



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 10 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

PETER THAIRU KUNGU.....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 he murdered Nganga Kungu on the night of 25th/26th December 2006, at Kabuge Village in Kiambu District.

It is common ground that the accused was arrested on 26th December 2006. It is also common ground that the accused was first taken before a court of law on 21st February 2007.

By the calculations of the accused, he was taken to court after 60 days. However, by my calculations the accused was taken to court after 57 days.

Although there is a slight difference in the calculations, the same is not significant because the accused ought to have been taken to court within 14 days of arrest.

Pursuant to the provisions of Section 72 (3) (b) of the Constitution, the state is obliged to prove that notwithstanding the delay in taking the accused to court, he was brought before a court as soon as was reasonably practicable. If the state fails to discharge that onus, the court will declare that the constitutional rights of the accused had been violated.

In this instance, the Investigating Officer, PC Paul Sum Busio has sworn a replying affidavit, in which he explains that the accused was assessed to be unfit to plead. The said assessment was conducted on 4th January 2007, by Dr. Kasiyoki of the Mathari Hospital, Nairobi.

Clearly, once the medical doctor had assessed the accused to be unfit to plead, there was no need to present him before the court for that purpose. It was therefore only reasonable to either produce him in court, for record purposes; or alternatively to withhold him from court until the doctor certified him to be fit to plead to the charge.

The state opted to withhold the accused from court because of his mental status. There is nothing unreasonable in that. However, the only difficulty is that the Investigating Officer has not informed the

court about the date when the doctor finally certified the accused to be fit to plead to the charge.

In the absence of the said information, this court is unable to ascertain for itself, whether or not there was a delay in taking the accused to court, even after his mental status had been found to be such that he was fit to plead to the charge.

In the circumstances, I find that the state has not proved that the accused was taken to court as soon as was reasonably practicable. In effect, the constitutional rights of the accused have been violated.

Notwithstanding that finding, I do not accept the accused's contention that the proceedings would be rendered a nullity.

To my mind, Section 72 (6) of the Constitution expressly spells out the consequence of an unlawful arrest or an unlawful detention.

And a detention becomes unlawful if it is for a period longer than that permitted under the Constitution.

For such an unlawful detention, the victim shall be entitled to compensation from the person who detained him.

In the event, I decline to acquit the accused. I also decline to declare the proceedings a nullity. Instead, I find that the proceedings ought to proceed to their logical conclusion, so that if the accused were to be proved to be guilty, he may be duly punished. Meanwhile, for the violation of his constitutional rights, the accused is already entitled to the remedy of compensation. That right cannot be taken away from him by having him undergo the trial.

If anything, I do find that by having the accused tried whilst also ensuring that he gets compensated, this court would have discharged its dual role of safeguarding both the fundamental rights of the accused as well as the public interest. On the other hand, if the accused were acquitted because his constitutional rights had been infringed, that would earn him not only an acquittal but also compensation for the same infringement. In other words, the accused will have received the best from both worlds, whilst the public interest, (in ascertaining whether or not the accused was guilty of the murder in issue), will have been scuttled altogether.

Section 70 of the Constitution expressly stipulates that the enjoyment of the fundamental rights and freedoms, by an individual, shall be subject to respect for the rights and freedoms of others and for public interest. My decision herein is directly influenced by that section as read with Section 72 (6) of the Constitution.

Dated, Signed and Delivered at Nairobi, this 24th day of September, 2009.

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FRED A. OCHIENG

JUDGE