



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Case 2 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

EVERLYNE AWINO OKWACHACCUSED

RULING

The accused faces a charge of murder and her counsel has raised a preliminary objection on grounds that since the accused's constitutional rights as envisaged under section 72(3) (b) and section 77(1) (2) (a) (b) and (c) of the Constitution of Kenya were violated, the case pending before this court for trial ought to be declared a nullity and the accused be set at liberty.

He submits that since the legal number of days in which accused should have been held were only fourteen, yet she was held in custody in excess of those days, then she cannot be said to be given a fair trial and there is no remedy provided for such violation under the Constitution. His argument is that section 72(6) which provides compensation relates to unlawful arrest yet in her case she was lawfully arrested but unlawfully kept in police custody. He has referred to the cases of Republic v James Njuguna HCCC No. 40 of 2007 and Carolyn Stephanie Nyawade v R Cr. Appeal No. 10 of 2008 in urging this court to quash the charges.

The preliminary objection is opposed, and Mr. Ogoti submits on behalf of the State that accused was arrested on 1-1-08 and the mandatory period was to expire on 15-1-08. The information/charge was presented to court on 14-1-08 but the court in Malindi was on the High Court vacation which was from 18th December to 4th February, so the earliest date within which she could take plea was on 7th February 2008 when the High Court resumed sitting.

The accused faces a capital offence and under provisions of section 72(3) (b) of the Constitution, she ought to have been taken to court within 14 days from the date of arrest.

The burden of proving that there were reasonable practicable steps taken to present her to court at the earliest available opportunity was with the prosecution.

It is not for every delayed arraignment in court that will result in an acquittal - as a matter of fact the Constitution does

not even prescribe an acquittal – that is purely judge-made law, stemming from the celebrated case of Albanus Mutua v R Cr. Appeal No. 120 of 2004 – where due to an eight month delay in presenting, the accused to court, he was acquitted. Yet that same court recognized that there may well be good reasons for failing to take one to court within the prescribed time and stated that:

“it could be that he fell ill during the fourteen days the police were entitled to hold him in custody, that he was admitted in hospital,...it could be that appellant had been presented to court earlier but his case was terminated for one reason....

Constitutionally, the burden was on the police to explain the delay.

From the court record the file was presented to court on 17-1-08 before the Deputy Registrar. Mr. Daniel Ochenja but the accused was absent, and an order was made for her production on 23rd January 2008 – and indeed she was presented before court on 28-1-08 – so if there was a delay it was for 14 days. Now in those 14 days she ought to have been presented before court but it is said that the High Court sitting in Malindi was on vacation. Indeed under the Judicature Act, the High Court vacation at the Coast runs from 18th December to 4th February – the most appropriate and reasonable step which the prosecution ought to have taken was to present the accused to the Coast duty judge sitting in Mombasa. This wasn't done and I find as a fact accused's rights were violated. Having so found then should an acquittal automatically follow? Certainly the Constitution of Kenya does not provide such a remedy, this remedy is judge-made – the remedy provided under the Constitution is under section 72(b) of the Constitution being compensation by way of damages. I recognize the duty of this court to ensure protection of an accused's Constitutional rights while also acknowledging the duty of protecting the rights of individuals whose rights have been violated by persons alleged to have committed certain acts against them. In my mind, a balance can only be struck by:

- (a) acknowledging that accused's rights were violated
- (b) censuring the State by invoking the provisions of section 72(6) of the Constitution which entitles accused person to compensation.

An acquittal is not a remedy in this instance, to my mind it sends the wrong message and makes a mockery of the principles of justice and the fact that the judiciary is the custodian of the law – it gives a very simplistic view of rewarding potential offenders with a simple stroke of the pen and may result in social anarchy. The upshot is that I find no reason to declare the trial a nullity and the preliminary objection is dismissed.

Delivered and dated this 11th day of February 2010 at Malindi.

H. A. OMONDI
JUDGE