



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA**

**Criminal Case 32 of 2009**

REPUBLIC.....PROSECUTOR

VERSUS

VINCENT SHIKUKU NANGENI .....ACCUSED

**RULING**

The accused herein is charged with murder contrary to section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that:

***“on the 30<sup>th</sup> day of March, 2006 at Sipala village, Mihuu Location, Chetambe Location in Bungoma District of Western Province, the accused with others not before court, murdered GLADYS NASWA MUYUNDO.”***

Mr. Ikapel, learned Counsel for the accused filed a notice of Preliminary Objection on 1<sup>st</sup> July 2009 raising the following Constitutional issues:-

- i. ***That the Constitutional and fundamental rights of the accused person, as enshrined in Section 72 (3) and Section 77 (1) (2) (b) and (c) of the constitution have been, are being and will continued to be violated by this prosecution.***
- ii. ***That the said violation is based on the fact that the accused person, who was arrested on 6<sup>th</sup> May 2006, was held in police custody incommunicado until 26<sup>th</sup> May 2006 when he was produced in court.***
- iii. ***That the holding of the accused person continuously for 20 days instead of the constitutionally permitted 14 days violated his constitutional rights and denied him his fundamental right to a fair trial within a reasonable time.***

Learned counsel for the accused further submitted that the accused was arrested on 6<sup>th</sup> May, 2006 in Nairobi and was held at Muthaiga Police Station before being transferred to Webuye Police Station. He was held until 26<sup>th</sup> May, 2006 when he was arraigned in court. Counsel submitted that the accused was kept in custody for six more days contrary to the provisions of Section 72 (3) of the Constitution which allows 14 days period for someone accused of a Capital offence.

Counsel further submitted that the accused has been in custody for three years and his rights under S. 77 (1) of the Constitution for his case to be heard within a reasonable time were violated. The violation of the accused's rights renders the charges against him null and void and the only remedy in the circumstances is to quash the information and acquit the accused. Counsel relied on the authorities of

**ALBANUS MWASIA MUTUA VS REPUBLIC, CR. APPEAL NO. 120 OF 2004 (NRB), R. VS HENRY OPONDO OGAM - NRB. HIGH COURT CRIMINAL CASE NO. 75 OF 2007, ANN NJOGU & ANOTHER VS REPUBLIC, MISC. CRIMINAL APPLICATION NO. 557 OF 2007, NRB. and PAUL MWANGI MURUNGA VS REPUBLIC – CRIMINAL APPEAL NO. 35 OF 2006 (NAKURU).**

The State did not file any affidavit or reply in response to the accused's contention.

The accused herein is invoking the Provisions of Sections 77 (1) (2) (b) and (c) and section 72 (3). He is alleging that his Constitutional rights to be arraigned in court within 14 days from the date of arrest and to a trial within reasonable time have been infringed. He would like this court to declare the charges he is facing as null and void and consequently acquit him. The first initial issue for determination is whether the accused person has approached the court through the proper procedure. Section 84 (1) of the Constitution provide as follows:-

***“S. 84 (1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”***

From the above provision, it is clear that the accused's contentions fall within the purview of Section 84. Section 84 (6) empowers the Chief Justice to make rules in respect to the practice and procedure of the High Court when someone alleges violation of his rights as provided by sections 70 to 83 of the Constitution.

On 16<sup>th</sup> February, 2006, the Chief Justice made the Constitution of Kenya (Supervisory jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. Rule 2 thereof provide as follows:

***“R. 2. Unless a matter is specifically provided for under section 67 or section 84 of the Constitution or any other law, a party who wishes to invoke the jurisdiction of the High Court under section 65 of the Constitution, shall do so by way of Originating Notice of Motion (hereinafter referred to as “the Motion”)***

The accused herein has filed a notice of Preliminary Objection instead of an Originating Notice of Motion. There is no sworn affidavit by the accused supporting the submissions of his counsel. This court is not in a position to confirm whether it is true the accused was detained for twenty days or not or whether he was arrested in Nairobi. It is not known when he was transferred to Webuye Police Station from Nairobi. The Submissions by the accused's counsel cannot be taken to be stating the correct position in the absence of the accused's affidavit. Further, the law requires that a Notice of Motion be filed. Rule three of the above rules state that the Motion shall state the concise grounds for the application and shall be supported by the applicant's affidavit.

Assuming that the accused herein was detained for twenty (20) days instead of fourteen (14) days before he was arraigned in court, would this call for quashing of the charges facing the accused and have him acquitted? Learned counsel for the accused has referred to several authorities where accused persons were acquitted after the court found that their pre-trial rights as enshrined in the Constitution were declared to have been violated. However, each case has to be determined on its own depending on the prevailing circumstances. This is so as there is no provision in the Kenyan Constitution that a victim of violation of Constitutional rights should be acquitted once the court declares that his rights have been infringed. The relevant provision is section 72 (6) which allow a person who is unlawfully arrested or detained to get compensation from those who violate his rights. Detaining someone for more than 14 days in custody is unlawful and the victim thereof is entitled to compensation and not to acquittal. Had the victim not been charged in court after having been unlawfully detained, he would still have had the right to pursue compensation from his detainers.

Learned Counsel for the accused has also raised the issue of violation of the accused's right to a fair hearing within reasonable time as enshrined in section 77 of the Constitution. The accused's case has been pending in court for three years.

The record shows that initially the accused was represented by Mr. Sichangi Advocate. The family of the accused appointed the firm of Yano & Co. Advocates to represent him. Assessors were appointed for the case. Mr. Kiveu Advocate has also been on record holding brief for the family. The firm of Yano also failed to attend court on 28/11/2007 and notice was to be issued to the Advocate. Similarly on 26.6.2008 the matter was listed for hearing before Justice Mbogholi Msagha but the accused's Advocates failed to attend court. Mr. Sichangi Advocate was discharged from representing the accused.

On 23<sup>rd</sup> June, 2009 the matter was listed for hearing before Justice F. N. Muchemi. The prosecutor was ready to proceed with eight witnesses but the learned State Counsel disqualified himself due to scathing attack leveled on him by a group calling itself Community Policing. Since the State Counsel in Bungoma has no assistant, this matter was forwarded to Kakamega law courts for mention on 2<sup>nd</sup> July, 2009. Mr. Ikapel was in court for the accused on 23<sup>rd</sup> June, 2009 and consented to the transfer of the matter to Kakamega. Given the above series of events, I do not find that the prosecution of the accused's case has been unreasonably or unfairly delayed. I do find that there has been no violation of the accused's right to a fair trial within a reasonable time.

The end result is that the Preliminary Objection has no merit and the same is dismissed. The trial file, Criminal Case No. 19 of 2006, now Kakamega Criminal Case No. 32 of 2009 shall proceed to hearing accordingly.

***Delivered, dated and signed at Kakamega this 22<sup>nd</sup> day of September, 2009.***

**SAID J. CHITEMBWE**

**J U D G E**