REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 61 of 2007

REPUBLIC .....PROSECUTOR

VERSUS

NAOMI WANGECHI CHEGE.....ACCUSED

R U L I N G

The court was moved by way of a Notice of Preliminary Objection, which cited **sections 70(a) 72 (3) (b) and 77 (1) (2) (a) (b) (c) and (d) of the Constitution** of the Republic of Kenya. By the said Notice, the accused person asserted that her constitutional rights had been, were being and were also likely to continue being contravened by the proceedings herein.

It was the view of the accused that the proceedings were illegal, null and void, by virtue of the violations of the accused's constitutional rights.

She therefore urged this court to acquit her.

The background to the Notice of Preliminary Objection was that the accused was arrested on 26th June 2007, on the grounds that she was reasonably suspected to have murdered **JOB CHEGE WANGECHI**.

Although the accused appreciates that the state had 14 days within which to first present her before a court of law, her complaint is that the state did not take her to court until she had been in custody for 84 days.

The accused also asserted that it was not until she was first presented before the court, for her plea to be taken, that she was informed of the charges which she was facing. In that respect, the accused cited section 72(2) (1) of the Constitution, as stipulating that she ought to have been informed of the offence which she was to be charged with, as soon as possible after she was arrested.

As the accused was, allegedly, not informed of the charge for 84 days after her arrest, the accused submitted that her constitutional rights had been violated.

Mr. Ojienda, the learned advocate for the accused placed reliance on the following two authorities;

(a) PAUL MWANGI MURUNGA Vs REPUBLIC, CRIMINAL APPEAL NO. 35/2006; and

(b) JOSEPH AMOS OWINO Vs REPUBLIC, CRIMINAL APPEAL NO. 450/2007

It was his considered view that those two decisions of the Court of Appeal made it clear that where the prosecution failed to offer an explanation for the delay in taking an accused person to court, the courts would find that the rights of the said accused had been infringed.

It was the further understanding of Mr. Ojienda advocate that the Court of Appeal had always acquitted those whose constitutional rights had been infringed. It was on those grounds that the accused sought an acquittal.

When responding to the Notice of Preliminary Objection, the learned state counsel, Miss T. Wafula pointed out that section 71(1) of the Constitution guaranteed the protection of life.

She also said that under section 70 (a) of the Constitution, the rights to protection by the law; the rights to liberty; and the rights to security were provided for.

In those circumstances, the state invited this court to hold that the rights of the accused should be balanced against the rights of the deceased.

The court was also told that section 72 (3) does not envisage automatic acquittals where there had been a delay in taking an accused person to court. As far as the state was concerned, the only remedy provided by the Constitution was compensation, as stipulated in section 72 (6).

I was therefore asked to dismiss the "application" made by the accused.

In **JOSEPH AMOS OWINO Vs REPUBLIC, CRIMINAL APPEAL NO. 450 of 2007**, the appellant was taken to court 17 days outside the time he should have been first taken to court. The Court of Appeal noted as follows;

"***No explanation was given in the trial court, or in the first appellate court or in this Court. His rights were clearly violated and no explanation exists for such violation. We need to make it clear that all the law requires the prosecution to do is to demonstrate to the court in cases where a person is taken to court outside the period allowed by section 72 (3) that there were reasons for the delay, such that when such reasons are considered then it would appear to the court that the accused has been taken to court as soon as was reasonably practicable notwithstanding the apparent delay."***

In contrast to the position in that appeal, the prosecution herein has offered an explanation for the delay in bringing the accused before the court. To that extent, this case is distinguishable from that authority.

In **PAUL MWANGI MURUNGA Vs REPUBLIC, CRIMINAL APPEAL NO. 35 of 2006**, the Court of Appeal observed as follows;

"***This appellant was held in unlawful custody for some ten days and no explanation for that delay is forthcoming either from the record or from the prosecuting counsel."***

In effect, therefore, that appeal too can be distinguished from this case, because herein the prosecution did put forward an explanation about the delay in taking the accused to court.

But then again, it is not just any explanation which will be deemed to have discharged the obligation placed upon the prosecution.

The explanation proffered by the prosecution must be reasonable and acceptable to the court; and it ought to satisfy the court that despite the delay, the accused was nonetheless still taken to court as soon as was reasonably practicable.

Before reverting to the explanation tendered herein, I wish to address the contention by the accused, that there had now developed a doctrinal precedent of acquittal of those persons whose constitutional rights had been violated.

If the accused intended to demonstrate or illustrate the alleged doctrinal precedent, through the two authorities she cited, I can only say that she was not successful. I say so because in **PAUL MWANGI MURUNGA V REPUBLIC CRIMINAL APPEAL NO. 35/2006,** the Court of Appeal expressly said;

"***So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again, the court may well countenance a delay of say one or two days as not being inordinate and leave the matter at that."***

By recognizing that there can be instances in which the court would leave the issue of the violation of a constitutional right at that, the Court of Appeal undoubtedly left the issue at the discretion of the High Court Judge who was called upon to determine questions of alleged violations of such constitutional rights. Had the Court of Appeal wanted to say that for all violations of constitutional rights, the accused should be acquitted, they would have said so. Instead, the Court said that there might be instances wherein the court would be entitled to leave the issue at that, notwithstanding the said violation.

Even in the well known decision of **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120/2004,** the Court of Appeal did not hand down a hard and fast rule. This is what the Court said;

"***The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge."***

I believe that the Court deliberately talked about what would normally happen, rather than what must happen, in the event that the constitutional rights of an accused person had been violated.

