



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 97 OF 2006

REPUBLIC..... PROSECUTOR

VERSUS

ANNAH WAITHERA & 6 OTHERS..... ACCUSED

R U L I N G

The seven accused persons herein have moved the court by way of a Preliminary Objection dated 19th November 2004. By the said preliminary objection, it is contended that the constitutional and fundamental rights of the accused have been violated. They also say that their said rights continue to be violated and are likely to violate in the future, in these proceedings.

Because of the alleged violation of their constitutional and fundamental rights, the accused persons ask that the proceedings in this case be declared null and void.

They also say that after the proceedings are declared null and void, they should be acquitted of the offence of murder.

The reasons for raising the preliminary objection is that each of the accused persons had been in custody for more than 14 days before being taken to court. The first accused was allegedly arrested on 16th June 2004, but was not taken to court until 26th July 2004. The 2nd accused is said to have been arrested on 18th June 2004, but only taken to court on 26th July 2004.

The 3rd, 4th and 5th accused were said to have been arrested on 25th and 23rd June, respectively. But it was not until 17th July 2004 that they were first taken to court.

As for the 6th accused, it is said that he was arrested on 1st September 2004, but was then detained in police custody until 17th October 2004.

And the 7th accused was said to have been arrested on 20th July 2004, and later taken to court on 8th August 2004.

It is instructive that the affidavit in support of the preliminary objection herein was sworn by Mr. Charles Oyoo Kanyangi, Advocate. However, I hasten to add that the dates cited by him had been cited by the 1st and 2nd accused persons in their own respective affidavits, which had been filed earlier.

Those dates do not however agree with those cited by the Investigating Officer, Police Corporal JOHN MAINA NDIGA. He says that he was assigned the duty of investigating the case on 21st June 2004.

As at that date, it was only the 1st accused who was already under arrest in relation to the issue of a report that **HANNAH WANJIRU NJOROGE** was a missing person.

According to the Investigating Officer, the 2nd accused was arrested on 22nd June 2004; and not 18th June 2004.

Two days later, on 24th June 2004, the 5th accused was arrested. The 4th accused was also arrested on that date.

Whilst the 2nd and 5th accused were arrested by members of the public, who handed them over to the police stations at Lari and Tigoni respectively, the 4th accused was arrested by the Investigating Officer, at Mai Mahiu area of Naivasha.

After being interrogated, the 4th accused provided leads to the police, which led to the recovery of the body of the “missing person” at a waterfall on Kwa Wafura River, inside Kamae Forest.

According to the Investigating Officer, the body of the said “missing person” was suspended on a rope at the waterfall. It was therefore necessary for the Investigating Officer to organize for experts to attend at the scene, for purposes of retrieval of the said body.

The Investigating Officer also explained to the court that the Kamae Forest was filled with wild animals; and that he therefore had to organize for Forestry officials to provide security for the experts who were to retrieve the body.

In the process, the personnel from the Scenes-of-crime Department advised the Investigating Officer to involve the Chief Government Analyst, as the body was already badly decomposed.

Whilst the Investigating Officer was in the process of having the body retrieved, the 3rd accused is said to have surrendered himself to the police.

The Investigating Officer formed the considered opinion that it would not be possible to have the accused persons charged within the 14 days prescribed in section 72(3) (b) of the Constitution. He therefore filed an Apprehension Report before the Resident Magistrate’s Court, Kiambu. The said Apprehension Report was filed in court on 28th June 2004, which is the same day when the body was retrieved.

According to the Investigating Officer, the post mortem examination was carried out on the body of **HANNAH WANJIRU NJOROGE**, on 29th June 2004.

Meanwhile, immediately after the body was retrieved on 28th June 2004, the Investigating Officer commenced the recording of witness statements. The police file was then sent to the Attorney general, for his advice and consent.

Thereafter, according to the Investigating Officer, five of the accused persons were produced in court on 15th July 2004. Those five were exclusive of the 6th and 7th accused herein, because he had not yet been arrested by that date.

A perusal of the court records, reveals that on 15th July 2004, the six accused persons appeared before

Osiemo J. However, as none of the accused persons were represented by advocates, the learned Judge adjourned the case upto 22nd July 2004. In the meantime, the court directed the learned Deputy Registrar to appoint advocates for the accused persons.

