



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Case 83 of 2009
REPUBLIC PROSECUTOR

VERSUS

JOHN GITONGA MARETE 1ST ACCUSED
JAMES KINOTI M'ARIMI 2ND ACCUSED

RULING

The accused is charged with the offence of murder. He has raised a preliminary objection to the trial commencing on the basis that his constitutional rights as embodied in section 72 (3) (b) of the Constitution were violated. Learned counsel for the accused stated that the accused were arrested on 11th July 2009. That it was not until counsel filed a habeas corpus application that the accused were brought before court. Counsel said that an order was issued in miscellaneous application No. 36 of 2009 for the release of the accused persons on 9th October 2009. The application for habeas corpus was in respect of the first accused but later the prosecution charged both accused with the present offence. She stated that the accused had been held in custody over 3 months. That by virtue of Section 72 (3) (b) their rights had been violated. Counsel relied on the following cases, the first being Republic Vs. Sebastiano Miriti Samwel & Ano. Criminal Case No. 50 of 2006. The 2nd one was Albanus Mwasia Mutua Vs. Republic Criminal Appeal Case No. 120 of 2004. In both of these cases, it was found that the court is obligated to enforce the fundamental rights and freedoms of the individual and where there has been found to be breach of those rights a trial should not proceed. The end result after finding of such violation is that the accused is acquitted of the charges he faces. The learned state counsel called the officer-in-charge of station (O.C.S.) who was the investigating officer to explain the delay in producing the accused before court. He stated that the accused were indeed arrested on 11th July 2009. That there were exhibits that were recovered from the scene. On 13th July 2009 those exhibits were taken to the government chemist for analysis. The government chemist report was received by him on 12th October 2009 and on that very day the accused were produced before court. He laid the blame of delay in bringing the accused before court at the door of the government chemist. The exhibits were 11 in total. The report of the government chemist was to assist him to compare the blood samples of the deceased and the accused. Although he had been able to obtain witness statements the government chemist report was to support that evidence. He said that he had tried to follow up the report at the government chemist to no avail. On being cross examined by learned counsel for the accused, he responded that even though he had eye witnesses to the crime, he needed to take the samples to the government chemist. He however conceded that the report of the government chemist was negative. That the report did not connect the accused and the deceased. He said he had taken blood, hair and clothing of both the accused and the deceased for testing. On being asked what effort he put to get the report, he said that he sent officers to the government chemist to check on the report. He however was unable to produce evidence that he had sent those police officers. He also stated that the accused had separately been taken for mental assessment on 8th September 2009 and 29th September 2009. He explained that he took them on different dates because the

doctor only examines a few persons at a time. That is the explanation given by the state for delaying in producing the accused for 3 months. The court record does support the investigating officer statement that the accused was produced before court on 12th October 2009 when the Deputy Registrar of this court appointed counsel to appear for the accused persons. Section 72 (3) (b) provides as follows:-

“72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases: -
.....

(3) A person who is arrested or detained:-

- (a) for the purpose of bringing him before a court in execution of the order of a court: or
- (b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence,
and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

The section requires the state to explain that the accused was produced before court as soon as was reasonably practicable if not produced within the period of time set out in that Section. As has been seen from the explanation given in this case, the investigating officer was awaiting the report of the government chemist to conclude his investigations. It is well known that in Kenya the government chemist is only one based in Nairobi. All the crimes that are committed in the Republic of Kenya requiring the assistance of the government chemist are taken to that chemist for their reports. It is a wonder however, that the investigating officer in this matter had to wait for 3 months for the report. The failure to produce the accused within the 14 days provided under the Constitution if indeed was due to the late submission of the report ought to have been explained by supporting documents to prove what the police alleged. The investigating officer also talked about having taken the accused for mental assessment on 2 different dates because the doctor is only able to see a limited number of persons for such examinations. It ought to also be understood that the doctor who carries out that assessment is the same doctor who attends to members of public who attend the hospital. It does for that reason explain the limitation he places on the Police Force. In the case of Dominic Mutie Mwalimu Vrs. Republic Cr. Appeal No. 217 of 2005 the Court of Appeal stated that the fact a person is not produced before court within the period stated in the Constitution is not necessarily evidence of violation of Constitutional rights. The Court of Appeal in that case stated as follows:-

“Thus, where an accused person charged with a non-capital offence brought before the court after twenty four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence.”

However, the concern of the court is that the police failed to show by producing documents that indeed there were samples sent to the government chemist as alleged. Even if there was, I am of the view it was not reasonable to have held the accused for 3 months in police cells. Infact, the police were prompted to charge the accused with the present charge because the court entertained the accused application for habeas corpus. It does seem the police charged the accused to avoid the order of the court for the accused to be released. The police, without a doubt, violated the accused constitution rights. There is no reasonable explanation given why the accused were not produced as required under the Constitution. To allow the accused's trial to continue, in the light of that violation, would only compound the violation. I therefore acquit accused of the offence of murder and I order accused to be set free unless they are otherwise lawfully held.

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO
JUDGE