



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Criminal Case 12 of 2008

REPUBLIC..... PROSECUTOR

VERSUS

SAMUEL MWAURA KARIUKI..... ACCUSED

RULING

The accused has moved the court by way of a Notice of Preliminary Objection.

Pursuant to that preliminary objection, the accused is asserting that his constitutional rights had been violated by the police. In particular, he asserted that his rights under section 72(3) and section 77(1), (2) (a) (b) and (c) of the Constitution of the Republic of Kenya, had been violated.

Mr. Odiwuor, advocate for the accused, submitted that his client had been held in custody for more than fifty-nine (59) days before he was first taken to court. The period of 59 days was said to run between 18th November, 2007, when the accused was arrested, and 1st February 2008, when he was first taken to court.

Between the date of arrest and the date when the accused was first taken to court, he was held at the Mai Mahiu Police Station.

It is a constitutional requirement that a person facing a capital charge should be brought to court within 14 days of his arrest.

And as the accused had been held in custody for over 59 days, he argues that he was entitled to an acquittal, after the court declares these proceedings null and void.

To support his case, the accused cited the following three (3) authorities;

(i) **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120/2004;**

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

(iii) **REPUBLIC Vs JAMES NJUGUNA NYAGA, CRIMINAL CASE NO. 40/2007.**

Meanwhile, the accused submitted that the replying affidavits filed in this case, failed to give any objective explanations for the delay in taking him before the court.

In the accused's view, the prosecution was only seeking to raise technicalities, in an attempt to defeat the constitutional rights of the accused.

His reason for that submission was that the police had all the instruments of the state, to quell any civil unrest. Therefore, the accused feels that the police were merely giving excuses, when they talked about having been hampered by the then volatile post election chaos that engulfed Kenya, subsequent to the General Elections conducted in December 2007.

The accused also found it curious that the police kept his file between 8th and 18th January 2008, before they sought the advice of the Attorney General, on whether or not the accused should be charged with murder.

The significance of 8th January 2008 is that it is the date when the police surgeon had examined the mental status of the accused.

Furthermore, the accused submitted that there was no explanation as to why the Attorney General's office stayed with the file from 18th January 2008, upto 1st February 2008.

Having commented on the explanations tendered by the police, the accused submitted that none of them met the threshold of reasonableness. The said threshold is said to have been laid down in **FAN XI & 3 OTHERS Vs REPUBLIC, CRIMINAL CSE NO. 860/2007.**

In answer to the preliminary objection, the learned state counsel, Mrs Ogoma, submitted that although the accused was first taken to court after more than fourteen (14) days from the date of his arrest, the state had explained the reasons for the delay.

In the first instance, there was confusion between the medical officers at Tigoni and those at the Mathari Mental Hospital. Apparently, Mathari Hospital declined to carry out a mental assessment on the accused because the accused had been arrested by police officers from Lari Police Station, which was situated in Central Province, whilst the hospital was within the jurisdiction of Nairobi Province.

Meanwhile, Tigoni Sub-District Hospital is said to have lacked the necessary expertise for assessing the mental status of the accused. As a result, the mental status of the accused was only assessed by the Police Surgeon, on 8th January 2008.

Ten days later, on 18th January 2008, the police forwarded their investigations file, to the Attorney General. The police sought the advice of the Attorney General on whether or not the accused should be charged with murder.

The advice from the Attorney General was received on 12th February 2008. As the Attorney General had

advised that the accused be charged with murder, the accused was charged with that offence, on 19th February, 2008.

Clearly, as conceded by the state, the accused was taken to court after more than 14 days.

However, as the learned state counsel, Mrs Ogoma, submitted, the makers of our Constitution did appreciate that there could be justifiable delays in bringing suspects to court.

In determining whether or not the suspect was brought to court as soon as was reasonably practicable, the court would take into account the particular circumstances of the case. In effect, each case would be determined on its own merits.

In this case, the police were not able to have the mental status of the accused assessed as speedily as they ought to have done. The reason for that inability was that Mathari Hospital medical personnel declined to carry out the assessment, because they were of the view that the case was outside their geographical jurisdiction.