When the matter was next in court, the five accused persons were represented by two advocates, Mr. Kariuki and Mr. Kanyangi, respectively. That was on 22nd July 2004.

Clearly therefore, the information provided by the accused persons are not accurate, in relation to the dates when five of them were first produced in court.

And whereas that, by itself, cannot imply that they also provided incorrect information regarding the dates when they were arrested, I can safely conclude that the basis upon which the preliminary objection was founded is not firm. The issue as to the dates would need to be first determined by the court, before the court can thereafter adjudicate on the issue of actual delay. Without having the benefit of evidence from both sides, the court does not have any basis upon which to determine the dates when the accused persons were arrested.

In this case, **ANNA WAITHERA MACHARIA, RUTH WANJIRU MAINA, JOSEPH KINYURU KIRIMBI, DANIEL NJOROGE KIMOTHO and ELIUD KIMANI MWAI** were cited in an Apprehension Report which was filed before the Kiambu Law Courts on 28th June 2004. Thereafter, on 4th September 2006, an Apprehension Report for **PETER CHEGE MWANGI** was filed before the Kiambu Law Courts.

The two Apprehension Reports were filed pursuant to section 36 of the **Criminal Procedure Code**, which provides as follows;

“When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring the person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:

Provided that an officer in charge of a station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.”

In my reading of that section, it is those persons who are in custody for non-capital offences who are to be either produced before a subordinate court within 24 hours or if that is not practicable, the officer in charge of the police station where the person is in custody, is to file an Apprehension Report.

However, that section also reiterates that;

“Where a person is retained in custody he shall be brought before a subordinate court as soon as practicable.”

To my mind, those words are significant because they are almost a restatement of section 72(3) (b), which requires that a person who is arrested or detained, and who is not released;

“shall be brought before a court as soon as is

reasonably practicable.....”

In the Constitution, the threshold of what amount of time is deemed reasonable is 24 hours for all non-capital offences, and 14 days for capital offences.

Section 36 of the Criminal Procedure Code is not in any manner inconsistent with the provisions of section 72(3) (b) of the Constitution. Both sections require that any suspect who is in custody be brought before the court as soon as reasonably practicable.

It does therefore appear to me that the filing of an Apprehension Report is not a substitute to bring a suspect, who is in custody, before a court. Had it been otherwise, then the police would simply go around the requirements of section 72(3) (b) by filing Apprehension Reports, but without bringing accused persons before the court.

In any event, the Criminal Procedure Code or any other Act of Parliament cannot purport to qualify the provisions of the Constitution, which is the supreme law of the land.

Reverting to the lengths of time that the accused persons spent in custody before being brought to court, my calculations show that;

- (i) *The 2nd accused, if she was arrested on 22nd June 2004, should have been taken to court by 7th July 2004; but she was taken to court on 15th July 2004.***
- (ii) *The 5th accused, if he was arrested on 24th June 2004, should have been taken to court by 9th July 2004, but he was taken to court on 15th July 2004.***
- (iii) *The 3rd and 4th accused, if they were arrested on 25th June 2004, they should have been taken to court by 10th July 2004, but were brought o court on 15th July 2004.***
- (iv) *The 1st accused, if she was arrested on 16th June 2004, should have been brought to court by 30th June 2004, but she was taken to court on 15th July 2004.***
- (v) *The 6th accused, if he was arrested on 1st September 2006, should have been brought before the court by 15th September 2006, but he was brought to court on 27th September 2006.***
- (vi) *The 7th accused, if he was arrested on 27th July 2004, should have been brought to court by 10th August 2004, and he was brought to court on 10th August 2004.***

If that be the factual position, it would imply that the 7th accused was brought to court within the prescribed period.

As for the 6th Accused, the explanation for taking him to court some 12 days late was that there had been a change of Judges at the High Court. In the light of the said changes, the state counsel advised the Investigating Officer to await further directions.

Given the fact that by the time of the arrest of the 6th accused, the witnesses had recorded their statements, and the investigations were complete, it means that there was no hindrance at all in having the said accused taken to court timeously. I therefore find and hold that the prosecution has not satisfied me that the 6th accused was brought to court as soon as was reasonably practicable. In effect, I do find that the constitutional rights of the 6th accused have been violated.

