



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 92 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD MWENGA WILSON.....ACCUSED

RULING

The accused asserts that his constitutional rights have been infringed. In particular, he says that the fundamental rights spelt out in section 72 (3) (b) and section 77 (1) (2) (b) and (c) of the Constitution have been violated.

That assertion is premised on the fact that the accused was taken to court long after the expiry of the 14 days period, from the date he was arrested. He was arrested on 28th October 2007, but was not taken to court until 17th December 2007.

By my calculations, the accused was first taken to court 61 days after he was arrested. That means that there was a delay of 47 days.

As far as the accused was concerned, the moment that 14 days had lapsed, his continued detention in custody was unjustified, as it was an unmitigated illegality. Such continued detention is said to constitute a violation of the Constitution.

It was the submission of the accused that the trial against him was null and void, and would remain so irrespective of the weight of the evidence which the prosecution may have against him. His reason for so saying was that the prosecution was founded on an illegality.

The accused therefore submitted that the charge against him should be dismissed, and that he should be set free.

In response to the issues raised by the accused, the state conceded that there had been a delay in taking the accused to court.

However, Miss Tumaini Wafula, the learned state counsel appearing for the state herein, submitted that the delay in bringing the accused to court does not automatically lead to an acquittal of the accused.

It was her submission that pursuant to section 72(6) of the Constitution, the accused was entitled to compensation.

The court was invited to take into account the provisions of sections 70 and 71 (1) of the Constitution.

In that regard, the state asked the court to balance the rights of the accused with those of the person whose life the accused is alleged to have taken unlawfully. On the one hand is the accused's right to liberty and protection by the law; whilst on the other hand was the right of the victim to life.

As the said victim was already deceased, the state invited the court to assume that the state stood in place of the deceased.

In the light of the concession by the state, that there was a delay in taking the accused to court, the accused submitted that there was no explanation at all, for the said delay.

He also said that even if there had been a reasonable explanation offered by the state, the court would have been obliged to acquit the accused.

To my mind that contention would, if accepted and acted upon, constitute a travesty of justice. I say so because section 72(3) (b) of the Constitution actually permits the person who may have delayed in taking an accused to court, to prove that he nonetheless took the accused to court as soon as was reasonably practicable, in the prevailing circumstances. Once he discharges that obligation, to the satisfaction of the court, it will be held that there had been no violation of the constitutional rights of the accused. In which event, there would be no basis for even contemplating the acquittal of the accused.

The accused did also submit that the issue of compensation would not arise in this matter, because this is a criminal case. In his view, compensation cannot be awarded in criminal cases.

He went on to add that after he had been acquitted, as he is seeking, he would thereafter sue the Attorney General for compensation.

The respondent cited two authorities from the International Tribunal for Rwanda. In the first of the said authorities, **JEAN BOSCO BARAYAGWIZA VS THE PROSECUTOR CASE NO. ICTR – 97- 19 – AR 72**, the Tribunal held that the rights of the appellant had been violated. However, the Tribunal declined to release him. Instead, the Tribunal made a finding that the appellant be compensated financially.

And in the case of **THE PROSECUTOR Vs PAULINE NYIRAMUSUHUKO CASE NO. ICTR -97-21-T**, the Tribunal held that if a remedy is to be given for violation of the rights of the accused person it;

“shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.”

Whereas, the decisions of the Tribunal are not binding on this court, I nonetheless find the reasoning therein to be of persuasive value. That is because the fundamental principles of fairness are of a universal application, in jurisdictions which value the rule of law.

Section 70 of the Constitution of Kenya stipulates that every person in Kenya is entitled to the fundamental rights and freedoms of the individual. However, it hastens to qualify the said rights and freedoms thus;

“the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

To my mind, the constitutional acknowledgment that any individual can only enjoy his rights and freedoms provided that in so doing he does not prejudice the rights and freedoms of others or the public interest, is a measure of the fairness that the courts are obliged to safeguard.

In **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120** of 2004, the Court of Appeal fully appreciated the role of the courts, as follows;

“We must admit that the matter has caused us some considerable thought and anxiety. On the one hand 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 our Constitution.”

That statement does, in my view, embody the fundamental principle of fairness.

If the said principle is applied to this case, I would say that the acquittal of the accused, who would then proceed to seek compensation for the violation of his constitutional rights would negate the said principle.

To my mind, fairness demands that if the rights of the accused have been violated, he should be given a remedy. And the remedy is spelt out in section 72 (6) of the Constitution. He should be compensated. And whether or not the

compensation is paid in separate proceedings, it remains available to the accused person because of the violation of his rights in the criminal case.

Having given to an accused the remedy of compensation, it would only be fair that the prosecution be accorded the opportunity to prove the guilt of the accused. If the court should ultimately find the accused guilty, justice demands that he be punished for the crime.

But if the accused were to be acquitted, and should he then also get compensation, he would have received double remedies, whilst the society would have been deprived of the opportunity to adduce evidence with a view to proving the guilt of the accused. That would not, in my considered view, be consistent with the fundamental principles of fairness.

In this case, although neither the accused nor the respondent made reference to it, there is on record a replying affidavit filed by **INSPECTOR ANDREW ODUOR**. He said that he was the Investigating Officer in the case.

He said that on 28th October 2008, he received a call from a member of the public, who told him that a man who had killed his wife at Mlolongo Town, had been beaten up a mob.

Inspector Oduor dispatched three police officers to the scene. And on arrival at the scene, the three officers found the accused herein, lying on the verandah outside a building in Mlolongo. The police officers notified Inspector Oduor that the accused was badly injured.

Inspector Oduor sent a mobile patrol car to the scene, and it was used to rush the accused to Kenyatta National Hospital, for treatment. The accused was admitted at the said hospital for one month.

The fact that the accused suffered serious injuries is supported by his P3 form.

As the accused was admitted in hospital for a month, he could not have been taken to court then. He was only taken to court after he had healed sufficiently. Therefore, I find that the state has proved that the accused was taken to court as soon as was reasonably practicable. The delay was justified, as indeed, it is what enabled the accused to obtain medical treatment.

In the event, the preliminary objection is overruled. However, if I had come to the conclusion that the explanation tendered by Inspector Andrew Oduor was not acceptable, I would still not have acquitted the accused. Instead, I would have directed that he be paid compensation pursuant to section 72(6) of the Constitution.

Dated, Signed and Delivered at Nairobi, this 23rd day of September, 2009.

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FRED A. OCHIENG

JUDGE