



IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 41 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

NANCY NJERI MUIGAI.....ACCUSED

R U L I N G

The accused has invoked the provisions of sections 23 and 72 (3) of the Constitution of the Republic of Kenya.

He states that his right to a fair trial had been violated, because he was held in custody for 278 days before he was first taken to court. He says that he was arrested on 24th September 2006, but was not taken to court until 6th July 2007.

Notwithstanding that delay of about 9 months, the accused says that the prosecution had failed to demonstrably justify that they had taken her to court as soon as possible, with a view to having her face her accusers.

According to accused, she was arrested at Kiambu, which was less than 100 kilometers from the High Court stations at Nairobi and at Nyeri. I presume that by citing the distance between Kiambu and the High Court (whether at Nyeri or Nairobi), the accused must have intended to illustrate the ease with which she could have been taken to court.

As she was not taken to court within 14 days of his arrest the accused submitted that the police ought to have released her. That submission is said to be founded on the provisions of section 72(3) of the Constitution.

If the police had any evidence linking the accused to the offence, they should have brought her to court within 14 days; so submitted Mr. Mbaluka, her learned advocate.

Instead, the police are accused of not only detaining the accused for 9 months, but also of torturing him, with a view to extracting a confession from her.

The accused went on to submit that there can be no justifiable explanation for the delay in taking her to court. The reason for that submission is that the accused was not unwell, and also that the post mortem examination of the body of the deceased, was carried out fast.

Therefore, in the opinion of the accused the delay was solely attributable to the lethargy on the part of the prosecution.

The accused provided the court with eleven authorities, and submitted that the said authorities had held that if the constitutional rights of an accused were violated, the trial proceedings against the said accused person would become illegal.

She concluded by asking this court to nullify the proceedings against her; and to thereafter acquit her.

In answer to the application, the learned state counsel, Mr. Imbali did submit that the state had adequately explained the reasons for the delay in taking the accused to court. The said explanation was said to be contained in the replying affidavit sworn by the Investigation Officer, Chief Inspector Kingsford Nyaga.

The gist of the explanation was that the accused was arrested on the same date when she is alleged to have murdered **RUTH WANJIRU NJERI**. Thereafter, the post mortem examination was done on the body of the deceased, on 2nd October, 2006.

Notwithstanding the fact that the post mortem examination was carried out fairly quickly, the Investigating Officer says that it was not until 29th December 2006 that he received the results of the said post mortem.

Thereafter, the mental assessment of the accused was conducted on 27th January 2007. The delay until that date was attributed to the fact that the accused was a candidate in the Kenya Certificate of Secondary Examinations (KCSE); and that the police allowed her to first undertake the said examinations.

The Investigating Officer further explained that the police file was forwarded to the Attorney General on 8th February 2007, with a request for his directions.

Initially, the Attorney General directed the police to carry out further investigations, because there appeared to be some inconsistencies on the part of the accused. After the police completed the further investigations, the accused was arraigned in court.

In a nutshell, the learned state counsel attributed the delay to the fact that the investigations herein were protracted, and also because the police allowed the accused to sit for her examinations.

The learned state counsel submitted that pursuant to the provisions of section 70 of the Constitution, the rights of an individual shall be subject to the rights of others, and to public interest. Therefore, in his view, the rights of a person shall only be protected if he respects the rights of others.

By bringing this application, the accused was alleged to be making an attempt to defeat justice. That is because, as far as the respondent was concerned, even if the detention of the accused was unlawful, she ought to be tried whilst being compensated.

In determining this application, I will give due consideration to the submissions made by both sides, the legal authorities cited, the provisions of the Constitution, and other legal authorities.

But first, I need to point out that although the accused did say that she was first taken before the court on 6th July 2007, the court records show that she was before Apondi J. on 29th June 2007. According to the court records, it is on 29th June 2007 that the learned Judge directed that the plea be taken on 6th July 2007, after the accused had been provided with an advocate.

Thereafter, there is no doubt at all that the accused was in custody for about 277 days, before she was first taken to court. The period is of about nine (9) months.

As there was a substantial delay in bringing the accused to court, it is the obligation of the police to explain the delay, with a view to satisfying the court that they did take the accused to court as soon as was reasonably practicable.

First, the post mortem examination was carried out about one week after the incident. As the Investigating Officer said in his affidavit, the purpose of the post mortem examination was to establish the cause of death.

After the post mortem examination, the report thereof was not received immediately. According to the Investigating Officer, the results were received awhile later, on 29/12/2006.

Meanwhile, the accused was allowed time, so that she could sit for the national Kenya Certificate of Secondary Examinations (KCSE).

Although the police would appear to have been magnanimous in that respect, they have not told the court about the exact dates during which the accused sat for the exams. However, it is a matter of common notoriety in Kenya, that the Kenya Certificate of Secondary Examinations are usually concluded by 30th November of each year. It is therefore a fact about which I can take judicial notice.

That being the case, I find that the police have not explained why the accused was not taken for her mental assessment for almost two full months after she had finished her exams.

Furthermore, even after the police received the results of the mental assessment, they waited for almost two weeks before forwarding the police file to the Attorney General, for his consideration. Once again, the delay of the said two weeks has not been explained.

The Investigating Officer did not receive the Attorney General's consent to prosecute the accused until 30th May 2007. The delay from 8th February 2007 to 30th May 2007 was attributed to the fact that the Attorney General had, at first, required the police to carry out further investigations.

Surely, as the police are deemed to be aware of the requirement for taking accused persons before the courts as soon as is reasonably practicable, and being mindful of the amount of time that had already lapsed from the time of the arrest, the police could have been more diligent. At any rate, if they wished to persuade me that they were diligent, they should have detailed the reasons why the extra investigations lasted as long as they did.

Yet another un-explained delay was between 30th May 2007, when the police received the Attorney General's consent to prosecute the accused, and 29th June 2007, when the accused was first taken to court.

In the light of the unexplained delay, I find that the constitutional rights of the accused were flagrantly violated.

Given the length of the delay, the accused was not afforded a hearing within a reasonable time, as envisaged by section 77 (1) of the Constitution.

In **ALBANUS MWASIA MUTUA VS REPUBLIC, CRIMINAL APPEAL NO. 120/2004**, the Court of Appeal expressed itself thus;

“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.”

In this case, the delay was for nine months, during which period the trial of the accused could have commenced, but it did not.

In view of the fact that the delay was so prolonged, thus depriving the accused her constitutional right to a hearing within reasonable time, I do hereby hold that it would no longer be possible to accord the accused a trial within a reasonable time. In the event, I now order that the accused be discharged

forthwith. The proceedings will therefore be terminated immediately.

It is so ordered.

Dated, Signed and Delivered at Nairobi, this 20th day of July, 2009.

FRED A. OCHIENG

JUDGE