Meanwhile, as regards the 2nd, 3rd, 4th and 5th accused persons, I am satisfied that they were brought to court as soon as was reasonably practicable. I say so because of the unique circumstances prevailing in this case.

First, the police received a report of a “missing person.” It is at that stage that the 1st accused was arrested.

As investigations went on, the 4th accused was arrested, and it appears that he is the person who caused a major shift in the investigations. That is because he is said to have provided information which led to the tracing of the body of the person who had, until then, been considered to be simply missing.

Once the body was traced, the recovery proved to be challenging, because the body was suspended over a water-falls which was located deep inside a forest that is full of wild animals. And as if that was not enough of a challenge, the weather was also not friendly to those who went to retrieve the body of the deceased.

Given those circumstances, I find that even for the 1st accused, she too was brought o court as soon as was reasonably practicable. I say so because although she was arrested much earlier, at first she was only thought to be inked to the disappearance of the deceased. However, once the police found that the “missing person” was dead, it was not possible to bring the 1st accused to court until after the body of the victim was retrieved, and a post mortem examination carried out.

In the event, the preliminary objection raised by the 1st, 3rd, 4th, 5th and 7th accused persons is overruled. But the preliminary objection raised by the 6th accused person is upheld. In other words, this court does make a finding that the constitutional rights of the 6th accused have been violated, by his not being produced in court as soon as was reasonably practicable.

The next question is; what relief is the 6th accused entitled to; should he be discharged, acquitted or should he be compensated whilst he continues to face trial?

In **SHEM KARANJA WAIGWA Vs. REPUBLIC, MISC. CRIMINAL APPLICATION NO. 186 OF 2008**; Ojwang J., expressed himself thus;

“I would hold also that the wrong of prolonged detention of a suspect prior to being brought to court, is amenable, as the Court may determine, to acquittal, or to redress by compensation, in terms of S.72(6) of the Constitution. In the exercise of that inherent judicial discretion which is founded on the Constitution itself, there are different, but weighty factors to consider; the main ones would be: the suspect’s right to liberty; the complainant’s entitlement to the protection of the law; the public interest in freedom from criminal injury; the Constitutional mandate of courts to hear and determine issues in dispute; the recognized setting of the Court, acting on a proper ventilation of evidence, as the ideal arbiter for disputes.”

As the provisions of section 72 do not provide for the remedy of an acquittal of an accused on the grounds of the violation of the said provision, I presume that the holding above-cited was influenced and informed by the Court of Appeal’s decision in **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120 of 2004**, in which it was held as follows;

“The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge.”

Yet it cannot be ignored that in that case, the Court of Appeal did not make any reference to section 72(6) of the Constitution. The said court however emphasized that;

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place.”

As the Court of Appeal did not make any reference to the provisions of section 72 (6) of the Constitution, in the case of **ALBANUS MWASIA MUTUA**, I do not know if it would have arrived at

the same conclusion, if they had taken it into account. I say so because in **DOMINIC MUTIE MWALIMU VS. REPUBLIC CRIMINAL APPEAL NO. 217/05**, the Court of Appeal did not acquit the appellant even though he had been taken to court after more than 14 days had lapsed.

In that case, the Court emphasized that;

“The wording of section 72(3) above, is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances.”

Being mindful of my judicial discretion in this matter, and taking into account the following words from **ELIUD NJERU NYAGA Vs REPUBLIC CRIMINAL APPEAL NO. 182 of 2006**;

“While we would reiterate the position that under the fair-trial provisions of the Constitution, an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal”;

I have come to the conclusion that justice will be best served whilst also upholding the constitutional rights of the 6th accused, if I order, as I hereby now do, that he should be compensated for the delay in bringing him to court. The said compensation shall be payable to him pursuant to section 72(6) of the Constitution, and he may pursue the police for the same, in separate legal proceedings. Meanwhile, the trial against him will also proceed.

It is so ordered.

Dated, Signed and Delivered at Nairobi, this 29th day of July, 2009.

FRED A. OCHIENG

JUDGE