Whether or not the medical personnel at Mathari Hospital were right in their decision, is not material. But it is evident that the police did make an effort to comply with the legal requirements.

The police also tried to get the mental status of the accused assessed at Tigoni Sub-District Hospital. But the hospital did not have the required expertise.

To my mind, the action undertaken by the police, in that regard, is reflective of a desire to comply with the law.

However, in my considered opinion, the state has not provided the court with a plausible explanation for the delay between 8th January 2008, (when the accused's mental status was assessed), and 18th January 2008, (when the investigations file was sent to the Attorney General).

Also, it is not at all clear, why the matter remained with the Attorney General for three (3) weeks, until 12th February 2008.

Finally, there has been no explanation, by the state as to why the accused was not taken to court immediately after 12th February 2008, when the Attorney General advised that he be charged with murder.

In the event, I find and hold that the state did not discharge the obligation of proving that notwithstanding the delay in taking the accused to court, the accused was nonetheless taken to court as soon as was reasonably practicable.

In arriving at that decision, I have not overlooked the fact that after the General Elections held in December 2007, there erupted serious chaos in Kenya. If anything, it is because I have taken that fact into account that I reached the conclusion that the efforts to get the mental status of the accused assessed, constituted a plausible explanation for the earlier delays.

Having concluded that the accused was not taken to court as soon as was reasonably practicable, I now have to address the question as to the remedy available to him.

On the one hand, the accused asserts that he is entitled to an acquittal, whilst on the other hand, the state contends that the accused would be entitled to compensation.

The accused concedes that pursuant to section 72 (6) of the Constitution, compensation would be payable to a person who had been unlawfully arrested or unlawfully detained. However, he also points out that the Court of Appeal has consistently acquitted persons whose constitutional rights had been infringed.

It was the submission of the accused that the Court of Appeal must be taken to have been alive to the provisions of section 72 (6) of the Constitution.

To my mind, the decisions cited by the accused do not indicate that the Court of Appeal had actively applied its mind to the provisions of Section 72 (6) of the Constitution.

And, as the accused submitted, the provisions of the Constitution cannot be in vain. By that I understand him to mean that the provisions of the Constitution should be given effect. If that be the position, it would follow that any person who had been unlawfully arrested or unlawfully detained, should be entitled to monetary compensation. That is what section 72 (6) of the Constitution stipulates.

Indeed, there is no provision in the Constitution, which expressly or by necessary implication, stipulates that the person whose constitutional rights had been violated should be acquitted.

But, would an award of compensation provide any meaningful remedy, considering that the accused cannot be granted bail pending trial; and would, if convicted, be sentenced to death?

The accused submitted that the compensation would, in his circumstances, not provide any meaningful remedy.

That submission appears to ignore the fact that when a person is killed, say in an accident, his dependants would normally be entitled to seek compensation from the person whom they perceive to be responsible for causing the said accident.

Furthermore, I hold the view that if the person was acquitted, and he thereafter received compensation, he would have received two remedies, arising from a single incident. Meanwhile, the society whose interest is to see that persons who are reasonably suspected to have committed offences are convicted and duly punished, if sufficient evidence is adduced; would have been deprived of the opportunity to give effect to that legitimate expectation.

In **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120/2004**, the court of Appeal said;

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise here would be no reason for having those provisions in the first place.”

The court then proceeded to discuss the;

“jurisprudence which emerges from the cases.”

they had cited.

In doing so, the Court of Appeal did not say that acquittals were provided for in the Constitution. I believe that that is because acquittals were not expressly stipulated as a remedy available to persons whose rights under the Constitution had been violated.

If anything, the only remedy expressly provided for is compensation. And the said remedy is provided for in section 72 (6) of the Constitution; which therefore provides a direct nexus with section 72 (3) (b) of the said Constitution.

It is for that reason that I deem myself to be enforcing the provisions of the Constitution by telling the accused to seek compensation for the violation of his rights.

Accordingly, I decline to order that the accused be acquitted. He shall therefore proceed to be tried, to the logical conclusion of the case.

Dated, Signed and Delivered at Nairobi, this 30th day of November, 2009.

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FRED A. OCHIENG

JUDGE