REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 68 of 2004

REPUBLIC..... PROSECUTOR

VERSUS

1. **ELIZABETH WAITHIRA MARY…….. 1ST ACCUSED**

2. **ELISPHER MUTHONI …….. 2ND ACCUSED**

R U L I N G

The application before me was commenced by way of a Notice of Preliminary Objection dated 14th July 2008. It is an application that has been brought pursuant to the provisions of Sections 23, 72(3) (b) and 77 of the Constitution of Kenya.

The accused persons assert that their constitutional rights had been violated, because they were held in police custody for two months and 23 days before being taken to court.

Their period of incarceration is said to run from 26th February 2004 upto 19th May, 2004.

As far as the applicants are concerned, the delay in taking them to court was not justifiable in the circumstances of this case. In any event, the state had not offered any explanations for the delay. Therefore, the applicants asserted that the prosecution had failed to exhibit judicial competence.

The applicants did submit that the delay constituted a flagrant violation of their constitutional rights to a speedy trial. Therefore, as far as they were concerned, the charge sheet had thereby been rendered null and void.

I was therefore invited to nullify the charge sheet, strike out or dismiss the charge, and acquit the applicants.

In that respect, the applicants relied on the authority of **REPUBLIC VS ANTONY MAINA MUIRURI, CRIMINAL CASE NO. 7 of 2007.**

The applicants also submitted that apart from violating their rights under Section 72(3) (b) of the Constitution, the delay in bringing them before a court of law also constituted a violation of their rights under Section 77 of the Constitution.

But the applicants readily conceded that the violations of their constitutional rights does not, ipso

facto, guarantee them an acquittal. However, as the state had failed to offer any explanation for the delay in taking them before court, they believe that that now entitles them to an acquittal.

In answer to the application, the state pointed out that although the plea was taken on 19th May 2004, the applicants had earlier been taken to court, on 11th May 2004.

Even though the applicants were taken to court on 11th May 2004, the state did not suggest that that date was within the 14 days' period, as provided for in Section 72 (3) (b) of the Constitution.

Therefore, it is not only conceded but also an irrefutable fact that the applicants were held in police custody for 2 months and 15 days before they were first taken to court.

If the state were to assert that regardless of the delay, the applicants were nonetheless taken to court as soon as was reasonably practicable, then the state would have had to place facts before the court, to try and persuade the court in that regard.

Mr. Ong'ondo, learned state counsel submitted that the state could lead such evidence either orally or by away of an affidavit.

Although the applicants did not address me on that issue, I do however hold the view that the position taken by the state was not accurate. My said view is informed by the provisions of Rule 16 of **The Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006,** which reads as follows;

"**The Attorney General or the respondents, as the case may be, shall within fourteen days of service of the petition, respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit."**

Of course, I am alive to the fact that in this instance, the court was not moved by a petition. But Rule 23 expressly stipulates that where a constitutional issue arises in a matter which was before the High Court, the court may treat such issue as a preliminary point, and shall hear and thereafter determine such issue.

In effect, the only way that the Attorney General or the respondent could offer an explanation, in answer to the application, would be by way of an affidavit. It follows, therefore, that there was no room for an oral response.

The second issue raised by the state was that the application ought to have been raised at the earliest opportunity. In support of that submission, the respondent relied on **DOMINIC MUTIE MWALIMU VS. REPUBLIC, CRIMINAL APPEAL NO. 217 OF 2005.**

In that case, the Court of Appeal expressed itself thus, at page 8 of its judgment;

"**Additionally, a careful reading of Section 84(1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity."**

In this case, the plea was taken on 19th May 2004. After receiving evidence from all the prosecution witnesses, and after giving due consideration to the submissions from both the advocate for the accused persons and the learned state counsel, the trial Judge held that both the applicants herein had a case to answer.

Although the trial court did put the applicants to their defence on 20th August 2007, it was not until 14th July 2008 that the applicants filed this application.

It follows, therefore, that the application was not brought at the earliest opportunity, as it ought to have been.

In the circumstances, if the application were to be allowed, it would imply that all the time expended by the court, the witnesses and both the state counsel and the advocate for the accused had been in vain.

Presently, all that remains is for the applicants, in their capacities as the accused persons, to put forward their defences, in any such manner as they may deem appropriate. They could choose to remain silent, or they could give unsworn testimony, or, thirdly, they could give sworn evidence. The accused persons may also choose to call other witnesses.

But whatever manner they choose to respond to the case made out against them, it is obvious that the trial is literally at its tail-end. Therefore, it cannot be said that the issue being raised now is a preliminary one.

In the event, and on the authority of **DOMINIC MUTIE MWALIMU V. REPUBLIC** (supra), this application must fail, on that basis.

It is to be noted that in **REPUBLIC VS. ANTHONY MAINA MUIRURI & ANOTHER, CRIMINAL CASE NO. 7 OF 2007,** the first accused was arrested on 29th October 2006. He was first arraigned in court on 14th February 2007, but it was not until 28th June 2007 that the trial commenced. But after two witnesses testified, the case was adjourned on several occasions, for different reasons.

Significantly, the case was consolidated with another one, so as to bring on board, the second accused. A fresh plea was then taken, in compliance with the law. And on the same date, the advocate indicated that he wished to prosecute an application pursuant to Section 72(3) of the Constitution.

In those circumstances, the issue as to the alleged violation of the constitutional rights of the accused, can be said to have been raised at the earliest opportunity.

That case is therefore distinguishable from the one before me now.

The respondent submitted that pursuant to Section 70 of the Constitution, the rights of the two applicants herein were subject to the rights of others. This court was therefore told that the only way of actualizing that provision of the constitution, was by allowing the case to proceed to its logical conclusion. In the meantime, the applicants were told that they could invoke Section 72(6) of the Constitution, to seek compensation.

Mr. Kinuthia, learned advocate for the accused persons submitted that Section 72 (6) was inapplicable to this case because the accused are facing a capital offence. He said that if his clients were to be convicted, they could not thereafter be compensated, as the mandatory sentence upon conviction for murder, is death.

First, it is my view that Section 72(6) does not distinguish between capital offences and other offences.

Secondly, just as happens in civil cases in which there had been fatalities, compensation can be paid to the estate of the deceased, if in this instance the accused were to be convicted and later hanged.

For all those reasons, I find no merit in the application. It is therefore dismissed.

It is further ordered that the case may now proceed to the stage in which the accused persons shall put forward their respective defences.

Dated, Signed and Delivered at Nairobi, this 30th day of June, 2009.

FRED A. OCHIENG

JUDGE