

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

Criminal Case 99 of 2005

REPUBLIC

-VS-

SIMON MUCHAI MUGA

RULING

The accused has been charged for the offence of murder, contrary to Section 203 as read with 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence as stated on the information are as follows:

“On the 24th November, 2004 at Matopeni area in Kawangware, Nairobi within the Nairobi Area, murdered FRANCIS MACHUA.”

From the record, it is apparent that the accused was first arraigned in court on 17th October, 2005. Consequently, the accused was accorded a defence counsel and assessors were selected accordingly. On 23rd April, 2007, the trial started in earnest and the prosecution eventually availed six witnesses. However, on 14th May, 2008, Mr. Oyalo informed the court that the defence were praying for a hearing date for a preliminary objection. Thereafter, the court conceded to the request and the said application was eventually heard on 2nd December, 2008. During the hearing of the same, Ms Sirma submitted that the accused was arrested on 24th November, 2004 and thereafter was arraigned in court on 1st November, 2005. She calculated that the accused was held in custody for a total of 342 days and hence there was gross violation of his rights as stipulated under Section 72 (3) of the Constitution. Ms Sirma was specific that the accused was brought to court after eleven months and that the prosecution has not offered any explanation. She reminded the court that the prosecution can only hold a suspect for 14 days in relation to murder and if there is a delay, the burden to explain the same lies on the prosecution. She further referred the court to Sec.71 (4) of the Constitution that allows the State to seek on extension after expiry of fourteen days. She lamented that the prosecution never applied for an order for that extension to allow them complete investigations. In addition to the above, Ms Sirma also submitted that Section 77(1) of the Constitution that guarantees a suspect – a fair trial within a reasonable period was also violated. It is on that note that the defence counsel urged this court to declare the case – a nullity and thereafter released the accused.

On the other hand, the State through Mr. Ong’ondo opposed the application on the ground that by the time the defence counsel gave notice of the preliminary objection, they had only remained with two witnesses. He urged the court to find that the proceedings are very advanced and that the same should not be terminated at this stage. He was of the view that the objections should have been raised much earlier. In support of his submissions, he quoted the case of

DOMINIC MWALIMU –VS- REPUBLIC

CRIMINAL APPEAL NO.217 OF 2005

In the said case, the Court stated that any allegation should be raised at the earliest opportunity. In addition to the above, he also quoted the case of

REPUBLIC –VS- JOSEPH NUNGARI

STEPHEN NUNGARI

CRIMINAL CASE NO.42 OF 2006

In his concluding submissions, Mr. Ong’ondo admitted that the accused was arrested on 24th November, 2004 and later arraigned in court on 17th October, 2005. Despite the above, he emphasized that the application was filed too late and hence the case should proceed.

This court has carefully considered the submissions made by both learned counsels. That apart, I have also considered the evidence and all the quoted authorities. From the above, it is obvious that the accused was actually arrested on 24th November, 2004 and thereafter held in custody till 17th October, 2005 when he was arraigned in court. Apparently, that is a period of about eleven months. Unfortunately, the prosecution never bothered nor attempted to give any reason whatsoever – why the accused was held for such a long period of time without being arraigned in court. It is not sufficient for the prosecution to state that the case is very advanced whereas they are aware that they have not availed even a single eye witness. Apart from the above, it is apparent that the investigating officer was neither called to explain the delay nor swear an affidavit in relation to the same.

Given the above, I hereby find that there was gross violation of the constitutional rights of the accused as envisaged under Section 72 (3) and Section 77 of the Constitution of Kenya. Apart from the fact that the accused was unlawfully held, he was also denied a fair hearing within a reasonable time by an independent and impartial court established by law. The upshot is that I hereby declare the proceedings null and void *ab initio*. In addition to the above, I hereby “**acquit**” the accused of the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code. The accused should be released forthwith unless held lawfully. Those are the orders of the Court.

MUGA APONDI

JUDGE.

Ruling read, signed and delivered in open court in the presence of the accused; Kangahi for Ms Sirma Defence Counsel and Ong’ondo State Counsel.

MUGA APONDI,

JUDGE.

10TH FEBRUARY, 2009.