



REPUBLICPROSECUTOR

VERSUS

JOHN OUMA OWINO 1ST ACCUSED

SAMUEL OTIENO AGOT..... 2ND ACCUSED

R U L I N G

The two accused persons, **JOHN OUMA OWINO** and **SAMUEL OTIENO AGOT**, have been charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

It is the contention of the prosecution that the accused persons murdered **QUANTINE MUTUA MUSUVALI**, on the 20th of April 20097, at Soweto village of Kayole, Nairobi.

It is common ground that the 1st accused, **JOHN OUMA OWINO**, was arrested on 5th August 2007, and was thereafter taken to court for the first time on 21st August, 2007.

Meanwhile, the 2nd accused, **SAMUEL OTIENO AGOT**, was arrested on 3rd June 2007, and was first taken to court on 2nd August 2007.

On the basis of those facts, the accused persons have each filed a Notice of Preliminary Objection, asserting that their constitutional rights had been infringed.

It is their contention that they should be acquitted by this court, on the grounds of the alleged violation of their constitutional rights.

Pursuant to **section 72 (3) (b) of the Constitution**, a person who is arrested on reasonable suspicion of having committed an offence for which the prescribed sentence is the death penalty, is entitled to be brought before a court of law within fourteen (14) days of his arrest.

In this instance, Mr. Nyangweso, the learned advocate for the 1st accused submitted that his client ought to have been brought before the court by 18th August 2007. It would therefore follow, that by bringing the 1st accused to court on 21st August 2007, there was a delay of three (3) days, on the part of the police.

In the understanding of the 1st accused, the police cannot have had any good explanation for the delay in taking him to court, because by the time of his arrest, the police had already concluded their investigations.

Why does the 1st accused say that the police had already concluded their investigations?

It is because, prior to the arrest of the 1st accused, the 2nd accused had already been charged with the

offence of murder. And in the Information constituting the charge against the 2nd accused, it had been expressly asserted that the murder had been committed jointly by the 2nd accused herein and another person, who was not yet before the court, as at that date.

In the opinion of the 1st accused, the prosecution sought to mislead the court, by indicating in the charge sheet, that he was arrested on 12th August, 2007.

In the event, this court was reminded that it was its duty to enforce the provisions of the supreme law of the country, which is the constitution. The 1st accused submitted that the court cannot be made a party to the breaking of the provisions of the Constitution.

The 1st accused cited **REPUBLIC VS JAMES NJUGUNA NYAGA, CRIMINAL CASE NO. 40/07** as an authority for the proposition that when the prosecution failed to explain the delay in bringing an accused person before the court, that constituted a violation of the rights of the accused.

That authority was also said to have held that the continued detention of such an accused person would be unconstitutional, and it renders the prosecution of the case null and void, as it was based on an illegality.

The 1st accused also cited **REPUBLIC Vs NATHANIEL NGUGI MWAURA, CRIMINAL CASE NO. 60/2007**, which held that upon the expiry of 14 days in custody, before an accused person was taken to court, any proceedings thereafter, (including efforts to justify the violation) are null and void.

This court was thus invited to hold that this case was a nullity, because it had not complied with the Constitution.

On her part, Mrs Wang'ombe, the learned advocate for the 2nd accused submits that her client's rights under both **sections 72(3) (b) and 77 (1) of the Constitution** had been infringed.

As far as the 2nd accused was concerned, once he was brought to court later than after 14 days, that automatically meant that he could not be accorded a fair trial within a reasonable time, as provided for by **section 71(1) of the Constitution**.

It was further submitted that when there was a delay in bringing the accused to court, that also constituted a violation of his right to personal liberty, as enshrined in **section 72(1) of the Constitution**.

According to the 2nd accused, there was an attempt, by the prosecution, to mislead the court about the date of his arrest. The said attempt is said to be contained in the charge sheet, which indicates that the said accused was arrested on 3rd August 2007, whereas the arrest was effected on 3rd June 2007.

There can be no doubt that the 2nd accused was arrested on 3rd June 2007, as the Investigating Officer has confirmed that fact, in his affidavit.

