REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE 7 OF 2006

REPUBLIC……..……. PROSECUTOR

VERSUS

SARAH WAITHIRA NJUGUNA ……....…… ACCUSED

R U L I N G

The accused was charged vide information dated 21st March 2006 with 2 counts of murder. It was alleged that on 11th January 2006 at Punda Milia village in Maragua District within Central Province, she murdered **Nancy Wanjiru** and **Sarah Waithira Njuguna**. The 2 victims were the children of the accused aged 3 months and 1 year respectively. The accused entered a plea of not guilty to both counts and her trial commenced. In a bid to prove its case against the accused, the prosecution called a total of 7 witnesses. At the close of the prosecution case, **Mr. Kimani** made a submission of no case to answer. His submissions were brief and straight to the point. They were along these lines, there was unexplained delay in arraigning the accused in court. According to PW6 who was part of the investigating team in this case, the accused was arrested on 16th January 2006 and it was not until 223rd March 2006 that she was arraigned in court over the charges. He categorically stated that he had no explanation to offer for the delay. Counsel submitted further that since the delay remained unexplained, the accused was entitled to an acquittal on that score. Counsel relied on the case **Republic v/s Amos Karuga Karatu (2008) eKLR** in support of this submission.

Secondly, counsel submitted that the prosecution case hinged on circumstantial evidence. However the evidence tendered so far did not meet the threshold of circumstantial evidence as understood in law. What remained was mere suspicion. Suspicion however strong remains mere suspicion. For this submission counsel relied on the case of **Neema Mwandoro Ndurya v/s Republic (2008) EKLR**. Accordingly, counsel submitted, it will be an exercise in futility to put the accused on her defence for if she elected to kept quiet, this court will not be in a position to enter a conviction against her on the basis of the evidence on record.

In response, **Mr. Makura**, learned state counsel submitted that the state had adduced sufficient evidence to establish a prima facie case to warrant the accused being placed on her defence. The evidence though circumstantial pointed irresistibly to the guilt of the accused and met the standards set by the law. The explanation given for the delay in arraigning the accused in court was reasonable.

To my mind, whether the accused will be called upon to defend herself or not will depend on my

finding with regard to the issue of delay in arraigning the accused in court. PW6 was the sole prosecution witness on this issue. In examination in chief, he volunteered the information that the accused had been arrested by him on 16th January 2006 from Pundamilia A.P. Camp. He then escorted her to Makuyu Police Station where she was locked pending further investigations. She was to remain in police custody until 21st March 2006 when she was arraigned in court. However he had no explanation to offer for the delay of over 2 months in presenting the accused before court for her trial to commence. Under cross-examination by **Mr. Kimani**, the witness stated that by 1st February, the accused mental capacity had been assessed. However he could not explain the delay in bringing the accused to court. Re-examined by Mr. Orinda, learned Senior Principal State Counsel on the issue he again repeated "…**.. I cannot explain why it took that long to charge the accused."**

Sections 72(3) (b) and 77 (1) of the Constitution of Kenya provides interlia:-

Any person who is arrested or detained:

(a) ……

(b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days, of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

and

77 "If a person is charged with criminal offence, then unless the charge is withdrawn, the case shall be accorded a fair hearing within a reasonable time by an independent and impartial court established by law."

What are the consequences of failing to comply with the aforesaid provisions of the law? Two schools of thought have emerged in the court of appeal. One school of thought holds that any unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. That if the issue is not raised by the accused, the trial court on its own motion should raise it. Finally as it is an issue of law, it can be raised at any stage even in an appeal. This school of thought is represented by these decisions of the court of appeal; **Albanus Mwasia Mutua v/s Republic (2006) eKLR, Gerald Macharia Githuku v/s Republic (2007) eKLR** and **Paul Murungu v/s Republic, Criminal appeal number 35 of 2006** (UR). Yet there is another school of thought which holds that a plain reading of Section 72(3) of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court "**as soon as is reasonably practicable."** 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. That the wording of Section 72(3) is clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence. Accordingly, a careful reading of Section 84(1) of the Constitution clearly suggest 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. Further the issue has to be raised at the earliest possible instance in the trial court. If not the accused will be taken to have waived the right to raise it. Further the issue cannot be raised at the appeal stage. These school of thought is represented by the case of **Dominic Mwalimu v/s Republic, criminal appeal 217 of 2005** (UR), **Muriithi Mwai Mugo & Others v/s Republic, Criminal Appeal No. 286 of 2006** (UR), **Robert Simiyu Khaemba v/s Republic, Criminal Appeal No. 60 of 2005** (UR).

