



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
Criminal Case 10 of 2007

REPUBLIC:.....PROSECUTOR

VERSUS

BENARD KILIRU SENERWA:.....ACCUSED

RULING

The accused herein Benard Kiliru Senerwa faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the 3rd day of April 2007 at around 9:00p.m at Milimani village, Sinoko location in Lugari District within Western Province he murdered one Erica Karecha Munangwe. Plea was taken before the High Court on the 24th day of May 2007 and he pleaded not guilty. Before the hearing of the murder trial could start the accused was taken to the Moi Teaching and Referral hospital for an assessment of his mental status. This took a while to be done and although it was ordered for by the court on the 13th December 2007 it was not received and read in court until on the 10.04.08. The accused continued to attend court for the mention of his case. Along the way and during the mentions his advocate Mr. Kirui stopped attending court and continued in such failure to attend court even after the medical report was received by the court. This prompted the court to have a different advocate appointed to represent the accused. Upon the appointment of the new advocate for the accused the court, not this one, set down the case for plea once again for reasons not quite clear to me save perhaps I might give a guess that it might have been due to the length of time it took to prepare the mental assessment report on the accused and so the court without perusing the file to see that the plea had already been taken, ordered that plea be taken. Second plea was therefore taken on the 26th June, 2008 and the case was fixed for hearing on 16th October 2008. On which date the accused's counsel applied for an adjournment to have the accused attended to in hospital due to chest pains. The case was fixed to be heard on 18/12/2008. On this day counsel for the accused prayed that the hearing be adjourned while he filed a Preliminary Point of law that the accused had been held in custody for a period in excess of 14 days as allowed by law. That objection was filed on the 9th January 2009 and it raises the point that the accused's fundamental rights as guaranteed by Sections 71(1), 77(2) (b), 72(3) (b), 72(3) (d), 77(3) (a) and 70(a) of the constitution of Kenya have been violated. He pleaded that his right to protection of life was violated by continuing to face trial for the charge of murder. That his right to fair trial was violated for having been held in custody for 46 days without being informed of the charges preferred against him, that the incarceration of the accused beyond 14 days was punitive, oppressive and barbaric, that the Deputy Registrar of the court limited the accused's freedom and personal liberty by ordering him remanded in custody and charging the accused before investigations were complete violated the accused's rights, that the prosecution had a predetermined mind to charge the accused with the offence of murder against the provisions of the constitution and finally that the continued detention and/or being held in custody of the accused is unconstitutional and the prosecution of the accused will be unconstitutional and

a violation of S.72(2) of the constitution.

The Preliminary Point was opposed and an affidavit was filed by police constable Edward Musyimi Muindi answering to the process taken before the accused was taken to court.

I wish to deal with the points raised as to deprivation of the accused's right to protection of life and personal liberty. Once the accused was held for the offence of murder he was not entitled to bail. That is as by law provided. That then cannot be alleged to be a violation of the fundamental rights of the accused. As for the rest of the points which all touch on time relevant to the accused being brought to court I find as follows:- It is not disputed that the accused was arrested on the 4th April 2007 and was first brought to court on 9th May 2007, some 35 days later. That delay is explained by police constable Muindi to have been occasioned by forwarding the file to the divisional Criminal Investigation officer for directions on 15/04/2007. On 17/04/2007 forwarded the file to Senior Principal State Counsel for advice who then returned the file to the D.C.I.O on 20/04/2007 with directions that the police do forward the extra judicial statement of the accused, the government analyst report and clear statements of CD2 and CD3 and on 27/04/2007 the file was forwarded to the O.C.S. to cover those points. The file was then returned to the state counsel on 03/05/2007 and on 07/05/2007 the information was signed and the accused was presented to court on the 9th May 2007. It would appear that the file moved between three offices within that time.

There is no doubt that the accused was brought to court beyond the 14 days allowed by law. No doubt his rights under S.72 (3) (b) of the constitution were violated. This court must then proceed to discharge its judicial obligation of considering the facts and circumstances of this case that led to the delay. Upon the arrest of the accused on 04/04/2007 the police say they commenced their investigations and on the 15th April 2007, eleven days later the investigations were complete and the file was forwarded to the DCIO for further action. Two days later on 17/04/2007 he forwarded it to the state counsel for action who in turn called for the particulars noted above. In these circumstances it cannot be said with any amount of sincerity that there was delay or that the accused was arrested before investigations were complete. In any event the accused cannot have expected the prosecution to complete investigations before the commission of the offence. In this case I find as a fact that investigations were complete within time and the accused ought to have been brought to court in time. The apparent delay occurred from the 17/04/2007 when the file was forwarded to the state counsel. That delay is sufficiently explained and in my judgment the explanation is such as is provided for under S.72 (3) (b) of the Constitution. I accept that the accused herein was brought to court as was reasonably practicable so to do. All the law requires is to satisfy the court that and I am so satisfied. It has been held that merely because there has been delay does not entitle the accused to an automatic acquittal. Even the length of the delay is not what is material, in my view. If there has been delay which is not explained, whatever the length thereof is immaterial as time beyond 14 days in a murder case before being charged is a violation. But if any delay be satisfactorily explained and the court accepts that explanation then the case must proceed and evidence be taken. An acquittal before all the evidence is taken must be the only alternative. Here it is not. In the circumstances I do not uphold the Preliminary Point taken herein and the same is hereby dismissed.

DATED AND DELIVERED AT ELDORET THIS 4TH DAY OF AUGUST,2009

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Mr. Koros for the accused

Mr. Omutelema holding brief for Chirchir for state

Chelang'a Court Clerk

Accused - Present.

4/8/2009

Coram - P.M. Mwilu 'J'

C/C - Chelang'a

MR. CHIRCHIR: I pray for hearing date and summons to issue.

P.M.MWILU

JUDGE

COURT: Hearing on 3/11/2009. Witness summons to issue.

P.M.MWILU

JUDGE