That being the factual position, the 2nd accused asserts that the prosecution has not tendered any reasonable explanation for the delay of about 60 days. As far as the 2nd accused was concerned, the alleged mis-placement of the post mortem report was untenable.

But even if it were true that the post mortem report was misplaced at the offices of the pathologist, the 2nd accused believes that the Investigating Officer displayed a lot of laxity when he failed to make a follow-up with the pathologist for over one month.

The one month that the 2nd accused was talking about was between 4th June 2007, when the pathologist first indicated to the Investigating Officer that the post mortem report was misplaced; and 7th

July 2007, when the Investigating Officer next checked with the pathologist about the post mortem report.

In support of his submissions, the 2nd accused relied on the following authorities;

- (1) **MOHAMED Vs REPUBLIC [2003] KLR 344;**
- (2) **GERALD M. GITHUKU Vs REP. CRIMINAL APPEAL NO. 119/04;**
- (3) **ARTICLE 14 (3) (C) of THE INTERNATIONAL CONVENTION ON CIVIL & POLITICAL RIGHTS;**
- (4) **PAUL MWANGI MURUNGA Vs REPUBLIC, CRIMINAL APPEAL NO. 35 of 2006;**
- (5) **ARTICLE 7 (d) OF THE AFRICAN CHARTER ON HUMAN & PEOPLES RIGHTS.**

As far as the 2nd accused was concerned, the state had not only failed to explain the delay in taking him to court, but also in seeking an extension of the time for taking him to court. In effect, the 2nd accused's position was that if the state could not take him to court within the period prescribed, he ought to have been set free on bail, unless the police sought and were granted an extension of time within which to take him to court.

Pausing at that point for a moment, it is worthy of note that the 1st accused strongly believed that there was no provision at all for the extension of time within which an accused person, who was in custody, should be produced before a court of law.

In **MUHAMED V REPUBLIC**, (above-cited), Etyang J. was requested by the learned state counsel, to give to the police officers, some three days to conclude their investigations. The state counsel told the court that within the said three days, the police would be able to take a decisive action.

His Lordship had this to say about that request;

“The plea is rejected. The Court cannot give police officers authority to hold suspects unlawfully at police stations a minute longer, for this violates the fundamental rights and freedoms of an individual as expressly enacted in the Constitution of Kenya. The better and legal option is for the respondent to bring the applicant to court and then to apply for him to be remanded in their custody to enable them to complete their investigations.”

In my understanding of the above-cited ruling, the learned Judge did not say that the court can extend the time within which an accused person should be brought to court. If anything, he made it abundantly clear that the Court cannot give to the police, authority to hold a suspect in their custody beyond the period stipulated in the Constitution.

In the event, although the 2nd accused expressed the view that it had been open to the police to seek an extension of time within which to bring him to court, I hold that that option was not available to the police. I say so because the court does not, in my view, have jurisdiction to expand the time limits spelt out in the Constitution.

When Miss Ruto, learned state counsel, was answering the Preliminary Objection, she first conceded that the 1st accused was taken to court three (3) days late; whilst the 2nd accused was taken to court forty-six (46) days late.

Notwithstanding that concession, the learned state counsel sought to demonstrate to this court that the accused persons were nonetheless taken to court as soon as was reasonably practicable. She explained that the delay was occasioned by the fact that the post mortem report had been misplaced at the offices of the pathologist who had carried out the post mortem examination on the deceased.

The Investigating Officer, PC DANIEL THURANIRA swore an affidavit in which he stated that the post mortem was done on 27th April 2007.

However, it was not until 3rd June 2007 that the 2nd accused was arrested. Following the said arrest, the Investigating Officer returned to the offices of the pathologist, with a view to collecting the post mortem report.

Unfortunately, the pathologist had misplaced the report. It was not until 7th July 2007 that the Investigating Officer was able to collect the post mortem report.

First, there is no doubt that when an accused person is thought to have murdered someone, a post mortem report on the victim is an essential aspect of the investigations, because it is what establishes the cause of death.

But in this case, the Investigating Officer has not explained why he waited for a whole month before reverting to the pathologist, to follow up the issue of the report which had earlier been misplaced.

