REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE Criminal Case 86 of 2007

REPUBLIC……..……PROSECUTOR

VERSUS

DESMOND MUKHAYA MULUSA..... ..... ACCUSED

R U L I N G

The accused, **DESMOND MUKHAYA MULUSA**, was first brought before this court on 29th November 2007, faced with a charge of murder.

In the Information, it was indicated that on the night of 19th and 20th May 2007, at Kawangware 56, within Nairobi Province, the accused murdered **MARY TSISIKA.**

Almost nine months after he was first arraigned before the court, the accused filed a Notice of Preliminary objection. Through that Notice, he asserted that his constitutional rights under sections 70 (a) and 72 (3) (b) of the Constitution had been violated. In particular, the accused asserted that his detention beyond the period of 14 days from the date of his arrest, constituted a violation of his constitutional rights.

For the record, the first Notice of preliminary Objection was filed in court on 10th September 2008.

Thereafter, on 15th June 2009, the accused filed yet another Notice of Preliminary Objection. This time, he invoked the provisions of section 77 (1) of the Constitution.

A perusal of the record reveals that Mr. Mwaura, the advocate who was then acting for the accused, absented himself from court on all the occasions when the Preliminary Objection was scheduled for hearing. As a result of his said absence from court, the matter was adjourned on no less than five occasions.

Consequently, on 20th April 2009, the accused requested the court to provide him with another lawyer. It was then that Mr. Keengwe advocate was appointed to act for the accused: and it is the said learned advocate who has moved the matter forward.

It is the position of the accused that he was arrested on 21st May 2007. That fact is confirmed by the Investigating Officer of this case, CPL DOMINIC MUSEMBI.

That being the case, it means that the police held the accused in custody for not less than six months before taking him to court.

Pursuant to the provisions of section 72 (3) of the Constitution, the police were then obliged to explain to this court their reason for taking the accused to court, so long after the expiry of the 14 days which the law allows them. In an endeavour to provide an explanation, the Investigating Officer swore an affidavit.

The accused submitted that the affidavit did not correlate to this case, because in his view, it was sworn to explain issues which arose in **Criminal Case No. 87 of 2007**, (whereas this is Criminal Case No. 86 of 2007)

A perusal of the court file reveals that the affidavit of Cpl. Dominic Musembi was sworn on this file. There was therefore no need for the respondent to seek to either amend the affidavit or alternatively, to seek leave to file a supplementary affidavit.

In my considered view, an affidavit cannot, in any event, be amended. I say so because an affidavit is made up of evidence, which the deponent of such affidavit, has tendered, on oath. If after the affidavit is sworn and tendered to court or to any other body, the deponent realizes that there are errors in it, the only lawful option available to him, for spelling out the correct factual position, is through a supplementary affidavit.

According to the Investigating Officer, the post mortem examination on the body of the deceased was only carried out on 10th July, 2007.

The reason why there was a delay in the post mortem examination is that the family of the deceased had been forcibly evicted from their residence, after the fateful incident. The eviction was carried out because the family apparently had serious financial constraints.

Secondly, the only police officer who knew the members of the family of the deceased, Inspector Edward Kaatho, who was also then the Chief Investigating Officer, deserted from duty. Following his desertion, a warrant was issued for his arrest.

It is true, as the Investigating Officer stated in his affidavit, that the post mortem examination could not be carried out until the body had been identified. And the persons who could have identified the body were not immediately available. They had been forcibly ejected from their residence.

As if the tragedy of losing a loved one was not bad enough, the family was thrown out from their residence. And until the members of that family were traced, so that they could identify the body, the cause of death could not be established. Therefore, in those circumstances, it would have been premature for the police to prefer charges of murder against the accused.

The fact that the family was in financial difficulties was further exemplified by their inability to pay the mortuary charges.

Indeed, the Investigating Officer revealed that the body of the deceased was finally disposed by the City Mortuary, after the family of the deceased failed to collect the body.

The Investigating Officer also disclosed that the City Mortuary could not release to the police, the results of the post mortem examination early enough, because of the unpaid mortuary charges.

To my mind, the refusal by the City Mortuary, to release the post mortem report to the police is most unfortunate. I say so because it made it impossible for the police to have an expert opinion on the cause of death. And, for as long as the cause of death was not ascertained by the pathologist or by any other duly qualified medical practitioner, it would have been premature to prefer charges of murder.

Meanwhile, because the potential charges against the accused were not bailable, the accused remained in custody.

Notwithstanding those explanations which were offered by the prosecution, the accused submitted that neither the inability of the victim's family to raise the fee payable for the post mortem, nor the fact that the original Investigating Officer had deserted his duties, were a justifiable explanation.

This court was reminded that the incident took place at Kawangware, Nairobi.

The accused pointed out that there was a good network serving the city of Nairobi. I presume that the accused was making reference to the infrastructural network.

