



No. 109

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE NO. 37 OF 2008

REPUBLIC.....PROSECUTOR

-VERSUS-

NASHON OKINYI.....ACCUSED

RULING

Nashon Okinyi Okeyo hereinafter “*the accused*” was arrested on 11th August, 2008 on suspicion of having committed the offence of murder contrary to section 203 as read with section 204 of the Penal Code. According to the accused he was thereafter held in police custody until 23rd September, 2008 when he was presented before the Deputy Registrar of this court for purposes of fixing a date for the taking of his plea. It was alleged in the information that he on 11th September, 2008 at Kokach village, Osingo South location in Migori District within Nyanza province murdered one, **Benard Onyango Okeyo**.

When arraigned in court to face the information he returned a plea of not guilty and his trial was scheduled for 26th April, 2010. However before the hearing of the case could commence formally before me the accused’s counsel **Mr. Kaburi** intimated that he had filed a constitutional challenge to the proceedings. He prayed to the court that he be allowed to prosecute the constitutional reference first. **Mr.**

The Constitutional reference was dated 12th April, 2010 and was filed in court on the same day. It was filed pursuant to the provisions sections 72(3)(b) and 84(1) of the Constitution of Kenya and rules 11 to 24 of **The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High court practice and Procedure rules.**

From the reference these facts emerge and which in the main inform the accused’s complaint. The accused was arrested on 11th September, 2008 and held police custody until 23rd September, 2008 when he was presented before the Deputy Registrar of this court and the taking of his plea was thereafter scheduled for 8th October, 2008. Thus the accused was held in police custody for 44 days. That contravened the accused’s fundamental rights and freedoms and more particularly, the rights under section 72(3) (b) of the Constitution of Kenya. No explanation for the delay reasonable or otherwise was rendered to him by the prosecution. All statements by witnesses were recorded and post mortem

conducted on the body of the deceased by 12th August, 2008. Thus the failure by the police to take the accused to court until 23rd September, 2008 was inexplicable and an abuse of office and constituted deliberate and willful infringement of the accused's mandatory constitutional rights. That it was incumbent upon the police officers at Migori police station to take the accused to court within 14 days as provided for in the constitution. However their failure aforesaid breached his rights which were grossly trampled upon thereby occasioning him great prejudice that can only be cured by an order of acquittal by this court.

The state on being served with the reference reacted by filing a replying affidavit through police constable **Abul Warid**. He also confirmed that the accused was arrested on 11th August, 2008. He confirmed further that it was not until 23rd September, 2008 that he was arraigned in court. In his estimation there was a delay of about 30 days. However he explained away the delay on the basis that he had to take the accused for assessment of his mental fitness to stand a trial. However the said assessment took too long to be carried out as the doctor at Migori district hospital was not available until 5th September, 2008. Secondly, he deponed that there was also inadvertent delay of another six (6) days as he sought advice from the Attorney –General's office over the matter. To cap it all he swore that the delay aforesaid was inevitable in the circumstances. However it was not malicious and or intentional.

In support of the reference, **Mr. Kaburi** reiterated what was stated in the reference that I have endeavoured to set out in detail elsewhere in this ruling. Suffice to add that in so far as the replying affidavit was concerned it confirmed that the investigations were complete and done with by 8th September 2008. By then 30 days had elapsed. Yet the accused was brought to court 18 days later: Counsel placed much reliance on the following authorities:-

- 1) **Albanus Mwasia Mutua V Republic .C.A.120 of 2004(UR)**
- 2) **Gerald Macharia Githiku V Republic C.A 199 of 2004 (UR)**
- 3) **Paul Mwangi Murunga V Republic C.A 35 of 2006 (UR)**

On his part, **Mr. Gitonga** learned senior state counsel, whilst conceding to the delay nonetheless submitted that the delay had been explained. Further that even if there was delay, the court is called upon to balance the rights of the accused and those of the victim of the accused's alleged acts. In any event, the accused had a remedy pursuant to section 72(6) of the Constitution since he could always sue for damages.

Section 72(3) of the constitution of Kenya provides interalia:-

“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 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 reasonable 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 reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”***

From the foregoing it is clear that a person charged with capital offence such as the accused herein is required to be brought to court within fourteen days of his arrest failing which he has to be arraigned in court as soon as is reasonably practicable. So that it is not every delay that would lead the court to hold that the accused's constitutional rights had been violated. The constitution recognizes that there are

certain circumstances which may very well make it impossible to bring a suspect to court within the set time lines. However, in the event of such delay, duty is cast upon the detaining authority to give the explanation. But again not every explanation will suffice. In the case of **Fanxi & Others .V. the Attorney General, Misc.Criminal application number 860 of 2007(UR) Ojwang J** attempted to define the kind of explanation that may resonate with to court. He stated thus:-