After the Investigating Officer obtained the post mortem report, he stayed with it for another five (5) days, before he forwarded his Investigations File to the Attorney General, on 12th July 2007. The reason for sending the file to the Attorney General was that the police wished to obtain the advice of the Attorney General on whether or not the 2nd accused should be charged with murder.

I believe that it is fair to presume that the Investigating Officer needed the five (5) days to compile his Investigations File appropriately.

Interestingly, the Attorney General did not revert to the Investigating Officer until 30th July 2007, when he advised the police to charge the 2nd accused with murder.

Although the Attorney General had the file for about eighteen (18) days, this court has not been told why he needed that amount of time.

The explanation tendered by the Investigating Officer was that;

“the cause of delay in bringing the accused to Court was because of the post mortem report had been misplaced at the office of the Pathologist”

To my mind, that explanation is not adequate or reasonable.

In any event, the said explanation was not applicable to the 1st accused, as he was arrested after the post mortem report had been traced.

As the 2nd accused had already been charged with a murder which he is alleged to have committed with another person, I hold the view that by the time the police arrested the 1st accused, they must be deemed to have already completed their investigations.

At any rate, the police have not said that they still needed to carry out further investigations, after they had arrested the 1st accused.

In the result, I do find and hold that the police have failed to satisfy the court that the accused persons were brought to court as soon as was reasonably practicable. In other words, the rights of both accused, under **section 72(3) (b) of the Constitution**, were violated.

Does that imply that, their rights under section 72(1) and 77 (1) of the Constitution were automatically violated, as submitted by the 2nd accused?

Section 72 (1) stipulates that no person shall be deprived of his personal liberty save as may be authorized by law in the circumstances spelt out in paragraphs (a) to (j) of that section.

Section 72 (1) (e) provides that a person may be deprived of his personal liberty;

“upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya.”

In the light of that provision, until and unless the accused demonstrated that there was no grounds upon which the police could say that they had reasonable suspicion that the 2nd accused had committed the murder which he is charged with, I cannot say that the police had no such grounds.

Of course, I am aware that the accused is presumed to be innocent, and also that he has no obligation to prove his innocence. I am therefore not suggesting that he should prove his innocence.

But when he asserts that the police had violated his rights under section 72(1) of the Constitution, he places upon himself the duty to discharge the responsibility of satisfying the court to accept his said submission.

In this instance, the 2nd accused has not discharged that onus. But at the same time, the presumption of his innocence remains in place. To my mind, the two positions are not mutually exclusive, nor are they inconsistent.

In other words, it does appear that the police had a reasonable suspicion that the 2nd accused and the 1st accused jointly murdered QUANTINE MUTUA MUSUVALI. But until and unless the prosecution proves, to the satisfaction of the court, that the accused, or either of them is guilty as charged, the law presumes that they are innocent.

Provided that the police had a reasonable suspicion that the accused committed a criminal offence, they were entitled to arrest the said accused. And although the accused would then be deprived to his right to liberty, the Constitution recognizes such deprivation as being legitimate and lawful.

Pursuant to **section 77 (1) of the Constitution;**

“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

The question that arises is whether or not an accused person who is brought to court after the lapse of 24 hours (if he is charged with a non-capital offence), or after 14 days (if he is charged with a capital offence), should automatically be presumed to have been deprived of his right to a fair hearing within a reasonable time.

I am limiting the issue to one of time because the 2nd accused has not asserted that the Court is not either fair or independent, or is not established by law.

In **DOMINIC MUTIE MWALIMU Vs REPUBLIC, CRIMINAL APPEAL NO. 21 of 2005**, the Court of Appeal said;

“In our view, the mere fact that an accused person is brought to court either after twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution, does not ipso facto prove a breach of the Constitution. 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.”

It would therefore follow, that the delay in bringing an accused person before the court, cannot, of

itself, automatically imply that the accused would not be accorded a trial within a reasonable time. I say so because it is possible to have a situation in which an accused is tried speedily, even though he was originally brought to court late.

In general terms, however, it is more probable than not, that when the delay in taking the accused to court is prolonged, there are greater chances that he would not be afforded a trial within a reasonable time.

In **PAUL MWANGI MUURUNGA Vs REPUBLIC, CRIMINAL APPEAL NO. 35 of 2006**, the Court of Appeal noted that;

“.....the Court might well countenance a delay of say one or two days, as not being inordinate, and leave the matter at that.”