This court takes Judicial Notice of the fact that the residential area of Kawangware is very close to the Law Courts in downtown Nairobi. And there is no doubt that the road network within the city is good enough, to enable the police escort the accused to court, timeously.

The accused says that he was not unwell during the period between the date of his arrest, and the date when he was first brought to court.

The accused also pointed out that there was no assertion that any witnesses were not available. If anything, it is the position of the accused that all witness statements had been recorded by 24th November 2007, save only for the statement of the pathologist.

By putting forward those arguments, the accused was trying to demonstrate to this court that the prosecution had not brought this case within the scope of reasons which the courts have hitherto found to be justifiable.

If the accused intended to persuade this court that the judgments which the courts have handed down so far, spell out the only acceptable explanations for bringing an accused to court later than is stipulated in the Constitution, then I must say that he did not succeed. To my mind, the scope of the reasons or explanations which may be acceptable to the court, cannot be exclusively delienated.

In **PAUL MWANGI MURUNGA Vs REPUBLIC, CRIMINAL APPEAL NO. 35 of 2006** (Unreported), the Court of Appeal said;

> **"These are no more than examples which would and can provide the prosecuting authorities with an explanation to enable them discharge the burden placed on them by section 72 (3) of the Constitution. So long as the explanation proffered is reasonable and acceptable, no problem would arise."**

In **DOMINIC MUTIE MWALIMU Vs REPUBLIC, CRIMINAL APPEAL NO. 217 of 2005**, the Court of Appeal emphasized the following message, about the need for each case to be determined within the context of its own facts;

> **"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."**

In this case, the incident took place in Kawangware, Nairobi. In practical terms, there should have been little, if any, difficulty in escorting the accused to court, relatively swiftly. The roads are all tarmac, and the distances to be covered are minimal.

However, if the accused was of the view that those factors were, by themselves, sufficient to show that the respondent cannot have had any explanation that might be acceptable, he would not be entirely correct. I say so not because the accused has any obligation to demonstrate that his long detention was unlawful or unjustified. The onus is on the police to demonstrate that they took him to court as soon as was reasonably practicable.

The accused cited **JOSEPH AMOS OWINO Vs REPUBLIC, CRIMINAL APPEAL NO. 450 of 2007 (KISUMU)** as authority for the preposition that when the constitutional rights of an accused have been violated, he is entitled to an acquittal.

It is true that in that case, the appellant had been held in custody for 17 days longer than is permissible under section 72 (3) of the Constitution. The state did not as much as attempt to demonstrate to the court that the appellant had been brought to court as soon as was

reasonably practicable.

The Court of Appeal held that the appellant's constitutional rights were violated. And as a consequence thereof, the Court quashed the convictions and set aside the sentences.

The accused also cited **ALEX WAFULA Vs REPUBLIC, CRIMINAL APPEAL NO.7 of 2008, [ELDORET]**, to re-emphasise the contention that when the constitutional rights of an accused have been violated, he was entitled to an acquittal.

In response, the learned state counsel, Mr. Imbali, submitted that if there was any breach of the constitutional rights of the accused, the court should apply the provisions of the Constitution in a wholesome manner.

It was his submission that the rights of the accused must be weighed as against the rights of the person who was the victim.

Of course, section 71 of the Constitution stipulates that no person shall be deprived of his life intentionally, save in execution of the sentence of a court of law.

But because an accused person is deemed innocent until and unless proved guilty, the court cannot use section 71 of the Constitution as a counter-weight to the provisions of section 72(3). I say so because otherwise the court could be accused of working from the premise that the accused, although not yet convicted, had a hand in the act or omission which led to the deliberate killing of the victim.

That notwithstanding, I hold the considered view that the court has an obligation give effect to the provisions of section 70 of the Constitution. That section provides as follows;

> **"Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for public interest....."**

In effect, although the accused herein is entitled to his fundamental rights and freedoms, the enjoyment of the same is subject to the respect for the rights and freedoms of others and to public interest.

Public interest requires the court to carry out its mandate of dispensing justice, without fear or favour. Thus, whilst an accused person is presumed innocent until and unless he is proved guilty, public interest requires the court to determine whether or not the accused was guilty. That can only be done if the prosecution was given the opportunity to lead evidence, during a trial. But then again, it is obvious that the courts must also safeguard the fundamental rights of an accused person. It is for that reason that the court remains ever vigilant, in the course of carrying out its mandate.

Reverting to the facts of this case, I make the following findings.

As the family of the victim were forcibly ejected from their house, due to non-payment of rent, it was not unreasonable that the actual post-mortem examination delayed. That is because the said examination could not be undertaken before the body of the victim was identified.

Following the conclusion of the post mortem examination, the Investigating Officer, Inspector Edward Kaatho deserted from duty.

