



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Case 71 of 2008

REPUBLIC PROSECUTOR

VERSUS

SILAS NJIRU *alias* MUTHUNGU ACCUSED

RULING

The accused is charged in this matter with murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence are that the accused on 6th day of January 2006 at Mutuati Market Kabachi Location in Igembe District of the Easter Province unlawfully murdered Gulicha Roba Gorole. The accused person raised a preliminary objection to being tried for that charge on the basis that his Constitutional rights under section 72(3) of the Constitution of Kenya had been infringed.

In support of that preliminary objection, it was submitted by learned counsel for the accused that the accused had been kept in custody for more than 14 days provided under that section in the Constitution.

It was submitted that the accused was arrested on 20th October 2008. He was eventually presented before court on 12th November 2008. The State called the investigating officer with the view to explaining the reason why the accused was not presented before court within 14 days of being arrested. The State submitted that the delay in presenting the accused was reasonable in the circumstances.

The investigating officer CPL James Mungai stated that the accused was indeed arrested on 20th October 2008. He accepted that he was presented before court for the first time on 12th November 2008. He explained the reason why he was not presented before court within 14 days of arrest.

He stated that the accused was arrested at Easleigh area in Nairobi by Pangani police officers. This was on 20th October 2008. That it took 5 days for the accused to be collected by the Meru police officers. The accused had been arrested by the Pangani police officers for an offence of robbery with violence.

It was 5 days after his arrest that it was discovered that he was wanted by Mutuati police station. He was therefore brought to Maua police station after the 5 days of being in custody. On being cross examined by the accused counsel, the investigating officer stated that the accused before being produced in court for this offence needed to be taken for age and mental assessment. At that time, the officer stated that the machines at Maua District Hospital were not functioning.

The age assessment therefore was not done until the 28th of October 2008. Further, he stated that it was necessary to carry out an identification parade of the accused person. The witness who was to identify the accused being a pastoralist was not easily obtained. That it was not until the 8th November 2008 when that witness was able to identify the accused person.

The investigating officer also stated that it took time to collect the accused from Nairobi because the police motor vehicle had broken down. After that explanation, the learned counsel for the accused submitted that there was no proper explanation given by the state on why they had breached the accused Constitutional rights.

The accused relied on case of **Cr. Case No. 21 of 2006 Republic Vrs. Kenneth Mwangi Njogu**. In this case, the

accused person had not been produced before court within 14 days provided under the Constitution. The court found the explanation given by the State did not show that the accused had been brought before court as soon as was reasonably practicable. The court proceeded to acquit the accused person of the charge of murder.

The accused also relied on a Court of Appeal decision Cr. Appeal No. 35 of 2006 **Paul Mwangi Murunga Vrs. Republic** In this case the Court of Appeal had this to say:-

“The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person is taken to court and accordingly, they know or ought to know whether the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences.....”

In a more recent decision of a Court of Appeal, it has been stated that the mere fact that an accused person is brought to court either after the 24 hours or the 14 days, as the case may be, stipulated in the Constitution, does not *ipso facto* prove a breach of the Constitution. See the case of **Dominic Mutie Mwalimu Vrs. Republic Criminal Appeal No. 217 of 2005.**

Whereas when an issue such as the one before the court is raised, the court has to consider the facts of each case, I am of the view that the State had an obligation to explain 3 days that the accused was detained in custody. It is clear that the accused was identified by a witness on 8th November 2008. It however took the police 3 clear days to bring the accused before court. The explanation given that the accused needed to be taken for age and mental assessment does not give reasonable explanation why the accused was not presented to court. There was no evidence that the machines, which I presume were required to give the age assessment were broken down. The investigating officer could not have intended to say that the accused person’s mental capability needed to be assessed by a machine. The mental assessment assists the court to determine whether accused is fit to plea. Obviously when accused is produced in court for the first time plea ordinarily is not taken because he needs to be represented by counsel. In the ordinary course of events, when an accused is taken to court for the first time, the court directs the Deputy Registrar to appoint an advocate for him. On the accused first appearance in court, the mental status is not likely to feature. For the state to say accused could not be produced because his mental and age could be assessed is not acceptable to explanation.

On the whole, therefore, the state did not shift the burden upon it to explain the delay in producing the accused. In the case of **Albanus Mwasia Mutua Vrs. Republic** Criminal Appeal No. 120 of 2004, the Court of Appeal in respect of such violation of Constitutional rights have this to say:-

“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. The Jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the Constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the Constitution also amounted to a violation of his rights under section 77(1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”

The Constitution puts a premium on the liberty of the citizens of this country. That being so, whenever the liberty of a citizen is impeded, the same should only be done as provided under the Constitution. The police detained the accused for 3 days. They had an obligation to explain the detention of the accused for those 3 days. In my view they failed to satisfy that obligation.

Bearing that in mind, I make a finding that the accused persons Constitutional rights embodied in Section 72(3) of the Constitution were infringed. That being so, the trial of the accused person following that detention would be illegal. I therefore do hereby acquit the accused person for the charge of murder. I order the accused to be released from custody unless otherwise lawfully held.

Dated and delivered at Meru this 23rd day of July 2009.

MARY KASANGO

JUDGE