All those pronouncements go to show that nothing is automatic. Therefore, the courts must continue to determine each case on the basis of its peculiar facts and circumstances.

In this case, the 2nd accused's trial was first scheduled to commence on 4th February 2008. It is arguable that if he had been taken to court earlier, on the first occasion, the court could have been able to give an earlier date for the trial.

However, it is equally true that because the 2nd accused was alleged to have committed the murder jointly with the 1st accused; and as the 1st accused was still at large for a considerable period of time; even if the trial of the 2nd accused had commenced earlier, it would probably have had to be consolidated with the case of the 1st accused. Upon consolidation, as has happened herein, the trial would have had to start anew.

Therefore, although a delay of 46 days is by no means short; and even though such a delay implied that the trial could not start sooner than it could otherwise have done; it is noteworthy that the court did list the case for hearing within the time range that murder cases are ordinarily set down for hearing. In other words, there was no delay, on the part of the court, in listing the case for hearing.

However, I nonetheless appreciate that the action taken by the court cannot undo the delay that had already occurred.

In the circumstances, the next question is whether the delay should earn the accused persons an acquittal or only compensation. That question arises from the submissions made by the parties before me.

On the one hand, the accused persons say that they should be acquitted, whilst the state says that they should only be compensated.

Pursuant to the provisions of **section 72 (6) of the Constitution:**

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

Clearly therefore, the Constitution has expressly prescribed the remedy available to the person who has been unlawfully arrested or detained. He is to be compensated.

Why, therefore, are the accused persons seeking an acquittal?

According to them the answer has been provided in several decisions of the court. For instance, in **REPUBLIC Vs NATHANIEL NGUGI MWAURA, CRIMINAL CASE NO. 60/2007**, Mutungi J. held as follows;

“The minute the detention went beyond the 14 days permitted by the Supreme Law of the land, without his being brought to court, any proceedings in relation to the alleged offence became illegal. Continuing with the proceedings in this case will achieve nothing but prolong the illegal detention of the accused in proceedings which are null and void.”

The learned Judge promptly set free the accused.

As far as he was concerned,

“.....any proceedings thereafter, including efforts to “justify” the violation are null and void. It is not prudent usage of our time to justify a nullity – a vacuum.”

With all due respect to my learned brother, Mutungi J. (now retired), his pronouncements did not take into account the fact that section 72 (3) (b) of the Constitution expressly gives an opportunity to the person who may have brought the accused late to court, to try and satisfy the court that notwithstanding such delay he had nonetheless brought the accused to court as soon as was reasonably practicable. Therefore, the proceedings during which the police try to “justify” the delay are legitimate, as they are specifically underpinned in the Constitution.

I think that it is necessary to consider whether or not there is any distinction between a trial which starts later than it could have done if the accused was taken to court later than the time prescribed; and a trial which takes much longer than it should, even though the accused was brought to court within time, in the first instance.

To my mind, if a trial starts late, because the accused was brought to court late; then the failure to accord the accused a trial within a reasonable time cannot be divorced from the original delay. That being the case, it would imply that the remedy available to an accused in such circumstances should be pegged to the original delay in bringing him to court. In effect, section 72 (6) of the Constitution ought to provide the remedy.

But in circumstances in which a trial cannot be achieved within reasonable time for any other reason (other than the delay in taking the accused to court for the first time), the remedy is not prescribed in the Constitution. And, in my considered view, it is in these latter circumstances, that the court should consider whether or not an acquittal, was the appropriate remedy.

In this case, the delay on the part of the 1st accused was for 3 days, which was thus not prejudicial to the said accused.

But the delay of 46 days, on the part of the 2nd accused was definitely prejudicial.

However, the resultant delay in starting the hearing is the direct consequence of the initial delay in taking the 2nd accused to court, for the first time. I therefore find and hold that the remedy, if any, to both the accused persons lies in compensation.

For those reasons, I decline to acquit the accused. Instead, I do hereby order that their trial will proceed to its logical conclusion.

Dated, Signed and Delivered at Nairobi, this 26th day of October, 2009.

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FRED A. OCHIENG

JUDGE