



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Case 43 of 2004

REPUBLIC PROSECUTOR

VERSUS

FRANCIS KUBAI M'KIOME 1ST ACCUSED
MOSES NDANDU MWITO 2ND ACCUSED

RULING

The accused herein were charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. At the conclusion of the prosecution case, the accused raised a preliminary objection alleging that their constitutional rights were violated because they were kept in the police custody before being presented to court for a period in excess to that which was provided under the old constitution. The evidence of their arrest was adduced by PW7 Cpl. Mohammed Galo on 29th September 2007. PW7 in giving evidence stated that on the 3rd April 2004 someone went to Kibirichia Chief's Camp at 5pm. That person gave him a note written by the O.C.S. which note stated that his relative, that is, the relative of the bearer of the note had been murdered. The bearer of the note stated to PW7 that the second accused in respect to that murder had been seen. PW7 accompanied the person with a note and arrested the 2nd accused. The 2nd accused then led them to where the 1st accused was. The 1st accused was also arrested. PW7 on arresting both accused persons, took them to Maua Police Station. Both accused after the arrest were presented before court on 16th June 2004. The period between the date of their arrest and the date they were presented before court was a period in excess of 14 days that was envisaged in the old constitution that is, section 72 (3) (b). That section provided as follows:-

It is because of the alleged violation of that section that the accused seek that this court will find that the charge of murder cannot stand and they seek their acquittal. The jurisprudence of the cases in interpreting that section and where it was found that an accused persons rights had been violated was that the court found that such an accused was entitled to an acquittal. To mention but a few of those cases is as follows:-

Albanus Mwasia Mutua Vrs. Republic Criminal Appeal NO. 120 of 2004, where the court of appeal stated:-

“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 Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. 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.”

Thomas Patrick Gilbert Cholmondeley Vrs. Republic HCA No. 116 of 2007 and stated as follows:-

“The rights of an accused person are considered to be so important that they are protected under section 77 of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association. We know who is capable of locking up individual Kenyans in the Nyayo House Dungeons. We know who is capable of telling Kenyans: “If you rattle a snake you must be prepared to be bitten by it”. It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed in sections 70 to 82 inclusive of the Constitution.”

Gerald Macharia Vs. Republic [2007] e KLR.

“.....That although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged we nevertheless do consider that the failure by the prosecution to abide by the requirement of Section 72(3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before court as soon as was reasonably practicable.....”

The state was unable to secure the attendance of PW7 to give further explanation for that alleged delay in detention at the police station when the matter was raised by the accused at the conclusion of the prosecution’s case. Therefore, there remains no explanation in respect to the accused prolonged detention at the police station. We are now however under a new dispensation with the passing into law of the new constitution on 27th August 2010. That constitution in Article 49 (1) provides that an arrested person should be presented before court as soon as reasonably possible and not later than 24 hours. The pertinent parts of that article are as follows:-

- “49 (1) An arrested person has the right –**
(a) to be informed promptly, in language that the person understands, of –
(i)
(ii)

- (iii)
- (b)
- (c)
- (d)
- (e).....
- (f) *To be brought before a court as soon as reasonably possible, but not later than –*
- (i) *Twenty-four hours after being arrested; or*
- (j) *If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*

Article 23 of the constitution provides that were a persons fundamental rights are violated the court may grant various reliefs. Article 23 (3) provides as follows:-

“23 (3) In any proceedings brought under Article 2, a court may grant appropriate relief, including –

- (a) *A declaration of rights*
- (b) *An injunction*
- (c) *A conservatory order;*
- (d) *A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24*
- (e) *An order for compensation; and*
- (f) *An order of judicial review*

It is clear from that provision that the accused have a right to seek compensation for the violation they allege of prolonged detention at the police station. That being so, I decline to order the acquittal of the accused as they seek. The accused are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Prosecution after calling 8 witnesses closed its case. I have considered the evidence adduced by prosecution and I find that prosecution has shown a *prima facie* case sufficient to put accused persons to their defence. I now therefore inform the accused of their right to address the court either personally or by their advocate, to give evidence on their own behalf, or to make an unsworn statement, and to call witnesses in their defence.

Dated and delivered at Meru this 8th day of October 2010.

MARY KASANGO
JUDGE