The High Court has on countless occasions decried the confusion brought about by these conflicting schools of thought in the court of appeal on the issue. Yet all those decisions are binding on us. The response that we have received from the said court is that each one of us is at liberty to choose which school of thought to follow. To my mind to adopt such cause will result in judicial mayhem. The law need to be settled and certain so that Practitioners are in no doubt at all when advising their clients. May be time is now nigh for the Chief Justice to constitute a bench of 5 and 7 court of appeal judges to deliberate on the issue and come up with the decision that may put to rest the confusion brought about by the two schools of thought aforesaid.

On my part however, I am more inclined to go the **Dominic Mutie Mwalimu** (supra) way. It perhaps represents a proper interpretation and appreciation of the provisions of section 72(2) of the Constitution. However in the circumstances of this case, the person who would have offered the explanation for the delay was not willing to do so much as the issue of he delay was raised during the trial. It was conceded by the state that there was a delay in excess of 2 months in arraigning the accused to court. PW6 categorically stated that he could not understand why the accused was not taken to court as soon as reasonably practicable. Though **Mr. Makura** in his submissions stated that an explanation had been given for the delay which was reasonable in the circumstances, I discern from the record no such explanation. Charging the accused over 2 months later following her arrested amounts to a violation of her constitutional rights as she ought to have been charged within 14 days upon her arrest or within reasonable time thereafter. No explanation for the delay was forthcoming from those concerned.

In the case of **Republic v/s Amos Karuga Karatu** (supra) I had these to say on the same issue:

"**The law of the land has to be obeyed particularly by those entrusted to enforce it. If the supreme law of the land says that an accused person has to be brought before court within 24 hours in the event of non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before court as soon as was reasonably practicable. I do not think that the Investigating Officer herein has been able to discharge that heavy burden in the circumstances of this case.**

We are no longer in 1980's where the fundamental rights of the citizens were trampled upon by the police. The courts of law could not stand up to challenge such conduct. As the court of appeal said recently the courts chose to see no evil and hear no evil giving rise to the infamous Nyayo house torture chambers. The consequences of this silence of conspiracy on the part of the courts was as the court of appeal went on to observe the infamous Nyayo torture chambers, a history which the courts can never be proud of. It should never be allowed to happen again in this country. It was a result of the foregoing legacy that the citizens of this country lost faith in the judiciary particularly when it came to enforcement and securing the constitutional and fundamental rights of the citizenry. Time is nigh for the judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and protect the fundamental rights and freedoms of an accused person. A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. Finally it matters not that evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity. For the court of appeal said again in the case of Albanus Mwasia Mutua (supra).

"**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."**

In the end, and for the above reasons, I hold that the accused having been brought to court in breach of the provisions of section 72(3) and 77(1) of the Constitution, his continued prosecution is illegal and a violation of his constitutional rights. No prima facie case has therefore been made to warrant the accused being put on his defence. The point was thus well taken by counsel for the accused. Pursuant to he provisions of section 306(1) I record a finding of not guilty against the

accused person with the consequence that the accused is acquitted and set him free of the charge…….”

The same situation obtains here. It is for the same reason that I find that no useful purpose will be served by placing the accused on her defence. Her trial is already a nullity. Accordingly I now acquit and set free the accused on the charges preferred.

Dated and delivered at Nyeri this 22nd day of July 2009.

M. S. A. MAKHANDIA

JUDGE