



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Murder Case 13 of 2009

WAMBUA KIOKO ACCUSED

VERSUS

REPUBLICPROSECUTOR

R U L I N G

Mr. Matini has sought that proceedings in this matter where appellant is charged with the offence of murder contrary to section 203 Penal Code as read with section 204 Penal code be declared a nullity as the appellant's rights under section 72 3(b) of the Constitution have been violated. Mr. Matini submits that the applicant should have been taken to court within 14 days from the date of his arrest – he was arrested on 30-7-07 and taken to court on 1-9-07 for plea but even then, plea was not taken on that date. He points out that many pleas were made to the OCS to bring accused to court in vain and so the intended proceedings should be declared null and void as they are founded on an illegality. He suggests that it is possible that during the period of delay the State has had enough time to manufacture evidence to use against the accused/applicant. He also status that there has been delay in taking peas and by the matter thus contrary to section 77 of the court.

Mr. Matini cites the decision in **Albnus Mwasia Mutua V R Cr. App No. 120 of 2004** which stated that it is the duty of the court to enforce provisions of the Constitution and any unexplained delay should lead to an acquittal regardless of the weight of evidence available.

He draws from decisions in **Athuman Karusi v R CRC 24 of 2005** and **Gerald Machari Githitu v R Cr. App 114 of 2004** as well as **Anne Njogu and 5 others V R HCCC MISC 551 of 2007**.

Mr. Matini argues that if the State felt there any reason not to produce the applicant/accused within the period recognized by law, then they should have preferred a holding charge.

The application is opposed, and Mr. Ogoti for the State submits that a satisfactory explanation has been given by the evidence tendered in the affidavit sworn by IP Thomas Kimuyu of Malindi Police Station to the effect that delay was due to challenges on investigations following the incident as there were pronounced hostilities between the Kambas and Giriomas. He explained that the two communities live at Dakacha – Mulunguni in Marafa area, where the deceased was murdered. Witnesses did not volunteer to give information and statements in time and when police visited the scene to assess the situation, most of the witnesses fled for fear of arrest.

As a consequence, an apprehension report was sent to the Senior Principal Magistrate on 6-8-07 explaining the accused's stay in custody and that the investigations were far from completion.

Mr. Ogoti, for the State, submits that on the face of it, in the minds of the police, they had to get sufficient

evidence before charging the accused in court, and the hostilities that were prevailing between the Kambas and Giriomas were beyond the police.

Further that the police may have failed to come to court to make the necessary application because there is no express provision that the accused has to be physically brought to court for the explanation to be given and that it is sufficient that police give the explanation.

As to the delay in taking plea and hearing the case, Mr. Ogoti submits that it is in the public knowledge that at the time, Law Society of Kenya Malindi was on strike and the law requires that an accused person charged with murder be represented by an advocate and that position was time and again explained to the accused and at no time did he inform the court that he could afford his own advocate - so that affected the pace of the proceedings.

As for a holding charge, Mr. Ogoti argues that Court of Appeal held that the Court means Court with relevant jurisdiction to try an offence, not a holding charge.

He asks the court to take note that even in the **Albanus Mutua Case**, an automatic acquittal does not apply and in any event if violation of accused's rights is proved then the remedy lies in section 72 (6) of the Constitution and applicant/accused should sue for compensation.

However Mr. Matini's response to all these is that the explanation being given by IP Kimuyu is only intended to appease the villagers and does not justify the delay in bringing applicant to court. Section 72(3) (b) of the Constitution of Kenya provides that:

“A person who is arrested or detained –

(b) and who is not released, shall be brought before a court of law as soon as is reasonably practicable, and where he is not brought before a court of law within twenty four hours of his arrest or from the commencement of his detention ...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.”

What this provision envisages is that there may arise situations where an individual is not brought to court within the period recognized by the constitution, and that when this happens, there may well be an explanation by the party causing the delay.

