



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Case 9 of 2007**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARTIN MAHINDA WAWERU.....ACCUSED**

**RULING**

The accused is charged that on the 5<sup>th</sup> day of April 2007, at about 3.30 p.m., at Mishomoroni, in Mombasa District of Coast Province, he murdered Christine Wangari Njuguna. Although the information is dated and was lodged on 18<sup>th</sup> May 2007, the accused actually appeared before Sergon J on 21<sup>st</sup> May 2007. On the face of it the accused was in custody for 1<sup>1/2</sup> months before he was charged before court. It is therefore not surprising that on 17<sup>th</sup> September 2007, the accused, through his counsel, lodged a notice to dismiss the charge pursuant to section 72 (3) (b) of the Constitution on the following grounds:-

- (a) That after the arrest of the accused on 5<sup>th</sup> April 2007, he was not arraigned in court within 14 days or a reasonable period.**
- (b) That the accused was admitted in hospital from the date of his arrest upto 13<sup>th</sup> April 2007 when he was discharged as evidenced by the discharge card.**
- (c) That the accused should have been arraigned before court by 29<sup>th</sup> April 2007.**
- (d) That the accused was brought to court on 21<sup>st</sup> May 2007 and that was after his counsel had complained.**

In opposition to the said notice, the prosecution filed a replying affidavit sworn by Joseph Ringera, the Investigating Officer in the case. In the affidavit, it is admitted that the accused was indeed arrested on 5<sup>th</sup> April 2007 and was immediately admitted to hospital between the said date and 13<sup>th</sup> April 2007. It is further deponed that the accused was taken back to hospital on 15<sup>th</sup> April 2007 for removal of stitches and further that between 16<sup>th</sup> April 2007 and 25<sup>th</sup> April 2007 the accused could not be assessed by a psychiatrist on his fitness to plead because the psychiatrist was out of Mombasa. It is then deponed that the accused was examined by the psychiatrist on 26<sup>th</sup> April 2007 but, according to the Investigating Officer, the accused appeared unwell and a Dr. Caleb of the Coast General Hospital advised that the accused stays in police custody to allow the wound to heal. The wound healed on 18<sup>th</sup> May 2007, according to the Investigating Officer, which date fell on a Friday.

In the Investigating Officer's view the earliest practicable time the accused could be arraigned in court was 21<sup>st</sup> May 2007 which was the date he was indeed so arraigned. The Investigating Officer therefore contends that the Constitutional rights of the accused were never violated.

The accused responded to that replying affidavit in an affidavit sworn on 20<sup>th</sup> April 2009. He deponed in the affidavit, *inter alia*, that by the 15<sup>th</sup> April 2007, when the stitches were removed, he had completely healed and the doctor did not advise that he stays in police custody. The accused reiterated that since the removal of the stitches he was kept in police custody for a period of five (5) weeks for unexplained reasons.

I have anxiously considered the contending stand points of counsel on the accused notice to dismiss the charge. I have on my own considered the relevant case Law on the subject as counsel made no reference to any authority save the Constitutional provisions. Those authorities conclude that under section 72 (3) (b) of the Constitution, the obligation is to produce an accused person within the periods limited thereunder failing which an explanation should be provided by whoever claims that the Law has been complied with. In **Albanus Mwasia Mutua – v – Republic: [Criminal Appeal No. 120 of 2004 (UR)]**, the Court of Appeal suggested some examples of what may amount to reasonable explanation for delay. Those examples have been given in subsequent cases. (See **Paul Mwangi Murunga – v – Republic: [Criminal Appeal No. 35 of 2006] (UR)**). Those examples are:

**It may be that upon arrest and on being taken to the police station the accused person fell ill, was taken to hospital and was admitted and kept there in excess of the period allowed. Or it may be that the accused person was arrested on a Friday evening and as our courts do not work on weekends, and it being not possible to release the accused on bail he is brought to court on the next working day. Or it may be that the court house is far from the police station and the station vehicle broke down or had no fuel. These are no more than examples which would and can provide the prosecuting authorities with an explanation to enable them discharge the burden placed on them by section 72 (3) of the Constitution. So long as the explanation proffered is reasonable and acceptable, no problem would arise.”**

It is plain therefore that each case will depend on its own peculiar facts and circumstances. The time the complaint is made will also be a factor to be considered. (See **Dominic Mutie Mwalimu – v- Republic: [Criminal Appeal No. 217 of 2005] (UR)**).

In the case at hand, it is not in dispute that the accused was arrested and immediately admitted in hospital after a self inflicted injury which, without the police intervention would probably have resulted in the accused losing his life. The accused remained in hospital upto 13<sup>th</sup> April 2007 when he was discharged but was taken back for removal of stitches on 15<sup>th</sup> April 2007. The Investigating Officer has sworn that between 16<sup>th</sup> April 2007 and 25<sup>th</sup> April 2007, he could not access the psychiatrist for the accused's mental assessment. He managed to have the accused so assessed on 26<sup>th</sup> April 2007. He exhibited a copy of the psychiatrist's report dated 26<sup>th</sup> April 2007. The Investigating Officer has further sworn that the accused still appeared unwell and obtained advise from Dr. Caleb of the Coast General Hospital that the accused be given time in police custody to allow his wound to heal which event happened on 18<sup>th</sup> May 2007 a Friday. In normal circumstances, the explanation of allowing the wound on the accused to heal in police cells would prima facie seem ridiculous. But not so in the circumstances of this case. The accused had attempted to take his own life and the police had saved him by taking him to hospital. Without police intervention, the accused would probably not be vigorously urging enforcement of his trial rights under the Constitution. It is in that light that the averment of the Investigating Officer, that on observing the accused on 26<sup>th</sup> April 2007 he did not appear well and on seeking advice from a Dr. Caleb, he kept the accused in police custody to allow the wound to heal, should be viewed. Given those circumstances, the explanation proffered by the prosecution is not altogether unreasonable.

I have, also considered the accused's Notice to dismiss the charge vis-à-vis other factors equally weighty and also protected by the Constitution. There are those who lost a dear one and expect the charge against the accused to be determined on evidence. Their expectation is a legitimate expectation. Murder is the

ultimate offence and determination thereof obviously is a matter of public interest and issues involving the public interest are recognized in the Constitution.

In those premises and taking into consideration all the circumstances surrounding this case, I am of the opinion that the accused's trial rights under section 72 (3) (b) of the Constitution were not violated by the prosecution. That being my view of the matter, the accused's Notice to dismiss the charge is declined. The case should now be listed for hearing on priority basis.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 8<sup>TH</sup> DAY OF JUNE 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Alwenya holding brief for Mr. Gakuhi for the Accused and Mr. Onserio for the Republic

**F. AZANGALALA**

**JUDGE**

**8<sup>TH</sup> JUNE 2009**