



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Case 16 of 2007

REPUBLIC PROSECUTOR

VERSUS

ABDALLA SAID MOHAMED 1ST ACCUSED

PETER MUTUKU PAUL 2ND ACCUSED

RULING

The accused persons, Abdalla Said Mohamed alias Kibonge (hereinafter “the 1st accused”) and Peter Mutuku Paul (hereinafter “the 2nd accused”) are charged with murder contrary to Section 203 as read with Section 204 of the Penal code. The particulars of the charge are that the two, on 27th April, 2007 at unknown time, at Junda, Mishomoroni in Mombasa district within Coast Province, jointly with another not before the court, murdered Samuel Kamau Kungu.

They were first brought to court on 1.8.2007 but their plea was taken on 21.8.2007 before Mr. Justice Sergon. Assessors were subsequently duly selected as then trial could only be held with their aid. On two occasions the case has come up for hearing but could not take off. On the 1st occasion the case could not be heard because an election petition was in progress and on the second occasion the 2nd accused through his counsel sought an adjournment to enable him raise a constitutional point which he duly raised by his Notice of preliminary Objection lodged on 22.11.2008. The 1st accused also filed a Notice of Preliminary Objection on 10.7.2009. The first accused person’s objection was based on the following reasons: -

- 1. That the prosecution is in breach of his fundamental rights and freedoms provided for by the Constitution of Kenya, in that he was brought to court in violation of section 72 (3) of the Constitution having been held in custody for 33 days a period of more than 14 days provided for by the constitution.**
- 2. That he was arrested on 28.6.2007 and detained by the police at Nyali police station until 1.8.2007 when he was produced and charged before the court without any explanation being given as to why there was an unconstitutional delay in charging him.**

The 2nd accused person’s objection carried the following assertions: -

- 1. That the prosecution is in breach of his fundamental rights and freedom provided for by the Constitution in that he was brought to court in violation of Section 72 (3) of the Constitution having been held in custody for 35 days more than the 14 days provided for by the Constitution.**

2. That he was arrested on 27.6.2007 and detained by the police at Nyali police station until 1.8.2007 when he was produced and charged before the court without any explanation for the delay.

The notices of Preliminary Objection have been opposed and Cpl. John Musyoka, the investigation officer swore a replying affidavit on 27.1.2009 in which it is deponed, inter alia, that between 5.7.2007 and 11.7.2007, effort was made to obtain psychiatrist's reports on the mental status of the accused. It is also deponed that no witnesses were traced to record statements until 18.7.2007 and the said statements were recorded between 18.7.2007 and 22.7.2007. It is further deponed that the police station had only one motor vehicle for several police duties. It is also deponed that between 23.7.2007 and 31.7.2007, witness statements were being typed and the police file compiled for onward transmission to the Provincial State Counsel which event happened on 31.7.2007. In the premises the investigation officer contends that the accused persons' constitutional rights were never infringed.

When the objections came up for arguments before me on 13.7.2007, Mr. Alwenya, Learned Counsel, appeared for the 1st accused and Mrs. Kipsang, Learned Counsel, appeared for the 2nd accused while Learned Counsel Mr. Onserio, appeared for the state. Counsel for the accused persons submitted that Section 72 (3) (b) of the Constitution prescribes a period of 14 days during which a person due to be charged with the offence of murder may be held prior to arraignment in court. For the 1st accused person, counsel argued that even one day of unexplained delay in arraigning a suspect is sufficient to vitiate a trial and for that proposition counsel invoked the decision of the Court of Appeal in **Albanus Mwasia Mutua – v – R [CRA No. 120 of 2004]**.

Mrs. Kipsang on her part contended that Section 72 (3) (b) does not envisage extension of the 14 days stipulated therein. She too relied upon the **Albanus Mutua Case (Supra)**. To buttress her arguments further she invoked the Court of Appeal and High Court decisions in **Gerald Macharia Githuku – v – R [CRA No. 119 of 200] (UR)** and **Ronal Manyonge Chepkui – v – Re [HCCR.A. No 8 of 2006] (UR)**. In the premises, both counsel contended that the proceedings now before the court should be declared null and void for infringing S. 72 (3) (b) of the Constitution.