This is the jurisprudence so clearly developed by the two cases of **Eliud Njeru Nyaga v R Cr. App No. 182 of 2006**, where the judges of Appeal stated as follows;

“while we would reiterate the position that under the fair trial provisions of the Constitution, an accused must be brought to court within twenty – four hours,...yet it would be unreasonable to hold that any delay must amount to a Constitutional breach and must result in an automatic acquittal”

The Court of Appeal Judges then drew from the celebrated case of **Albanus Mwasi Mutua v R Cr. App 120 of 2004** by quoting a passage therefrom as follows;

“...He was brought before the trial magistrate some eight months from his arrest and no explanation AT ALL was preferred for the delay. It could be he fell ill...the police were entitled to hold him in custody... Constitutionally, the burden was on the police to explain the delay”

The police have offered an explanation, that they had not collected sufficient evidence to warrant bringing the applicant to court as there were existing hostilities between the two communities identified with the

victim and the suspect, and attempts to get witnesses to record any statement met great difficulty. So having realized this, the police took the next step as provided under section 37 of the Criminal Procedure Code, - they filed an apprehension report before the 14 days were over and is dated 6-8-07 (as applicant herein faced a capital offence), which provision reads as follows:

“Officers in charge of police station shall report to the nearest magistrate within the local limits of their respective stations, whether those persons have been admitted to bail or not”

As submitted by Mr. Ogoti, there is no prescribed manner as to how this apprehension report should be made – does it require presentation of the suspect in court, or is the filing of the report alone sufficient.

The question which follows this is how soon should the applicant have been taken to court after the filing of the apprehension report. He was taken to court on 5th September 2007, that would make it almost a full month after filing of the apprehension report and 42 days from the date of his arrest.

Would the existing hostilities between the two communities have prevented police from taking the applicant to court, or could they have taken him to court then make a request to retain him at the police station as investigations were incomplete? I think not. To my mind that is not a satisfactory or reasonable explanation. What then should be the solution? Should this court take the **Ann Njogu and 5 others v R Hc Misc. 551 of 2005** approach, that at the 60th minute of the 14 days, then every other minute thereafter amounts to a violation of the applicant’s constitutional right which therefore calls for an acquittal?

Mr. Matini cited other decisions such as **Gerald Macharia v R** and he undertook to supply the court with a copy of the same, but at the time of writing this ruling, I have not had the benefit of reading through that decision.

Does the Constitution provide for a premature acquittal as the solution where one’s rights are violated? What about the rights of the victim which are equally protected by the self same Constitution, are the victim’s right subordinate to the suspect’s rights? Especially in a situation such as this involving the very recognized right to life under section 71(1) of the Constitution which is said to have been taken away. How does an acquittal protect the, victim’s Constitutional rights?

Indeed the prosecution process is accompanied by several categories of Constitutional claims running parallel, among them being applicant’s rights versus the victim’s right to life, and section 70 of the Constitution of Kenya, which addresses the fundamental rights, does not give guarantee of these rights in gross and absolute content, but only subject to respect for the rights of others and also the public interest.

I am persuaded that the duty of this court lies in protecting both rights which are recognized under the Constitution, i.e right to life (victim’s right) and right to a fair trial process (the applicant’s rights) and the remedy, to my mind, does not lie in an acquittal – the remedy is clearly provided under section 72(6) of the Constitution, in the form of compensation for the person whose rights have been violated under section 72(3)b.

As regards delay in taking plea and hearing, it is common knowledge a year and a half, LSK Malindi had boycotted pauper briefs, applicant faces a charge of murder and had to have legal representation. At no point did applicant inform the court that he could afford private services of an advocate and so as long as the boycott remind, no plea could be taken non could the hearing proceed, and that limb about violation of section 77 of the constitution is really made in bad taste and I regard it as mala fides.

Consequently I decline to declare the pending trial a nullity or to pronounce a premature acquittal and the application is dismissed.

Delivered and dated this 21st day of July 2009 at Malindi.

Mr. Abdallah for applicant

Mr. Ogoti for State

Applicant present

H. A. OMONDI

JUDGE