Ultimately, as was said by the Court of Appeal in **DOMINIC MUTIE MWALIMU Vs REPUBLIC, CRIMINAL APPEAL No. 217/05;**

"***The wording of section 72 (3) above is, in our view, clear that each case has to be considered on the basis of its peculiar facts and circumstances."***

That decision was handed down on 31st July 2008, which was more than five months after **PAUL MWANGI MURUNGA'S** case was determined.

The need for a court to decide each case on the basis of its own peculiar facts and circumstances was perhaps best demonstrated in **GERALD MACHARIA GITHUKU Vs REPUBLIC, CRIMINAL APPEAL No. 119/04.** I say so because in that appeal, the accused person had been taken to court 17 days after his arrest. The Court of Appeal said;

"***We have come to the conclusion, after a careful weighing of these two considerations, in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court 17 days after his arrest, instead of within 14 days, in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant, and although on the evidence we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure be the prosecution to abide by the requirements of section 72 (3) of the Constitution should be disregarded."***

In arriving at the decision to quash the appellant's conviction, the Court took into account the fact that the appellant had been in custody for in excess of 12 years.

In comparison, the accused person herein has been in custody for just over two years. That is therefore a relevant factor to be taken into account.

Meanwhile, it must be borne in mind that the two considerations which the Court of Appeal weighed against each other, in the case of **GERALD MACHARIA GITHUKU** were derived from the following passage, drawn from **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120/2004;**

"***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 the Constitution."***

In an endeavour to give life to the words of the Constitution; and so as to be able to afford protection to society whilst also enforcing the human rights of the accused person, I derive guidance and direction from Section 70 of the Constitution. I do so because that section expressly stipulates that the provisions of the **Chapter 5 of the Constitution,** which affords protection of fundamental rights and freedoms of the individual,

"***shall have effect for the purpose of affording protection to those rights and freedoms subject to the limitations of that protection as are contained in those provisions, 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."***

Every individual is thus entitled to enjoy the rights and freedoms provided that he has not infringed on the rights and freedoms of any other person or persons, or the public interest.

Of course, I do appreciate that an accused person is presumed innocent until and unless he is proved to be guilty. Indeed, a suspect or an accused has no obligation at all, to prove his innocence.

However, I believe that where the prosecution has reasonable grounds for believing that the accused had committed a criminal offence, it would be in public interest to afford the prosecution a reasonable opportunity to lead evidence, with a view to discharging the onus of proving the guilt of such an accused.

If the accused is acquitted, before the prosecution can lead evidence in respect of the charges facing the said accused, society would never know whether or not the accused was innocent or guilty.

In my considered view, that is why the authors of our Constitution expressly provided at section 72 (6), that;

"***A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person."***

In enforcing the rights of the accused herein, I find and hold that if her constitutional rights have been violated, her remedy lies in compensation; not an acquittal.

Through that route, if she were to be ultimately convicted, the accused would be punished for the offence she had committed; whilst at the same time she would have been given compensation by those who had violated her constitutional rights.

But, have the rights of the accused herein been violated?

She was arrested on 26th June 2007. She was then held in police custody until 4th September 2007 when she was brought before Rawal J. In other words, when the accused asserted that she was first brought to court on 18th September 2007, that was factually incorrect.

However, it is true that on 18th September 2007 the accused was once again brought before the court. On that occasion, she appeared before Apondi J. By then, she was already being represented by Mr. Ojienda advocate.

The court records show that the advocate for the accused expressly stated that his client could not take a plea because she was mentally disturbed. As a result of that information, the court ordered that the accused be examined by a psychiatrist at the Mathare Mental Hospital, Nairobi. The court further directed that the psychiatrist was to prepare a comprehensive medical report on the condition of the accused.

When the accused was produced in court on 23rd October 2007, the psychiatrist had filed her medical report, which showed that the accused was not fit to plead to the charge. Consequently, the court

referred the accused back to the hospital, for further treatment.

On 5th March 2008, Dr. Catherine Syango Mutisya, who had been attending to the accused, informed the court that the accused had become fit to plead to the charge.

Although the ailment of the accused was a factor in the delay in commencing the trial, the Investigating Officer has not suggested that it contributed to the delay in bringing the accused to court for the first time. The original delay is attributed to the financial constraints on the part of the victim's family, which resulted in the post mortem being conducted a week after the victim was killed. Secondly, after the post mortem examination, the pathologist took 17 days, (upto 20th July 2007), to type and sign his report. The delay by the pathologist was attributed to the heavy work load on his part.

Those two pieces of information constitute an acceptable and reasonable explanation by the prosecution.

However, there is no clear explanation for the delay between 20th July 2007 and 4th September 2007. I so find because although the Investigating Officer has made reference to a delay attributable to the absence of a psychiatrist at the Gatundu Hospital, who could have ascertained the mental status of the accused, the court has not been told about the efforts which were made in having the mental status of the accused assessed elsewhere.

Surely, if Gatundu Hospital did not have a psychiatrist, it was not enough for the Investigating Officer to just wait and hope that some day, the hospital would have a psychiatrist.

Furthermore, the court has not been told when or by whom the mental status of the accused was finally assessed prior to her being arraigned in court.

I am therefore not satisfied that the accused was brought to court as soon as was reasonably practicable. In effect, I find and hold that her constitutional rights were violated.

However, as I have already stated earlier herein, the said violation would only entitle her, pursuant to section 72 (6) of the Constitution, to compensation. I therefore decline to order that she be acquitted. Instead, I direct that her trial should proceed to its logical conclusion.

Dated, Signed and Delivered at Nairobi, this 29th day of October, 2009.

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FRED A. OCHIENG

JUDGE