



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 6 of 2008

REPUBLIC.....APPLICANT

-VS-

MIRIAM NJAMBI KAMAU.....DEFENDANT

RULING

The accused has been charged for the offence of murder, contrary to Sec. 203 as read with Sec. 204 of the Penal Code, Cap. 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

“On the night of 16th December, 2007 at Banana Trading Centre in Kiambu District within Central Province, murdered PERIS MUTHONI NDUNG’U.”

After the plea was taken on 4th February, 2008, the defence counsel viz, Mrs. Nyakwana prayed for a further mention on the ground that the accused was willing to make an offer of “guilty” for the lesser charge of manslaughter. On receipt of the offer, the State rejected the same and applied for a hearing date. When the case came up for hearing on 30th June, 2008, the defence counsel applied for a further mention on the ground that they had filed a preliminary objection. Unfortunately, the application could **not** be heard on three different occasions since the defence counsel was absent. During the hearing of the application on 22nd June, 2009, the defence counsel viz Mr. Koech submitted that the constitutional rights of the accused were and continue to be violated by these proceedings since he was held in custody for 42 days. Further to the above, he also submitted that the accused was arrested on 16th December, 2007 and he was arraigned in court on 28th January, 2008. Apart from the above, he also pointed out that Sec. 72 (3) (b) and 77 (1) (i), (2) (b) and (c) of the Constitution were violated. Besides the above, he also submitted that the prosecution did **not** give any sufficient explanation for the delay. In conclusion, he also submitted that once a constitutional right has been violated, then the proceedings become an illegality despite the weight of the evidence. It is on the basis of the above that the defence urged the court to allow the preliminary objection and set the accused at liberty.

On the other hand, the State through Ms. Mwaniki, State Counsel has opposed the application on the ground that the accused was arraigned in court as soon as was reasonably practicable. The learned State Counsel relied heavily on the replying affidavit of PC Ali Mohammed Aden who confirmed that the accused was arrested on 16th December, 2007. The deponent also explained that the post-mortem was conducted on 7th January, 2008 at the City Mortuary. Further to the above, he also explained that the delay was caused since the family of the deceased could **not** be traced easily so that they could identify the body. The reason was because they were unknown and that they were only traced on 4th January, 2008. Previously, the relatives of the deceased had relocated from their homes due to the post-election violence. After the file was compiled and forwarded to the Attorney-General on 14th January, 2008, the issue of the marital status of the accused and occupier took a new dimension that had to be investigated. In support of her submissions, Ms Mwaniki relied on the following authorities:

KAZUNGU KASIWA VS. REPUBLIC

C.A NO. 239 OF 2004 - MOMBASA

DOMINIC MWALIMU VS. REPUBLIC

C.A. NO. 217 OF 2005 – NAIROBI

REPUBLIC VS. PAUL NJEHIA KANGU

HCCR NO. 96 OF 2005 – NAIROBI

REPUBLIC VS. SHEM KARANJA WAIGWA

MISC. CRIMINAL APPEAL NO. 186 OF 2008

This court has carefully considered the above submissions by the learned counsels. From the above submissions, there is no doubt that the accused was held in custody for 42 days instead of the statutory period of 14 days. Though the court acknowledges and appreciates the fact that the accused was *not* arraigned before me on time, I observe that an explanation has been given for the delay. Firstly, there is the issue of relocation of the family of the deceased. That was a real problem following the post-election violence. That issue cannot be brushed aside nor be blamed on the family of the deceased. Secondly, though the issue of the marital status of the accused had to be investigated, what is more significant is to balance the rights of the accused to that of the deceased to life. Sec. 70 of the Constitution of Kenya states as follows:

“Whereas every person in Kenya is entitled to fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all the following, namely –

- (a) *life, liberty, security of the person and the protection of the law;*
- (b) *.....*
- (c) *.....”*

Needless to state both constitutional rights Sec. 72 (3) and (70) are at par. None of them seem to be superior to the other. Significantly, Sec. 72 (6) of the Constitution of Kenya provides for compensation for people whose rights have been breached. That provision must have been inserted deliberately to cater for parties whose rights have been violated. In the event that the accused feels strongly about infringement of her rights, then the proper procedure would be for her to apply for adequate compensation. This court is satisfied that the explanation given is reasonable and plausible under the circumstances. In view of the above, I hereby dismiss the application since the same has *no* merits at all. I also direct that the case proceeds to its logical conclusion to enable the court to decide the same on merits. Case to proceed on 14th and 15th October, 2009.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open court in the presence of the accused

Mr. Mwangi for KoechFor the accused

Mr. ImabliFor the Republic

MUGA APONDI

JUDGE

17TH JULY, 2009