



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS) Criminal Case 25 of 200

REPUBLIC..... PROSECUTOR

VERSUS

- 1. RAHAB NJERI..... 1ST ACCUSED**
- 2. JOSHUA KIMANI 2ND ACCUSED**
- 3. JOHN WAWERU 3RD ACCUSED**
- 4. SAMUEL KAMAU 4TH ACCUSED**
- 5. GEORGE KINYANJUI 5TH ACCUSED**

RULING

The five accused persons have asked the court to declare that their constitutional rights had been violated. In particular, they assert that their rights under Section 72 (3) (b) and section 77 (1) of the Constitution have been violated.

The said assertion is founded upon the fact that the 1st accused was arrested on 26th December 2006, whilst all the other four accused were arrested on 27th December 2006.

As they have been charged with murder, the accused submitted that they should have been brought to court within 14 days of their arrest.

However, it is their contention that they were held in custody for over fifteen (15) months, before being taken to court. It was their further contention that the said delay in taking them to court constituted a violation of their right to a fair trial within a reasonable time, as enshrined in section 77 (1) of the Constitution.

In the light of the said violations, the accused submitted that they were entitled to either an acquittal or a discharge.

The accused cited the case of ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120 OF 2004, as authority for the proposition that if the rights of an accused are violated, he is entitled to an acquittal.

As far as the accused were concerned, the prosecution had displayed impunity, by failing to give any

cogent explanation for the delay in taking the accused to court. In the opinion of the accused, the affidavit of CHIEF INSPECTOR CHRISTOPHER ROTICH was nothing more than a belated effort to explain the delay. Yet even then, the deponent is faulted for not indicating whether or not he was the Investigation Officer in the case.

It was the submission of the accused that the prosecution should have provided the court with particulars of the cases, if any, in which the accused had been previously charged with manslaughter. The accused also say that the prosecution was obliged to provide information regarding what transpired to them immediately after any of the alleged previous criminal cases against them were terminated. In particular, the accused argued that the prosecution should have indicated whether or not they were set free, or if the police continued to hold them in custody.

The accused also submitted that the only evidence that was produced by the prosecution was to the effect that the accused were held at the Karuri Police Station. That evidence was, in the opinion of the accused, discernable from the Call Register.

Having said so, the accused went on to submit that the said evidence demonstrated that they had been held in custody upto 25th March 2008, when they were first produced before this court.

And because the rights of the accused were vested in the Constitution, which has no exceptions, the accused submitted that the attempt by the prosecution herein, to show that there were some exceptions, was void and unacceptable as the same was not founded on the laws of Kenya.

In any event, as far as the accused were concerned, the Constitution was a contract between the people and the government. Therefore, the Constitution was said to govern the relationship between the living persons and the government.

Because of that position, as understood by the accused, they submitted that dead persons had no rights.

The accused further submitted that the rights they sought to have enforced were superior to any rights that can accrue to a dead person. This court was therefore requested to refrain itself from being swayed by ethical or moral rights of a dead person.

In answer to the issues raised by the accused, the state submitted, firstly, that there were no delays at all in taking the accused persons before court.

In an affidavit sworn by the Chief Inspector Christopher Rotich, it was stated that the accused persons were first charged with manslaughter. The case in which they faced that charge was before the Kiambu Chief Magistrate's Court.

Although the police did not provide this court with the particulars of the case, it was explained that the police found it hard to investigate that case, because the witnesses claimed that they were being intimidated by the accused.

The prosecution withdrew the charges on 27th February 2007. Having perused the record of the proceedings herein, I note that the 5th accused expressly deponed that he was arrested within the precincts of the court, on the same day when he was first discharged.

The 2nd accused also swore an affidavit, in which he deponed that he was first charged on 21st February 2006, in Kiambu Chief Magistrate's Criminal Case No. 338 of 2007.

Although there is an obvious error in the particulars of that case (because a case filed on 21st February 2006 cannot be numbered 338 of 2007), it is evident that the accused persons did confirm that they were brought to court long before 25th March, 2008.

In the event, I find and hold that when the accused persons told this court that they were not brought to court until 25th March 2008, they were definitely misleading the court.

The accused persons were also misleading this court by purporting that they had remained in custody from December 2006 until 25th March 2008. I say so because on the two previous occasions when the charges against them were withdrawn, the accused persons were set free.

By their own admissions, the accused were re-arrested within the precincts of the court, shortly after each of the earlier cases were terminated.

As the accused had confirmed that they had been charged with manslaughter, in two cases filed earlier, before the Chief Magistrate's Court, Kiambu; and as the accused were clearly knowledgeable of the particulars of those cases, I find that the prosecution herein did not have any reason to give the particulars of those cases, to this court.

In the case of ALBANUS MWASIA MUTUA V REPUBLIC (above-cited), the Court of Appeal gave examples of explanations that would be deemed sufficient to satisfy the court that although the accused was brought to court late, he was nonetheless brought to court as soon as was reasonably practicable. This is what the Court said;

“It could be that he fell ill during the fourteen days the police were entitled to hold him in custody; that he was admitted in hospital and was detained in hospital for the eight months as a result of which the police were unable to produce him in court. It could also be that the appellant had been presented to the court earlier but his case was terminated for one reason or the other, was discharged and was subsequently recharged afresh.”

Those words are applicable to this case.

Therefore, the accused could only have demonstrated that they were taken to court later than should have been, if they had told this court about the date when they were re-arrested on the occasion before they were charged before the High Court. If they were held in custody for more than 14 days after that re-arrest, the prosecution would have been obliged to satisfy the court that the accused were, nonetheless taken to court as soon as was reasonably practicable.

But the accused did not meet the minimum threshold, which would then have imposed an obligation on the prosecution to explain the delay in taking the accused to court.

On its part, the prosecution have said that the accused were re-arrested on 20th March 2008; and were thereafter taken to court on 28th March 2008. That fact, which was stated by Chief Inspector Christopher Rotich, on oath, shows that the accused were brought to court within eight (8) days of their arrest.

In the event, I find and hold that the constitutional rights were not violated.

The preliminary objection raised by the accused is therefore overruled.

Dated, Signed and Delivered at Nairobi, this 24th day of November, 2009.

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FRED A. OCHIENG

JUDGE