

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Criminal Case 26 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY KIMANDO.....1ST ACCUSED

ALEX MWANGI WANJIKU.....2ND

ACCUSED

JUDGMENT

ANTHONY KIMANDO and ALEX MWANGI WANJIKU are charged with murder contrary to Section 203 are read with Section 204 of the Penal Code. It is alleged that on 25th December 2006 at Likia Trading Centre in Nakuru District within Rift Valley Province they jointly with another before court murdered James Kariuki Njogu.

After taking the evidence of four witnesses, they applied under Sections 65, 70, 72 and 77 of the Constitution for a declaration that the charge against them in this case is oppressive, discriminative, unconstitutional and null and void for violation of their constitutional rights to a fair trial hence the same should be dismissed and they be unconditionally discharged.

The application is based on the ground that the Accused persons were arrested on 26th December 2006 but they were not taken to court until 26th February 2007. The police through Mr. Mugambi, the state counsel, appearing in this application contend in the replying affidavit that when the Accused persons were arrested they had been badly beaten by the public necessitating their admission in the hospital. After discharge they were charged with manslaughter but the state entered a nolle prosequi in that case after which they were re-arrested and charged with murder in this case.

No particulars of the accused's hospitalization or the charge of manslaughter against them have been given. I therefore agree with their counsel that those allegations are false and that no good reason has been given for the delay in bringing them to court. I therefore find that that delay violated their rights under Section 72(3)(b) of the Constitution.

This finding notwithstanding, I am unable to grant this application. I have anxiously considered this application in light of the Court of Appeal and this Court's decisions on the issue and I have come to the conclusion that we are not doing the right thing.

The past decisions of this court and those of the Court of Appeal on the issue have not squarely addressed the violation of the fundamental rights of the victims of crime giving raise to the charges against the accused persons whose rights are also violated in the course of their prosecution. In the circumstances I think it is right to address this issue in this ruling.

Fundamental rights are not absolute. They are never enjoyed in isolation. Section 70 of the Constitution is very clear that the enjoyment of fundamental rights and freedoms is "subject to respect for rights and freedoms of others and for the public interest." Therefore when one complains that one's fundamental rights have been violated, the court has to consider all the circumstances of the case before granting one's plea. The court cannot ignore the violation of other people's rights in the course of violation of one's constitutional rights.

As I have stated the accused persons are charged with murdering one James Kariuki Njogu. Though as of now that is a mere allegation, if true, however, the deceased has lost his constitutional right to life at the hands of the Accused persons. Justice demands that his killers be punished. Justice also demands that the violation of the accused person's constitutional rights under Section 72(3)(b) also be remedied.

The deceased in this case had nothing to do with the delay in bringing the accused persons to court. The accused persons constitutional rights were violated by the police who, as I have said, have not offered any reasonable explanation for the delay. In my respective view the Accused should have sought damages from the state for the violation of their constitutional rights. Dismissing the charge against them before hearing the case and finding them not guilty will in my view in be total disregard of the deceased constitutional right to life.

For these reasons I dismiss this application.

DATED and delivered this 27th day of October, 2009.

D. K. MARAGA

JUDGE.