In response Mr. Onserio, submitted that the period of delay in arraigning the accused persons beyond the 14 days had been satisfactorily explained by the investigation officer in his replying affidavit facts whereof had not been challenged in a subsequent affidavit of any of the accused persons. Mr. Onserio further submitted that even if there had been an unexplained delay, the accused persons would not automatically be entitled to an acquittal but to a declaration that there was an unexplained infringement on their fundamental rights and on that basis seek compensation in the form of damages. For that proposition counsel cited a persuasive authority of the High Court in **R – v – Paul Nduale Musili [HCR.C. No. 20 of 2007]**.

I have now considered the objections raised by the accused persons, the replying affidavit of the investigation officer, the submissions made to me by counsel and authorities cited. Having done so I take the following view of the matter. There is now plenty of case law on a suspect's trial rights under the Constitution. In **Dominic Mutie Mwalimu – v – Republic [CR Appeal No. 217 of 2005] (UR)** the Court of Appeal stated as follows: -

“Thus where an accused person charged with a non-capital offence brought before the court after twenty four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution had not been complied with the prosecution can still prove that he was brought to court as soon as was reasonably practicable, notwithstanding that he was not brought to court within the time stipulated by the Constitution. In our view the mere fact that an accused person is brought to court either after the twenty four hours or the fourteen days as the case may be stipulated in the Constitution does not Ipso facto prove a breach of the Constitution. The wording of Section 72 (3) (b) is in our view clear that each case has to be construed on the basis of its peculiar facts and, circumstances. In deciding, whether there has been a breach the court must act on evidence.”

The same Court cited possible examples of situations that may provide justification for delay in arraigning a suspect before the court (**Albanus Mwasia Mutua – v – Republic (supra)**). The following is what their Lordships said:

“He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for the delay. It could be that he fell ill during the fourteen days the police were entitled to hold him in custody; that he was admitted in hospital and was detained in hospital for the eight months, as a result of which the police were unable to produce him in court. It could also be that the appellant had been presented to the court earlier but his case was terminated for one reason or another he was discharged and subsequently recharged afresh. Constitutionally, the burden, was on the police to explain the delay.”

There are of course other authorities on the subject. But what emerges from them is that whether or not a reasonable explanation for the delay has been given will depend on the facts and circumstances of each case. The High Court has the discretion to determine the issue which discretion like all judicial discretions should be exercised reasonably judiciously and on known principles always keeping in mind the correct balance to be maintained. The Court of Appeal said so in the **Albanus Maria Mutua case**. In their own words: -

“On the one hand it is the duty of the courts to ensure that crime where it is proved is appropriately punished. This is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitutional.”

So whereas each case will depend on its own special facts and circumstances, where there has been delay, it has to be explained, and in the absence of a reasonable explanation, the court’s discretion would be taken away especially with regard to significant delays. In the **Albanus Mwasia Mutua’s Case** the Court of Appeal said as follows: -

“The jurisprudence which emerges from the cases Appears to be that an unexplained violation of a Constitutional right will normally result in an acquittal.”

In the case at hand, the accused persons were detained for 18 days beyond the prescribed period. The investigating officer in his replying affidavit has given his explanation for the delay. He says, there was delay in obtaining a psychiatrist’s report; that difficulties were encountered in compiling the police file and that the police station is served by only one motor vehicle which is inadequate for the numerous duties the police station handles. The factual position given by the Investigation Officer was not challenged by the accused persons in a further or supplementary affidavit. In the absence of any affidavit evidence in rebuttal, I find that the prosecution’s explanation for the delay in arraigning the accused is not unreasonable. It must be appreciated that the charge facing the accused persons is grave; someone lost his life and the interests of the society at large must be considered. That interest is also protected by the same Constitution. This case is distinguishable from the **Gerald Macharia Githuku case** where no explanation for the delay in arraigning the appellant was proffered by the prosecution. There also appears to have been no such explanation in the case of **Ronald Manyonge Chepkui – v – R [HC C.R.A. No. 87 of 2006] (UR)**.

In this case however, I see no basis for terminating these proceedings and acquitting the accused persons as there has been no breach of their fundamental rights under Section 72 (3) (b) of the Constitution of the Republic of Kenya. The upshot is that accused persons’ preliminary objections are overruled. This case should now be set down for hearing on priority basis.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of:

Alwenya for the accused and holding brief for Kipsang for the 2nd accused.

F. AZANGALALA

JUDGE

26.8.2009