REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 104 of 2006

REPUBLIC …… PROSECUTOR

VERSUS

APOLLO NDUNGU MWAURA. ……. ACCUSED

R U L I N G

The accused is facing a charge of murder contrary to section 203 as read with section 204 of the penal code. It is alleged that on 28th August 2006, at Wangige Village within Kiambu District, the accused murdered Lucy Njeri Nyokabi.

The accused was arrested on 4th September, 2006. Thereafter, he was held in police custody until 21st November 2006, when he was first taken before the court. In effect, he was in custody for 78 days, before he was first taken to court.

By virtue of the provisions of section 72(3) (b) of the Constitution, the accused ought to have been taken to court within 14 days of his arrest.

However, in the event, such as this one, in which the accused was not taken to court within 14 days of arrest, the Constitution stipulates that it is the obligation of the person who asserts that the accused was nonetheless taken to court as soon as was reasonably practicable, to prove his assertion.

As the accused has, correctly, in my humble view, submitted the Court of Appeal did give examples of reasons which the court deems to be reasonable and acceptable for explaining the delay in bringing an accused person before the court. Those examples were given by the court in **ALBANUS MWASIA MUTUA Vs REPUBLIC**, **CRIMINAL APPEAL NO. 120 OF 2004**, wherein the court stated as follows, at page 6-7;

"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 court earlier but his case was terminated for one reason on the other, was discharged and was subsequently recharged afresh. Constitutionally, the burden was on the police to explain the delay."

In an endeavour to discharge that obligation, **CPL MOMANYI ABUGA** has sworn an affidavit.

However, the accused argued that the explanation offered by the police was not plausible.

By the time the accused raised the preliminary objection, five prosecution witnesses had already testified. In the light of that fact, the state argued that the preliminary objection had been raised belatedly, and that the same was no more than an afterthought.

The accused placed reliance on **REPUBLIC Vs JAMES NJUGUNA NYAGA, CRIMINAL CASES NO. 40 OF**

2007, to submit that he was entitled to raise the preliminary point of law at any stage of the proceedings. I understand him to have been saying that he could not be denied the right to raise such a point of law at any stage of the proceedings.

The accused indeed contended that such appoint of law could be raised at any stage, be it before the trial court or even before the appellate court.

That argument was founded on the following words of Mutungi J., in **Criminal Case No. 40 of 2007** (above-cited), wherein the learned judge said;

"***In any proceedings, any party has the right to raise any Preliminary Objection, on points of law, at any stage of the proceedings.***"

With the deepest regret, I find myself unable to concur with my learned brother, now retired. I say so because the word "**Preliminary**" is defined by the "**Chambers Concise Dictionary**" as follows;

"***Occurring at the beginning; introductory or preparatory***"

In the event, an objection cannot be said to be a preliminary one if it is raised at any time other than at the beginning of proceedings, or as early as possible in the course of the proceedings.

In this case, five prosecution witnesses have already testified. Meanwhile, in the bundle of witness statements provided by the prosecution, a total of ten witnesses are listed, therefore, it would appear that there are 5 more witnesses who are yet to testify for the prosecution.

In those circumstances it cannot be said that the trial was still at the introductory or preparatory stages.

But then again, I have taken note of the following words of Okubasu, Onyango-Otieno and Aluoch JJA in **MARK WANYAMA WANJALA** Vs **REPUBLIC, CRIMINAL APPEAL No. 69 of 2006**, at page 11;

"***The question of deprivation of a constitutional right is a matter of law and this Court cannot stop an appellant from raising it in his last appeal simply because it was not raised at the trial court or at the first appellate court. Neither can this Court down its tools on the mere reason that a legal point is being raised before it for the first time. That would be an abdication of our powers.***"

Of course, once an issue of law is raised before a court of law, the said court has a duty to determine it, provided that the said court had the requisite jurisdiction. But in the same vein, I believe that such an issue of law would not be raised before the appellate court as a "**Preliminary Objection**" or a preliminary issue.

In this case the accused first filed a Notice of Motion dated 9th May 2008. By the said application he sought orders to quash the information dated 9th November, 2006. His reasons for seeking that order and also for seeking a consequential acquittal, was that he had been detained unlawfully, for 3 months, before being first taken to court.

Although the court listed the application for hearing on several occasions, it was always adjourned. The said adjournments were generally at the instance of the prosecution, who needed time to file an affidavit in reply to the affidavit filed by the accused.

Ultimately, when the court ordered that the application should proceed, even though the state had filed no replying affidavit, it is the accused who then withdrew the said application.

Thereafter, the accused filed a Notice of Preliminary Objection.

I have set out the above-cited history of the matter to illustrate that it was possible for the accused to move the court in any manner other than by way of a preliminary objection. He had done so, and the court was ready to hear this application.

Thereafter, the accused withdrew the application when he was unable to find any lawful means of amending the affidavit in support thereof.

The point I am making is that whereas an accused has a right to raise, at any time, issues concerning the violation of

this constitutional rights, if he should do so by way of a preliminary objection, he ought to do so as early as possible.

In **DOMINIC MUTIE MWALIMU Vs REPUBLIC, CRIMINAL APPEAL NO. 217 OF 2005**, the Court of Appeal said;

"***Additionally, a careful reading of section 84(1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity."***

It would therefore appear that the requirement to raise the issue regarding an alleged breach of constitutional rights, should be raised at the earliest opportunity, regardless of whether or not it was raised by way of a preliminary objection.

Another feature of this case is that when the accused filed the Notice of Motion dated 9th May 2008, he sought both an acquittal and compensation for the period when he was unlawfully detained.

