

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 31 of 2006

REPUBLICPROSECUTOR

VERSUS

PETER MAKANYA.....ACCUSED

RULING

The accused was charged with murder contrary to section 203 as read with section 204 of the Penal Code. At the end of the prosecution case, counsel for the accused person submitted that there was no case to answer. The case against the accused person, according to the prosecution's evidence, is that the accused on the fateful day quarreled with the deceased. They were heard at night quarreling by PW I, PW 5 and PW 7. All those witnesses recognized the voice of the deceased who was pleading for his life and calling out the name of the accused. PW 7 even walked out of his house to address the accused person questioning him why he was attacking the deceased and the accused person abused him. Having considered the entire prosecution's evidence, in my view, a *prima facie* case has been made out against the accused person. But while the accused's counsel submitted that there was no case to answer, he also raised an objection to the continued trial of the accused on the basis that the accused constitutional rights were violated. The accused was arrested on 14th January 2006. He was produced before court on 6th June 2006. The investigating officer on being asked to explain the delay in producing the accused before court he stated that it was occasioned by the unwillingness of some witnesses to record their statements. On being cross examined, the investigating officer accepted that the statements recorded in this case were recorded by February 2006 backwards. He was taken through each witness statement and became apparent that all the witnesses who testified in this case recorded their statements between October and November 2005. There was only one other witness who recorded his statement on 23rd February 2006 but that witness was not called to testify in this case. The investigating officer then stated thus:-

“Yes. All witnesses recorded their statement in February 2006 and backwards. Yes. There was an extra period of 4 months in which we did not bring the accused to court. I would say the OCS is the best to explain the delay. I was with Chief Inspector John Gathomi investigating this matter. I was the Investigating officer under instructions of the OCS.”

The state did not call the OCS and the delay of about 5 months in bringing the accused to court was not explained. The court is left with no option but to assume that there was no explanation. Section 72(3) (b) of the Constitution provides as follows:--

72. (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:-

(3) A person who is arrested or detained:-

(a) for the purpose of bringing him before a court in execution of the order of a court: or

(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

The burden as can be seen from that section is undoubtedly upon the police to explain the failure to produce the accused person before court within 14 days in case of a capital offence. Failure to explain as in this case will lead the court to find that the accused constitutional rights were violated. Once the court finds that the rights of the accused under the constitution had been violated a trial cannot in those circumstances continue. In that regard, I am fully persuaded by the case **Republic Vs. Amos Karuga Karatu** High Court Criminal Case No. 12 of 2006 where Justice M. S. A. Makhandia had this to say:-

“A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. Finally, it matters not that evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity. For the Court of Appeal said again in the case of Albanas Mwasia Mutua:-

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

Since it is the duty of the court to enforce the provisions of the constitution, I cannot shy away from that responsibility. I make a finding that the prosecution failed to satisfy the burden laid upon it by section 72 (3) (b) and I therefore find that the accused constitutional rights were violated. I therefore hereby do acquit the accused of the charge of murder and I order the accused to be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 19th November 2009.

MARY KASANGO

JUDGE