However, this court was not given the specific date when Inspector Kaatho deserted duty. Nor has the court been told when Cpl. Dominic Musembi took over the role of Investigating Officer. Consequently, this court is unable to make an informed assessment as to how reasonable or otherwise the delay attributed to the desertion is.

Once the current Investigating Officer took over that responsibility, he and other police officers visited the City Mortuary on various

occasions, to try and get the post mortem report.

However, the report was only released after the City Mortuary had disposed of the deceased's body, when it had become apparent that the family of the deceased had no financial means to pay the post mortem fees as well as the mortuary fees.

One could argue that as soon as the family of the deceased had indicated that they had serious financial problems, the police could have utlisised other means to obtain the post mortem report. But unless it is shown that the post –mortem report could be released to the police even when the fees for both the post mortem and the mortuary were still outstanding, I cannot fault the police for that aspect of the delay.

Instead of finding fault with the police or with the City Mortuary, I would only urge the Commissioner of Police, the Ministry of Health and the Legislature to formulate a system which would assist families who were financially challenged, to obtain post-mortem reports without having to pay for it. Indeed, the report could be released to the police, as ultimately happened in this case.

I say so because it defies all logic to have the City Mortuary or any other establishment where a post mortem examination was conducted, to withhold the report, initially, for non-payment, and eventually release it, when the fees were still outstanding.

The post mortem report was initially withheld due to non-payment of fees. The family of the deceased, who had already suffered the loss of their loved one, were then kicked out of their house, for non-payment of rent. They were then deprived of the post-mortem report, because they could not afford to pay either for it, or for the mortuary, where the body had been preserved.

Yet, it was not their choice to have the body preserved at the said mortuary.

Had they had their wish, their loved one would not have been dead, but alive.

In the circumstances prevailing, if the delay in conducting the post mortem examination; or the delay in having the post mortem report released; (both because the family was unable to pay the requisite fees); can result in the accused being set free without a trial, it would imply that the poor in society may be denied justice in every respect.

In the result, although I do find that the constitutional rights of the accused were violated, I would not want to add to the misery of the family of the victim, by denying them an opportunity to adduce such evidence as may lead them to at least ascertain whether or not the accused was the author of their original misfortune of losing their loved one.

In **ALEX WAFULA V REPUBLIC [ELDORET] CRIMINAL APPEAL NO. 7 of 2008,** the Court of Appeal said;

> **"The learned Judge finally took the view that the failure to bring the appellant to court within the prescribed time only entitles the appellant to compensation for breach of his rights as is provided for under section 72 (6) of the Constitution.**
> **While we do not differ with the learned Judge on the provisions of section 72 (6) of the Constitution, we think that the consequences of breach of the constitutional right to personal liberty, where established, are now too well established in the various authorities which have dealt with the issue, to be overthrown by a side wind. Each case will stand or fall on its peculiar facts and circumstances and the issue in this case is whether the breach was established."**

Clearly, the Court of Appeal did uphold the views which the High Court had expressed on section 72 (6) of the Constitution. And those views, as re-stated above, were that,

> **"the failure to bring the appellant to court within**
> **the prescribed time only entitles the appellant to**
> **compensation for breach of his rights as is provided**

for under section 72 (6) of the Constitution."

That being their Lordships view, my understanding is that by seeking to give effect to the express provisions of the Constitution and in particular, section 72 (6) which falls within the section that stipulates the period within which an accused ought to be brought to court, the court cannot have been said to have been seeking to overthrow an established legal position through a side-wind. Section 72 (6) of the Constitution is an integral part of the Constitution.

If it cannot be brought into play, in situations wherein section 72 (3) is said to have been violated; yet it is the expressly provided remedy, I do not know when it can be invoked.

My legitimate fear is that the indiscriminate acquittal of accused persons whose constitutional rights had been infringed may result in a much bigger legal problem than the one it would have addressed. I say so because it would then be very easy for suspects to collude with some unscrupulous police officers to be detained in custody for longer than 24 hours or than 14 days, as may be appropriate. It would be an attractive preposition especially in cases in which there was overwhelming evidence. Such evidence would then not matter at all, because the suspect would be acquitted on the grounds that his constitutional rights had been infringed.

Not only would the suspect have earned his freedom, but he would thereafter go ahead to sue for compensation.

Thus, whilst victims, complainants and the society would have been deprived the opportunity to present such evidence as might be available, with a view to having a trial court determine the guilt or innocence of the accused, the suspect would get both an acquittal and compensation!

Although, I am not at all suggesting that the accused herein was involved in any underhand arrangements with the police or anybody else, yet I hold the view that it is in public interest to have the trial proceed to its logical conclusion. I therefore decline to acquit the accused. Instead, I direct that the trial should go on, on a priority basis, until the case is determined on merit.

Dated, Signed and Delivered at Nairobi, this 20th day of April, 2010

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FRED A. OCHIENG
JUDGE