



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Case 38 of 2004

REPUBLIC PROSECUTOR

VERSUS

JAPHET MIRITI MUGAMBI ACCUSED

RULING

In the course of this trial and after the prosecution has called five witnesses, the accused person, through his counsel filed a notice of preliminary objection challenging the trial mainly on the ground that the accused person's constitutional right under section 72(3) of the Constitution was infringed.

Arguing the objection, counsel for the accused person submitted that the accused person, having been arrested in connection with a capital offence on 26th April 2004, ought to have been brought to court within fourteen (14) days; that instead he was brought before the court for the first time on 3rd July 2004, a delay, in his calculation, of thirty eight (38) days.

In response to the alleged delay, I.P. Musa Bwengo, the O.C.S. Timau Police Station has sworn an affidavit dated 23rd December 2008 in which he attributes the delay to the difficulties in tracing some of the witnesses who vanished after the incident; the delay in obtaining the results of blood samples and exhibits from the Government Chemist.

I have given close consideration to these submissions and hold the following view of the matter.

It is not disputed that the accused person was arrested in connection with the death of the deceased, Geoffrey Mworira on the night of 25th/26th April 2004 at Muteithia farm, Kirimara location, Meru. The evidence so far presented for the prosecution case is that on the night in question the accused person and the deceased were taking soda or wine at a bar together. That they left together. There is evidence also that the following day the deceased person's body was found with multiple stab wounds.

In the course of investigations, a jacket with blood stains and partly washed as well as a pair of blood stained trousers and safari boots (shoes) were recovered from the accused person's house. These were submitted for analysis to the Government Chemist. That the results of that analysis linked the accused person with the death of the deceased. The court has not called upon the accused person to make his defence as the prosecution has not closed its case.

It is trite law with the promulgation of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, that an accused person in a trial before the High Court can, at any stage, raise a Constitutional issue and the court seized of the matter may treat the same as a preliminary point, hear it and determine the same. It is on that score that the accused person has raised the alleged violation of his rights under section 72(3) of the Constitution. There is no dispute that the accused person was arrested on 26.4.2004.

Although learned counsel for the accused person submitted that the accused person was brought to court for the first time on 3rd July 2004, the record is clear that he appeared before Sitati, J. on 3rd June 2004, when his plea was taken. In computing the days for purposes of the law the courts must be guided by the provisions of section 57 of the Interpretation and General Provisions Act.

In particular, in computing the days from the happening of an event or doing of an act, the day of the event or act is excluded. Also excluded are Saturday, Sunday and public holidays.

It follows from this that if the accused person was arrested on 26th April 2004, the police ought to have presented him before the court on 14th May 2004, fourteen (14) days, computed in accordance with the above provisions of the Interpretation and General Provisions Act.

He was instead brought to court on 3rd June 2004, some fourteen (14) days later. On the authority of recent numerous decisions of the Court of Appeal and the High Court, it is settled that the onus of demonstrating that the accused was presented before the court as soon as was reasonably practicable in the circumstances of the case is upon the prosecution. See Ndede V. R. (1991) KLR 567. See also Albanus Mwasia Mutua V. R. Criminal Appeal No. 120 of 2004.

It is also settled that so long as the prosecution offers a plausible and reasonable justification for holding the accused beyond the prescribed period it will have discharged the burden of showing that the accused was presented as soon as was reasonably practicable.

In the matter before me, the prosecution has offered two grounds as justification for holding the accused person for fourteen (14) days after the period allowed. It is deposed that the witnesses disappeared and some have not been traced to date. Secondly that the Government Chemist report was delayed.

Learned, counsel for the State submitted that so long as the State offers an explanation that *per se* is sufficient discharge of the burden on the State. While the State is required to explain the circumstances leading to the delay in presenting the accused to court in accordance with the law, that explanation must be sufficient and reasonable. The issue at hand being an alleged violation of a Constitutional right.

It is my view that the prosecution ought to have deposed to facts such as the date the exhibits were submitted to the Government Chemist and when the report was received.

It also ought to have provided the details of the witnesses said to be at large. But more significantly the prosecution has not explained what prevented the police from seeking extension of time in terms of section 72(4) of the Constitution if indeed the police were encountering huddles in investigations.

I find that no sufficient or reasonable explanation has been provided for holding the accused person for fourteen (14) days from the date he ought to have been brought to court. The trial is therefore a nullity and the accused person acquitted and shall be set at liberty forthwith unless for any other lawful cause he is held.

Dated and delivered at Meru this 22ndday of ...May... 2009.

W. OUKO

JUDGE