



REPUBLIC OF KENYA

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

Criminal Case 89 of 2007

REPUBLICPROSECUTOR

VERSUS

MARY AUMA.....ACCUSED

RULING

The accused/applicant, MARY AUMA, was, on 4/12/07 charged with the murder of ELIDAH ATIENO contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

The offence is alleged to have been committed on 16/9/2007 at Mathare 4B within Nairobi.

On 27/2/08 the accused, through a Notice of Preliminary Objection, challenged the legality of these proceedings in that the same violate her Fundamental Rights as enshrined in Sections 72(3) (b) and 77(1) of the Constitution, in that she was arrested on 16/9/07, but was not brought to court until 6/12/07, which was 68 days over and above the period of 14 days stipulated by Section 72(3) (b) of the Constitution.

That Section 72(3) (b) under which this application is brought provides that any person arrested/detained upon reasonable suspicion of having committed a capital offence must be brought to court as soon as is reasonably practicable, and at any rate, within 14 days of his arrest.

Any proceedings instituted after the expiry of the 14 days is illegal, null and void and the accused must be acquitted unless the prosecution can explain the delay to the satisfaction of the court.

On the basis of the foregoing facts – which are not disputed by the State, and the law, the accused urges this court to declare the proceedings a nullity and acquit her forthwith.

In support of her application the accused cited and relied on the following authorities.

HCCr.C No. 31 of 2008 – SIMON KAMAU KINYANJUI VS. REPUBLIC and HCCRC.NO. 82 of 2006 – SAMUEL MWAURA NJENGA VS. REPUBLIC.

In opposition to the application, the prosecution, while conceding the delay, relied on an Affidavit dated 19/5/08, by Inspector Mkenyo Mwambodze, to explain the delay in bringing the accused to court outside the stipulated period of 14 days.

I have perused through the Affidavit and I have reached the following findings and conclusions. The reasons given by the prosecution vide the Affidavit, are that there was delay in finalizing the post mortem report, and getting through the process before they could bring the accused to court.

The Affidavit, in my view, does not offer any explanation for the delay. More so given that the eye witnesses to the alleged offence recorded their statements the day after the alleged offence was committed.

To fail to bring the accused to court within the Constitutionally permitted period of 14 days simply because the Postmortem Report was delayed by one of the agencies of the State, or the consent to prosecute was not granted in time, is not an acceptable explanation for failure to comply with Section 72(3) (b) of the Constitution.

What constitutes acceptable explanation for delay was extensively dealt with in Cr. Appeal No. 120 of 2004 – ALBANUS MWASIA MUTUA VS. REPUBLIC in which the court of appeal gave a non-exhaustive list of circumstances which are acceptable to the court, in the court's interpretation of the obligation placed on the State by Section 72(3) (b) of the Constitution.

Such circumstances include, **inter alia**., that the accused fell sick and was admitted in hospital during the 14 days and hence could not be brought to court; that there was no court of competent jurisdiction near by to which the accused could have been brought before the expiry of the 14 days; or that the vehicle carrying the accused to the court broke down on the way and it was not possible to reach the court before the time had expired.

Granted each case has its own unique and or peculiar facts and circumstances. But for the reasons explaining the delay to be acceptable, they must be either one or other on the list given above, or reasons **pari materia** thereto.

I have examined the affidavit relied upon by the prosecution to explain the delay in this case, and my finding and conclusions are that the same fall far short of the test set in the MUTUA case, **supra**.

Accordingly, I hold and conclude that the delay is both conceded and unexplained by the police. To that end the rights of the accused as per Section 72(3) (b) of the Constitution were violated and these proceedings are a nullity as they have their genesis in an illegality.

I thus acquit the accused and order for her immediate release unless she is otherwise lawfully held.

DATED and delivered in Nairobi this 28th Day of April, 2009.

O.K. MUTUNGI

JUDGE