



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 1 of 2009

REPUBLIC..... PROSECUTOR

VERSUS

DAVID OTIENO OPIYO..... ACCUSED

RULING

The appellant, **DAVID OTIENO OPIYO**, is facing a charge of **murder contrary to section 203 as read with section 204 of the Penal Code**. It is the prosecution case that on 28th November 2008, at Kandisi area of Ongata Rongai township, in Kajiado District, the applicant murdered **DISMUS OMONDI**.

The applicant was arrested on 30th November 2008. But it was not until 8th January 2009 that the applicant was first arraigned before the court. In effect, the applicant was held in custody for 39 days before he was first taken to court.

Pursuant to section 72 (3) of the Constitution, any person who is arrested on reasonable suspicion of committing or being about to commit a criminal offence should be produced before a court of law within 24 hours, if the offence was anything other than a capital one. If the offence was capital one, the suspect ought to be produced before a court of law within 14 days of arrest.

Prior to the applicant taking his plea on the charge preferred against him, the Investigating Officer, PC ISALAH GORO, had filed an affidavit, explaining why the applicant was taken to court later than he should have been.

The applicant holds the view that the explanation offered by the Investigating Officer was neither reasonable nor sufficient. In his view, there had been no explanation as to why the police kept their file for a period of 30 days before they sent it to the Attorney General for his advice.

Secondly, the applicant believes that he could have easily been brought before the court, within the period stipulated; thereafter, if the prosecution still needed to conduct further investigations, they could have made an application to the court, to allow them more time to do so.

However, Mr. Kihara, the learned advocate for the applicant, submitted that the prosecution squandered its opportunity to bring the applicant to court within the period stipulated.

And, as the delay had not been explained reasonably or sufficiently, the applicant urged this court to hold that his constitutional rights had been violated. He also asked the court to acquit him, and then order that he be set free forthwith.

In support of his case, the applicant relied on the Court's decision in **REP. Vs BONIFACE KAMAU MUTHONI, CRIMINAL CASE NO. 102 of 2004.**

In answer to the Preliminary Objection raised by the applicant, the learned state counsel, Ms Mwaniki submitted that the said Preliminary Objection had been overtaken by events.

It was the contention of the respondent that because the Investigating Officer had filed an affidavit explaining the reasons for the delay in taking the applicant to court; and because that affidavit was filed before the applicant raised the issue, the objection had been overtaken by events.

Secondly, the respondent was of the view that it had provided a reasonable explanation for the delay. The said explanation was to the effect that the Investigating Officer had to trace a crucial witness, and he also had to look for the exhibits.

The two-pronged search went on, whilst the applicant remained in custody, because the offence for which the applicant was to be charged was not bailable.

Finally, the respondent pointed out that the Constitutional provisions cited by the applicant, did not provide for the acquittal of an accused. I was therefore asked to dismiss the Preliminary Objection.

In my considered view, the applicant was right to have argued, as he did herein, that the simple act of filing the affidavit of the Investigating Officer before the applicant raised the issue regarding the alleged violation of his constitutional rights cannot imply that the objection had been overtaken by events.

The affidavit filed by the Investigating Officer cannot have either authorized the state to hold the applicant longer than was permissible, nor could it act in such manner as to retroactively excuse the delay that had already taken place.

By the date when the Investigating Officer was filing his affidavit, the delay complained about had already taken place. Therefore, that affidavit, of itself, could not excuse the delay. The only way that any affidavit could be said to provide an acceptable explanation is if it contained an explanation that demonstrated to the satisfaction of the court, that the accused person was taken to court as soon as was reasonable practicable.

Applying those requirements to the matter before me, I find that the Investigating Officer has not explained why it took him 30 days to forward the investigation's file to the Attorney General.

Clearly, the police were aware that the applicant should have been taken to court within 14 days of his arrest. The police were also aware that they arrested him on 30th November 2008. Therefore, they knew, or ought to have known that the accused should have been taken to court by 14th December 2008.

According to the Investigating Officer, the delay in taking the accused before a court of law as occasioned by the need to trace the murder weapon; the clothes which the accused wore on the material day; and the need to record the statement of a witness named Caroline Anyango. Apparently, the murder weapon and the clothes which the accused had worn on the material day have never been recovered.

Meanwhile, Caroline Anyango had travelled upcountry, and it was thus not possible to record her statement as soon as the Investigating Officer would have liked.

Although, the explanation tendered appears justifiable, I hold the considered view that the Investigating Officer should have provided the court with more information. For instance, he should have indicated the date when Caroline Anyango travelled upcountry; the efforts made in tracing her, and in getting her to go to record her statement; the date when the said statement was recorded; the date when the police decided to abandon their search for the murder weapon and for the clothes which the accused wore on the material date.

In the absence of such further material, this court is unable to formulate its own informed assessment about how reasonable the explanation tendered was in the prevailing circumstances. And because the onus is upon the person who contends that he nonetheless took the accused to court as soon as was reasonably practicable, notwithstanding the delay on the face of the record, I find that the respondent has failed to discharge the onus.

In other words, the respondent has not satisfied me that the accused was taken to court as soon as was reasonably practicable. To that end, I find that the constitutional rights of the accused have been violated.

However, the respondent urges the court to order that the trial should nonetheless proceed, because section 72 (6) of the Constitution provides a remedy to the applicant.

The applicant did not say anything regarding section 72 (6)

Similarly, in **REPUBLIC VS BONIFACE KAMAU MUTHONI, CRIMINAL CASE NO. 102 OF 2004**, the Court was not called upon to address its mind to the provisions of section 72 (6) of the Constitution. I therefore do not have any idea whether or not the said court would still have “acquitted” the accused if its attention had been drawn to that statutory provision.

On my part, I hold the considered view that this case ought to proceed to trial. In the meantime, or subsequent thereto, the accused may, if he is so minded, invoke the provisions of section 72 (6) of the Constitution, with a view to seeking compensation from the person who detained him in custody for longer than was permissible.

I therefore decline to terminate the proceedings, or to acquit the accused.

Dated, Signed and Delivered at Nairobi, this 22nd day of March, 2010

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FRED A. OCHIENG
JUDGE