified indeed attests to several visits made to Nakuru, Gilgil and Nyahururu. It would appear indeed that heavy reliance was placed on the accused for their investigations.

On the facts already before the court, I make a prima facie conclusion that it is not a simple case. Its complexity was evidenced by the fact that when learned counsel for the State initially was presented with the police file, he called for further investigations which investigations involved taking statements from additional witnesses.

The investigating officer has further complained of inadequate personnel and limited resources. That complaint is in my view not frivolous given the well known logistical imperfections of the police of which I take judicial notice of. The investigating officer has in the premises persuaded me that there was reason for the delay in charging the accused. The case of **Paul Mwangi Murunga -vrs- Republic (Supra)** is therefore distinguishable from the facts herein. In that case, there was no explanation for the delay of ten days. There is now the recent decision of the Court of Appeal of **Julius Kamau Mbugua -vrs- Republic (Supra)**. There, after reviewing several decisions of the High Court and the Court of Appeal, the court stated as follows:-

“In our view, the right of a suspect to personal liberty before he is taken to court under section 72 (3) (b) are clearly distinct from the rights of an accused awaiting trial under section 77 (1). The main difference is that the breach of right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody. If by illustration, the police breach the right to personal liberty of a suspect by unreasonable detention in police

custody, there is a right to apply to the High Court for a Writ of Habeas Corpus to secure release (see Section 389(1)(a) of the Criminal Procedure Code and Section 84(1) of the Constitution).

In addition, Section 72(6) provided a remedy by way of damages to a person who is unlawfully arrested or detained.

In contrast, the right to a trial within a reasonable time guaranteed by section 77(2) is trial related ...

In our view, it is not the duty of a trial court or an appellate court dealing with an appeal to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the Criminal Court assumed jurisdiction over the accused.”

On the authority of the above case, I should not enquire into the accused’s complaints before he was charged unless the violations of his rights are linked to or affects the criminal trial process.

The court in that case gave instances when that occurs. In their own words:-

“Where the prolonged detention of a suspect in police custody being charged affects the fairness of the ensuing trial e.g. where the accused has suffered trial-related prejudice as a result of death of an important defence witness in the meantime, or a witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise the breach of a civil right to personal liberty of a suspect by police per se is merely a breach of a civil right though Constitutional in nature, which is beyond the statutory duty of a criminal court and which is by section 72(6) expressly compensatable by damages.”

Although those circumstances were not and were not expected to be exhaustive, the accused in this case has not alleged such violations of his fair-trial rights as are linked or affect this trial.

I am alive to the fact that the above case did not overrule the many Court of Appeal decisions which held to the contrary with regard to infringement of fair-trial rights provisions under the Constitution. I need not consider those decisions as I have already found that the prosecution has furnished what I consider reasonable explanation for the delay in charging the accused.

In the end, I am not inclined to terminate this trial on the ground that it is a nullity.

The accused has in the alternative sought to be released on bond pending his trial. The learned state counsel filed no replying affidavit in opposition to the accused’s alternative prayer. He was content with merely stating that the offence carries a death sentence and therefore the propensity of the accused to abscond is real. With all due respect to counsel, the framers of the Constitution were alive to that consequence and yet they still provided for release of a person charged with a capital offence such as the one the accused is facing on bond/bail. It was for the State to demonstrate why the accused should not be admitted to bail/bond pending his trial. The State has not. In the premises, there is no impediment to the order sought. In the event, I order that the accused may be released on bond of Kshs 500,000/= with a surety in the like sum and further report to the OCS Eldoret Police Station every month until the conclusion of his trial or until further orders of the court.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF FEBRUARY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

1. Mr. Bichanga for the Applicant and
2. Mr. Kabaka for the State.

F. AZANGALALA

JUDGE

28/2/2011