- i) The explanation must carry elements of objective reasoning.*
- ii) Explanation must make sense in the light of special circumstances of the case*
- iii) The explanation must be made bonafide, and not merely as a technicality in aid of the prosecution.*
- iv) The explanation should show such operational difficulty as may have prevented timeous arraignment of the suspect in court.*
- v) The explanation should show clearly that the arresting authority did exercise genuine professional care in conducting the investigations preceding the arrest.*

I entirely agree and endorse the aforesaid sentiments. However in dealing with the question of violation of Constitutional rights and in particular on issues of delay, it must be appreciated as correctly submitted by **Mr. Gitonga** that the court is dealing with two competing Constitutional rights: the right to ensure that crime where detected, perpetrator identified he should be prosecuted and if successful he should be appropriately punished. For he too has violated the rights of the complainant(s). On the other hand it is equally the duty of the court to uphold the Constitutional and fundamental rights of such accused person(s). That is what the court of appeal stated in the case of **Albanus Mwasia Mutua (supra)** when it delivered itself thus:-

“We must admit that the matter has caused us some considerable thought and anxiety. On the one hand is the duty of the courts to ensure that crime where it is proved, it’s appropriately punished. This is for the protection of society; on the other hand it is equally the duty of courts to uphold the rights of persons charged with criminal offences particularly the human rights guaranteed to them under the constitution”

Besides the foregoing, it must also be appreciated that a suspect who claims that his Constitutional rights have been violated has under the same Constitution a remedy, he can always sue for damages.

The explanation given by the state for the delay herein is two pronged: the unavailability of the Doctor to assess, the accused mental status in good time and secondly, there was delay in accessing the Attorney General’s input in the matter. I do not buy any of these explanations however. First, the accused could have been taken to any other medical practitioner in town or indeed any other Government hospital for the mental assessment. Indeed nothing prevented the police officers from taking the accused to Homa Bay District Hospital, Kisii District hospital or even Kisumu Provincial Hospital for such exercise. It is the height of impunity for police officers to detain a suspect in their cells for a period in excess of that permitted in the law under the pretext that they were waiting the availability of the doctor. With a bit of ingenuity and resourcefulness, the police will have been able to have the accused mentally assessed without having to wait until the doctor in their neighbourhood availed himself. Further I note that the accused was eventually seen on 5th September, 2008 by the doctor for that purpose. However, he was not soon thereafter taken to court to take the plea. It took another 18 days to have him so arraigned. That delay from 5th to 23rd September, 2008 respectively has not been explained away at all.

As for the delay emanating from the Attorney General’s office, the assertion is ambiguous. There is no explanation at all as to what precipitated the delay. Indeed there is no evidence even that the police ever sought any advice from the office of the Attorney General. There is nothing to suggest that they ever forwarded their file to the Attorney General for advice; If so when? There is also nothing to suggest that the Attorney General ever gave any advice and if so when? The upshot is that the allegation of delay

attributed to the Attorney General's office remains a bare and mere allegation.

Under section 72(3) of the Constitution the police were entitled to hold the accused in custody for 14 days as he had been arrested for a capital offence failing which to bring him to court as soon as was reasonably practicable. The police, prima facie, in detaining the accused for thirty (30) or so days before arraigning him in court did so for a period beyond that permitted by the Constitution nor can it be said that he was thereafter brought to court as soon as it was reasonably practicable. The burden to explain the delay was on the prosecution.

In the recent case of **Paul Mwangi Murunga (ibid)** the court of appeal observed :-

“This appellant was held in unlawful custody for some ten days and no explanation for that delay is forthcoming either from the record or from the prosecuting counsel. In the case of ALBANUS MWASIA MUTUA .V. REPUBLIC Criminal Appeal no. 120 of 2004, (unreported) the court suggested some examples of what might amount to an acceptable explanation for the delay. It may be that upon arrest and on being taken to the police station the accused person fell ill, was taken to hospital and was admitted and kept there in excess of the period allowed. Or it may be that the accused person was arrested on a Friday evening and as our courts do not work on weekends and it being not possible to release the accused on bail, he is brought to court on the next working day. Or it may be that the court-house is far from the police station and the station vehicle broke down or had no fuel. 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. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the court in MUTUA's case.

In view of the foregoing, I am satisfied that there was not or no acceptable explanation why the accused was not taken to court within fourteen (14) days of his arrest or so soon thereafter as was practicable. Accordingly I find merit in the reference and allow it. The information preferred against the accused is quashed with the consequence that the accused is acquitted. Unless he is otherwise lawfully held, he should be set at liberty forthwith.

Ruling dated, signed and delivered at Kisii this 30th June, 2010

ASIKE-MAKHANDIA

JUDGE