



REPUBLIC OF KENYA

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

Criminal Case 28 of 2007

REPUBLIC.....PROSECUTOR
VERSUS
ANNE NJERI WANGARI.....ACCUSED

RULING

The applicant, ANN NJERI WANGARI, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

In the information, through which the criminal case was instituted, the prosecution indicate that the applicant committed the offence on 20th October 2006, at Kwambira Trading Centre, in Kiambu District.

It is common ground that the applicant was arrested on 20th October 2006. However, it was not until 28th March 2007 that the applicant was first taken before a court of law.

On 24th September 2008 the applicant filed a Notice of Preliminary Objection, seeking to terminate the criminal proceedings against her. The basis for the said objection was that the applicant believes that her constitutional rights had been violated.

In particular, the applicant asserts that her rights pursuant to section 72 (3) of the Constitution, had been violated.

By virtue of that provision, the applicant ought to have been first taken before a court of law within 14 days from the date of her rest. Instead, as per the calculations of the applicant, the police did not take her to court until 98 days had lapsed.

Mr. Mwangela, the learned advocate for the applicant cited the decision in ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120 of 2004, as authority for the proposition that an accused who was brought to court later than prescribed should be acquitted.

Although the applicant had first said that the acquittal should be automatic, she later modified the submissions, and said that before the accused could be acquitted, the prosecution should first be given an opportunity to explain the reasons for the delay in taking the accused to court.

When the prosecution offers an explanation, the applicant believes that the court would be obliged to assess whether or not the explanation was reasonable in the prevailing circumstances.

If, as the applicant has submitted, the prosecution ought to first be accorded an opportunity to explain any delay in taking an accused person to court, it would follow that delay per se cannot of itself constitute a violation of the rights of the accused. Had it been otherwise, there would then have been no need to ever offer to the prosecution an opportunity to explain the reasons for the delay.

With the utmost respect to Mutungi.J, I hold the view that when he expressed the following considered opinion, he stretched the law beyond limits;

“I dare said that the Section 72 (3) of the Constitution) is very clear and specific – that the applicants can only be kept in detention or the cells, for upto 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants.”

- ANN NJOGU & 5 OTHERS Vs. REP. CR. APPL. NO. 551/2007

The learned Judge appears to have appreciated that the police or the prosecution ought to be provided an opportunity to explain the delay. I say so because he actually went ahead to make the following observation;

“Needless to say, in the absence of the authorities that are detaining them, despite being duly served, there is no explanation, good or otherwise, as to why the applicants were not brought before the court within 24 hours.”

Implicit in that observation is the appreciation that the persons who are responsible for bringing an accused to court later than is permissible under the Constitution, could provide an explanation that was good.

In ELIUD NJERU NYAGA Vs REPUBLIC, CRIMINAL APPEAL NO. 182 of 2006 the Court of Appeal held as follows;

“Even section 72 (3) of the Constitution which deals with the period of bringing an accused person to court recognizes that there can be a valid explanation for failure to bring an accused person to court as soon as reasonably practicable.”

In this case, the state had the opportunity to offer an explanation for the delay in taking the accused before the court. However, not a single explanation was tendered.

Regardless of that fact, Mr. Imbali, the learned state counsel did submit that this court ought not to terminate the proceedings at this stage. I was invited to hold that the case should not be determined on technicalities. Instead, the prosecution expressed the view that the case should proceed to trial, so that it can thereafter be determined on the basis of

the evidence adduced.

The prosecution emphasized that the right to life was very important. Therefore, it was said that it was only through a trial that the victim and his family would have a chance to get justice.

Meanwhile, as regards the delay in bringing the accused before the court, the learned state counsel submitted that this court ought to invoke the provisions of section 72 (6) of the Constitution.

But Mr. Mwangela, the learned state counsel reiterated that the accused was not simply raising a technicality. She was said to be seeking to give effect to her constitutional rights. It was her view that the legality of the trial was doubtful, in the light of the violation of her fundamental rights.

Having given due consideration to the submissions raised before me, I am satisfied that the issues canvassed transcend the bounds of mere technicalities. They are actually issues of fundamental rights, which are accorded constitutional recognition.

But even then, the Court of Appeal has made it clear that the person wishing to have the court give effect to the said rights, should do so in such a manner as to afford the prosecution an opportunity to offer an explanation, if any, as to why the accused was not brought to court within the period permitted under the Constitution.

In *ELIUD NJERU NYAGA Vs REPUBLIC, CRIMINAL APPEAL NO. 182 OF 2006*, the appellant first raised the issue on the morning of the hearing of the appeal. And the Court of Appeal held that by so doing, the appellant had deprived the prosecution of an opportunity to offer such explanation as they might have had, to explain the delay in taking him before the court as soon as was reasonably practicable.

The Court therefore rejected that ground of appeal, as it was brought to the attention of the court too late and without allowing the State the opportunity to investigate the reason for the delay.

In effect, a claim such as that raised by the applicant herein may yet fail if perceived as having been brought to court too late.

In *ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120 of 2004*, the Court of Appeal expressed itself as follows:

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence, which emerges from the cases we have cited in the judgment, appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence, which may be adduced in support of the charge.”

That holding is often cited by applicants who seek an acquittal. The applicant herein was no exception. But I believe that the Court of Appeal did not intend to nor did they give a blanket conclusion to the effect that whenever the

constitutional rights of an accused person were violated, he should be acquitted.

Had that been their message, the Court of Appeal would not have deemed it necessary to delve into the following holding, which comes immediately after the quotation above-cited;

“In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72 (3) (b) of the Constitution also amounted to a violation of his rights under section 77 (1) of the Constitution, which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin, obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”

In my humble understanding of that holding, the appeal succeeded on the one ground; that the appellant could not have been tried within a reasonable time, as stipulated by section 77 (1) of the Constitution.

Of course, the inability of the justice system according him a trial within a reasonable time was directly attributable to the delay in taking him before the court. But it is not in all instances wherein section 77 (1) is violated automatically, when section 72 (3) of the Constitution had been violated. I say so because there might be an unexplained delay, but it may be for so short a period, that, of itself, it would not result in an accused person’s trial being unduly delayed.

In the ALBANUS MWASIA MUTUA case (above-cited), the Court of Appeal went on to state as follows;

“Having taken that view of the matter, we find it unnecessary to consider some of the outlandish submissions made before us by Mr. Ondieki. We doubt whether Mr. Ondieki’s other submissions would have carried any weight with us.”

Meanwhile, and in the same judgment, the Court emphasized the following;

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place.”

That is significant because section 72 (6) of the Constitution provides as follows;

“A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”

Thus within section 72, a remedy is expressly stipulated. Therefore, I hold the considered view that the applicant herein cannot be correct to argue, as she has done, that that sub-section deals with separate matters.

In this case, the prosecution has not offered any explanation for the delay. In the event, I do find that the applicant’s rights under section 72 (3) of the Constitution have been violated.

However, it is not reason enough to terminate the proceedings. Instead, I find and hold, that in an endeavour to enforce the provisions of the Constitution, the remedy available to the applicant is compensation, as provided for in

Section 72 (6) of the Constitution. She may therefore take such action as she deems appropriate against the person who detained her unlawfully.

In the meantime, I direct that the criminal case herein should proceed to its logical conclusion.

Dated, Signed and Delivered at Nairobi, this 11th day of March, 2010.

.....

FRED A. OCHIENG
JUDGE