



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 10 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

MWADUNDU MWAVADU NYAE.....ACCUSED

RULING

On 1st September 2008, Mr. Alwenya, counsel acting on the accused's instructions, filed a Notice of Preliminary Objection based on the ground that the accused's constitutional rights as enshrined in Section 72 (3) of the Constitution have been violated in that the accused was not produced before a court of Law within fourteen (14) days as required by the constitutional provisions. The objection was canvassed before me on 25th February 2009. Mr. Alwenya submitted that the accused was arrested on 22nd April 2006 and was not arraigned in court until the 25th May 2006 which was twenty days after the statutory period of fourteen (14) days. Counsel further contended that that delay had not been satisfactorily explained by the prosecution in the replying affidavit sworn by Corporal Steven Savali, the Assisting Investigating Officer. Counsel identified what he considered weak points of the affidavit and contended that notwithstanding the explanation proffered, there had still been a violation of Section 72 (3) (b) of the Constitution and the accused should be acquitted. Counsel invoked the Court of Appeal decisions in **Albanus Mwasia Mutua – v- Republic: CR APPEAL NO. 120 OF 2004 (UR)** and **Paul Mwangi Murunga – v – Republic: CRA NO. 25 OF 2006 (UR)**.

The preliminary objection was opposed by the Republic. Mr. Ondari, the Learned Assistant Deputy Public Prosecutor, submitted that the delay in arraigning the accused had been satisfactorily explained by the said Assistant Investigating Officer in his replying affidavit. Counsel invoked the decision of the Court of Appeal in **Dominic Mutie Mwalimu – v – Republic: CR Appeal No. 217 of 2005 (UR)** which disapproved of complains based upon the Constitution being lodged late. In counsel's view, each case had to be decided upon its own peculiar facts and circumstances.

I have considered the contending stand points of counsel, on the accused's preliminary objection and I have given due consideration to the relevant case Law. I am in agreement with the principles set out in the case of **Dominic Mutie Mwalimu – v – Republic (supra)**. One of the principles is that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable. Another principle is that where there is a complaint of breach of the constitutional provisions regarding delayed arraignment, the prosecution can still prove that the suspect was brought to court as soon as was reasonably practicable notwithstanding that he was not brought to court within the time stipulated by the Constitution. Yet another principle is that whether there has been breach of the Constitutional provisions will depend on evidence.

In this case the facts are really not in dispute. There is no dispute that the accused was arrested on 22nd April 2006 and was arraigned in court on 25th May 2006. There was therefore a delay in arraigning the accused before the court. But the Assistant Investigating Officer has explained the delay in some detail. Mr. Alwenya contended that the delay between 15th May 2006 and 25th May 2006 had not been satisfactorily explained. During that period, the Assisting Investigating Officer deponed that he twice traveled from his station to the Attorney General's Chambers for advice and pursuant to the advice he received, further witness statements were to be recorded which event caused the delay. To my mind, that explanation is not unreasonable. In any event, the factual position as given by the Assisting Investigating Officer was not rebutted by the accused in a further or supplementary affidavit.

This case is distinguishable from the **Albanus Mwasia Mutua Case** where a delay of eight months was not explained by

the prosecution. The case of **Paul Mwangi Murunga – v – Republic (supra)** is also distinguishable as in that case a delay of ten (10) days was not explained.

Taking all circumstances into consideration, I have come to the conclusion that the prosecution has given a satisfactory explanation for the delay of twenty (20) days in bringing the accused before the court. It is also desirable that such complaints as have been made by the accused be made at the earliest opportunity. The advantages would be twofold: the prosecution are given an early opportunity to explain the delay and the proceedings would not be continued in vain. The accused herein was arraigned on 25th May 2006. The present counsel represented the accused on 19th June 2006, when the accused's plea was taken. There was no complaint raised at that time. Even when the trial commenced before Maraga J on 29th May 2007, no complaint was made regarding the accused's trial rights. Proceedings before any court should not be in vain and late complaints should be discouraged.

I am further alive to the fact that the accused is facing the ultimate charge of murder and his rights under the Constitution must be weighed against other rights equally enshrined in the Constitution. There is also the public interest aspect of the trial which must also be considered.

In the end, I have come to the conclusion that the accused was arraigned before court as soon as was reasonably practicable and there was no infringement of his Constitutional rights under Section 72 (3) (b) of the Constitution. The preliminary objection is therefore overruled.

The part heard trial proceedings shall be listed for further hearing on priority basis in view of the age of the case.

Order accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Accused and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

25TH MAY 2009