Those are some of the unique facts in this case, which the accused appreciates should inform the determination of the issue he has raised.

He submitted that although compensation was provided for, as a remedy to a person whose constitutional rights had been infringed, that would not justify the violation of the said person's rights.

Of course, by stipulating that a person who is unlawfully arrested or detained shall be entitled to compensation from the person who is responsible for such arrest or detention, the Constitution is, by necessary implication, saying that such arrest or detention was not justified. If the arrest or detention was justified, no compensation would be payable.

Mr. A O Oyalo, the learned advocate for the accused told the court that very few people can go back to the court, after an acquittal, to claim compensation.

That is a matter of conjecture.

But, in any event, there is nothing to stop an accused person from seeking compensation, which is his constitutional right as soon as the court declares that his arrest or detention was unlawful. If an accused person chooses not to pursue his rights, in those circumstances, he has only himself to blame.

When answering the Preliminary Objection, Mr. Imbali, learned state counsel pointed out that the only evidence which was found by the investigating officer was circumstantial. Therefore, it was necessary to have the exhibits analysed by the Government Chemist, to ascertain if there was any nexus between the accused and the murder.

According to the Investigating Officer, the exhibits ere taken to the Government Chemist on 7th September, 2006.

To my mind, the need to have the exhibits analysed was an essential step in this case.

However, the investigating Officer of the Government Chemist have not explained to this court why the process of analyzing the exhibits lasted six months.

At the same time, there appears to be a contradiction inherent in the explanation tendered by the prosecution. I say so because although it is the report from the Government Chemist which linked the accused to the murder; and although that report was not received until 8th March, 2007, the Attorney General had, by a latter dated 9th November 2006, already advised the Investigating Officer to charge the accused with murder.

As soon as the Attorney General gave the said advice, it should have been possible to prefer charges against the accused. And, in order for the Attorney General to advise that the accused be charged with murder, the presumption is that, in his view, the evidence that was already available was sufficient to sustain the charge. That would therefore imply that the report from the Government Chemist was not a critical piece of evidence, as the Investigating Officer now says.

Furthermore, as the accused was actually taken to court on 21st November, 2006, that means that the police did not wait for the report form the Government Chemist before charging the accused. It would therefore not be right for the Investigating Officer to say, as he did in his affidavit, that;

"*9.THAT there was no direct evidence against the accused and therefore the only evidence was the report from the government chemist which was to enable the suspect be charged for murder correctly. The result was therefore released much later on 8th March 2007. The delayance to produce the suspect in court was therefore due to the delayance of the said expert report mentioned above which was important to proof the matter against the suspect."*

Had the report been the only evidence upon which the state made the decision to prefer charges against the accused, the suspect would only have been brought to court after 8th March, 2007.

In the event, I find that the explanation tendered by the prosecution is not reasonable or acceptable.

I also find that there is no explanation for the delay between 7th September 2006 when the accused was ascertained to be mentally sound and the 9th November 2006, when the Attorney General gave a letter to the police, directing that the accused be charged with murder.

The Investigating Officer ought to have provided the court with information about the date when he sought advice from the Attorney General. Such information would have enabled this court make an informed assessment of the reasons for the delay.

The Investigating Officer has also not told the court why the accused was only taken to court on 21st November, 2006, whereas the Attorney General had directed that he be charged on 9th November, 2006.

In the event, I find and hold that the prosecution has failed to satisfy the court that the accused was taken to court as soon as was practicable. In effect, the constitutional rights of the accused have been violated.

The accused was unlawfully detained for 64 days, by my calculations.

The next question is whether or not I should now acquit the accused

In **REPUBLIC Vs PAUL NJEHIA KANUGU, CRIMINAL CASE NO. 96 OF 2005**, Apondi J. found that the constitutional rights of the accused had been violated. In that case the accused had been taken to court six months after his arrest. Nonetheless, the learned Judge declined to terminate the trial. Instead, he said;

"*that the circumstances of the case justifies handsome and adequate compensation for the violation of the rights of the accused under section 72(6) of the Constitution*."

In my considered opinion, the learned judge did respect the following words of the Court of Appeal, which were uttered in **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120 OF 2004**;

"*At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place*."

The accused herein was well aware of the constitutional provision which stipulated that he would be entitled to compensation from such person as had either arrested or detained him unlawfully. That right has not and cannot be taken away form the accused. It remains available to him and it is the route that he should now take.

In the result, although I find that the constitutional rights of the accused have been violated, I do not find that the said violation rendered the proceedings a nullity. The criminal proceedings remain regular and lawful in every respect. In fact, not even the accused has given any grounds upon which the proceedings could be said to be a nullity.

To my mind, the Constitution appreciates that there is a distinction between the arrest and the detention of a suspect. It is for that reason that in section 72(6), the two actions are mentioned separately.

As an example, an arrest may be unlawful, but the person arrested may thereafter be taken to court within the prescribed time. Alternatively, an arrest may be lawful, such as in this instance; but thereafter the suspect might be held in custody for longer than the period permissible under the constitution.

The fact that the accused person was detained in custody for longer than permissible, does not render the initial arrest unlawful.

Similarly, in my considered view, the unlawful detention of a suspect in custody, before he is produced in court, cannot, of itself, render a nullity the proceedings subsequent thereto.

It is for those reasons that I now say to the accused, please pursue your remedy for compensation. Meanwhile, the proceedings will also proceed.

Dated, signed and Delivered at Nairobi, this 29th day of September, 2009**.**

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FRED A OCHIENG

JUDGE