



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 85 of 2006

REPUBLIC.....APPLICANT

-VS-

MATIPET KOSHAI PARKO.....DEFENDANT

RULING

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

“On the night of 24th September, 2004 at Kumpa

Masai reserve within Kajiado District in Rift Valley

Province, murdered LETEIYO NKURUMA.”

From the record, it is apparent that on 17th May, 2007, the court selected three assessors and the case started in earnest. Consequently, the court heard seven witnesses on diverse dates. However, on 20th May, 2008, the defence counsel viz, Mr. Muoki applied for a further mention on the ground that he was under instruction to file a preliminary objection. During the hearing of the same, he submitted that the accused’s right to a fair trial had been breached. According to Mr. Muoki, the accused was arrested on 24th July, 2006 and was thereafter held in police custody without trial for 57 days. Subsequently, the accused was first arraigned in court on 18th September, 2006. Mr. Muoki was the view that the rights of the accused were blatantly violated together with his freedom under Section 72 (3) of the Constitution of Kenya. Apart from the above, he also submitted that the rights of the accused to a fair trial within a reasonable period was also violated. In support of the application, he referred the court to the annexed affidavit that is dated 28th May, 2008. Besides the above, he also submitted that the delay was not justified given the circumstances of the case and that the investigating officer did not bother to give any reasons as required by the law. He pointed out that the above trampled upon and contravened fundamental rights of the individual. Further to the above, he submitted that the proceedings are null, void and that the same should be nullified and the accused be discharged forthwith. In addition to the above, Mr. Muoki also submitted that the accused was tortured and was **not** allowed access to his counsel and relatives. He was also of the view that Section 16 of the Constitution of Kenya required that the Attorney-General should respond through an affidavit – though this was not done despite passage of six months. He emphasized that the duty to explain the delay lies squarely on the prosecution as per Section

72 (3) of the Constitution of Kenya – and the same does **not** shift to the accused.

On the other hand, the State through Mr. Ong’ondo, State Counsel opposed the application on the ground that the case was filed in the year 2006. He also pointed out that before the accused took the plea, he was provided with a counsel to represent him in court. Besides the above, Mr. Ong’ondo also submitted that after the case was set down for hearing, the prosecution availed seven witnesses from Kajiado. The said witnesses were later paid traveling and subsistence allowances. He opposed the application since the issues were not raised at the earliest opportunity. In support of his submissions, he quoted the following authorities:

DOMINIC MUTIE MWALIMU –VS- REPUBLIC

CRIMINAL APPEAL NO. 217 OF 2005

In the above case, the Court of Appeal stated that there must be an allegation of breach that must be raised at the earliest opportunity. Mr. Ong’ondo also quoted the case of

REPUBLIC –VS- JOSEPH MUNGAI & ANOTHER

CRIMINAL CASE NO.42 OF 2006

In the above case, the court stated that the application went to him belatedly before the prosecution closed its case. Mr. Ong’ondo also informed the court that they were only remaining with two witnesses. He was also of the view that the allegations made in this case have been done in a casual manner and trivializes the same. It is on that note that he urged the court to dismiss the allegations with the contempt that it deserves.

From the above, it is apparent that the accused was arrested on 24th July, 2006 and was first arraigned in court on 18th September, 2006. Within a period of two weeks, the accused had been accorded an experienced and qualified counsel to conduct his trial. Despite the above, the accused and defence counsel waited for almost three years before they filed the application. During that period, the prosecution had availed seven witnesses and only two are remained. Needless to state enormous resources have been expended to conduct the trial. Apart from the above, the court has also considered the nature of the evidence on record and feels strongly that the principles of justice and fair play would be better served by hearing the case to its logical conclusion. However, the court is sensitive and alive to the fact that the law assumes that the accused is innocent unless proved otherwise. By the end of the trial, it will be incumbent on the court to consider carefully all the evidence that has been adduced before it. Having gone through the case of

REPUBLIC –VS- JOSEPH NUNGARI

STEPHEN NUNGARI

CRIMINAL CASE NO.42 OF 2006

I hereby concur with the sentiments of Ojwang J. when he stated inter alia;

“After considering the submissions of counsel, and the relevant case law, as well as the depositions filed in Court, I have come to the conclusion that there is no cause to justify the termination of the trial proceedings, or to acquittal at an early stage of the accused persons. I have considered the constitutional obligations of this Court in the trial and criminal cases, the interest of the society in effective criminal prosecution, and the contentions of counsel on both sides; and I have come the conclusion that the trial ought to proceed to a logical conclusion, on the basis of rules of trial laid out in the Criminal Procedure Code (Cap.75, Laws of Kenya)

Though the above case was decided by a court of concurrent jurisdiction, I am persuaded and convinced

by the reasoning of the same In view of the above, I hereby dismiss the application since the same has no merits at all. In addition to the above, I hereby direct, which I do, that the case proceeds to its logical conclusion. Accused remanded in custody,

MUGA APONDI,

JUDGE.

Ruling read, signed and delivered in open court in the presence of the accused; Muoki Defence Counsel and Ong'ondo State Counsel.

MUGA APONDI

JUDGE.

3RD FEBRUARY 2009.

Court: Further hearing on 24th February, 2009. Accused remanded in custody.

MUGA APONDI,

JUDGE.

3RD FEBRUARY, 2009.