



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 31 OF 2006

REPUBLIC PROSECUTOR

VERSUS

ROBERT LOBURA EKAI ACCUSED

J U D G M E N T

Mr. **Robert Lobura Ekai** hereinafter referred to as the **accused** was arraigned in this court on 27th September 2006 on an information laid by the Attorney General in which it was alleged that he murdered **Peter Nderitu Kariuki** hereinafter referred to as the **deceased**. The particulars of the information were that “**Robert Lobura Ekai** on the night of 3rd and 4th day of August, 2004 at Naromoru Township in Nyeri District within Central Province, murdered **Peter Nderitu Kariuki**.”

The accused pleaded not guilty to the charge and his trial with the assistance of assessors commenced in earnest. In a bid to prove its case against the accused, the prosecution lined up a total of 8 witnesses. Their evidence may be summarised as follows:-

On 3rd August 2004 at about 7.30 a.m. the deceased informed his son (PW1) and wife (PW2) that he was leaving for Nairobi to pursue his son’s loan from Higher Education Loans board. The son (PW1) was then a student at the University of Nairobi pursuing a degree course in Mechanical Engineering. He also informed them that he would pass through Nyeri town to withdraw some money from a teachers Sacco. On the same day at about 8 p.m., the deceased called his son on his cell-phone and informed him that he was in Karatina town on his way home. At about 9.30 p.m. on the same day he again called PW1 on his cell-phone and informed him that he had reached Naromoru enroute home but was finding it difficult to get means of transport home. Finally at about 10.30 p.m. on the same day, he again called PW1 maintaining that he was still trying to get a motor vehicle home. The deceased however never made it home on that night.

On 4th August 2004 at about 6.30 a.m. a neighbour by the name of **Gitahi** came and informed PW1 and PW2 respectively that he had received information that a body resembling the deceased’s had been discovered in Naromoru town. PW1 immediately proceeded to the scene where he found his father’s body lying in a pool of blood at a bus stage besides the road. He was dead. He noted that the body had a cut on the left arm and a big gush on the back and the buttocks. There was also a bloodstained dagger nearby. PW1 immediately contacted PW2 who also came to the scene. Whilst at the scene police officers from Naromoru police station led by PW3, **Sergeant Nicholas Kiplimo** came to the scene. They

summoned scenes of crime personnel from Nyeri. PW8 P.C. **Antony Kefa Kwalemba** photographed the scene and the body. Subsequent thereto he developed the photographs at the C.I.D. headquarters under his supervision. The said photographs were tendered in evidence.

Once the scenes of crime personnel had taken photographs, PW3 removed the body to Nanyuki District Hospital mortuary for post mortem. He also collected the bloodstained dagger which he kept and produced it as an exhibit in this case. The post-mortem was subsequently carried out by PW7 who concluded that the cause of death was acute anaemia secondary to internal and external haemorrhage leading to cardiac Arrest. The post-mortem report was tendered in evidence.

On the same day, that is, 4th August 2004, PW3 went looking for the accused as he was the watchman on the material night at the kiosks near where the body of the deceased was discovered. The accused was traced and arrested. At the time of his arrest the accused had blood stained clothes. The said clothes and the dagger were then submitted to the government Chemist for analysis. The analysis was conducted by PW6, **Albert Gathuri Mwaniki**. His findings were that the blood stains on some of the clothes of the accused together with the blood stains collected at the scene and on the dagger matched in group the blood sample of the deceased. He further formed the opinion that those bloodstains could have originated from the deceased person after injury. The government analyst report was similarly tendered in evidence.

At the close of the prosecution case I ruled that the prosecution had established as against the accused persona prima facie case to warrant him being put on his defence. The accused elected to give an unsworn statutory statement and called no witnesses. In his defence, the accused stated that he was at the material time, a watchman at roadside bar in Naromoru town. On 3rd August 2004 he worked as a watchman the whole night and went home. On 4th August, 2004 in the evening when he resumed his duties he was informed that he was required at the police station. He proceeded to the police station where he found 3 other people, all watchmen arrested. They were all locked up. He was held in police custody for 3 months and later released and he resumed his duties. A year later he was again arrested over the same matter and held in police custody for well over 8 months before he was presented in court on 21st September 2006 when he was charged with the instant case. The accused denied having been involved in the killing of the deceased. He maintained that he never saw the deceased on that material night. That the bloodstained clothes exhibited in court were not his. Finally, the accused contended that the initial results of the investigations that led to his release from police custody should have been tendered in evidence.

Arising from the defence advanced by the accused, the issue which ought to be resolved first and which may very well determine the fate of this case is whether the accused's constitutional rights to a fair trial and within reasonable time were violated by his long incarceration in police custody before he was presented to court to answer the charge. From the testimony of PW3, the accused was arrested on 4th August, 2004. However it was not until 27th September 2006 that he was presented in court to answer to the charge. That would mean that the accused had been in police custody for well over 2 years which would be unconstitutional. The offence facing the accused required that he be presented in court within fourteen (14) days of his arrest. This was not done. The delay in bringing the accused to court within the statutory period has not been explained by the prosecution. It is possible however that the accused may not have been in custody all this time. It was however incumbent upon the prosecution to explain to the court and indeed the accused the reasons for the delay. According to the accused though he was first arrested on the 4th of August 2004, and held in police custody for 3 months before he was released presumably for lack of evidence. One year later he was again arrested and held in police custody for a total period of 8 months before he was presented before court to stand trial. I am prepared to accept this evidence given the circumstances of the case. However, the prosecution cannot still escape the blame. If indeed the accused was held again for 8 months after his second arrest before being charged in court, his constitutional rights to a fair trial were similarly violated. The prosecution had no answer to this allegation.

Under section 72 of the constitution of Kenya

e a person is arrested upon reasonable suspicion of his having committed a criminal offence, then, if he is not released, he is required to be brought before a court as soon as is reasonably practicable. Where he is not brought before a court within 24 hours of his arrest, or within 14 days of his arrest where it relates to an offence punishable by death, the burden of proving that he was brought to court as soon as was reasonably practicable usually rests upon the prosecution. In this case the accused was not brought to court within 14 days as required by the law since he was arrested for an offence punishable by death. He was charged after a period of eight (8) months following his arrest by police. The prosecution on whom the burden of proof rests has failed to satisfy me that the accused, who is charged with a capital offence, had been brought before the court as soon as was reasonably practicable. In the case of *Githuku v/s Republic*, Criminal appeal No. 119 of 2004 (unreported) where the delay in bringing the accused to court was only 3 days, the court of appeal was unanimous in its defence of human rights. It observed that even though the delay of three days in bringing **Githuku** to court did not cause him any substantial prejudice, and although the evidence showed that he was guilty as charged nevertheless the failure by the prosecution to abide by the requirements of the constitution could not be disregarded. On that basis the court proceeded to allow the appeal.

In the case of **Albanus Mwasya Mutua v/s Republic**, Nbi Criminal appeal number 120 of 2004, the court of appeal again delivered itself on the issue as follows:-

“In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3)(b) of the constitution also amounted to a violation of his rights under section 77(1) of the constitution which guarantees him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trials could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”

These decisions are binding on me. Accordingly, I find and hold that in not bringing the accused to court within the stipulated time and the prosecution offering no explanation

for the delay, the accused’s constitutional rights to a fair trial were violated. Accordingly he is entitled to an acquittal.

That being my view of the matter I would acquit the accused of the charge and set him free forthwith unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 31st day of January 2008

M. S. A. MAKHANDIA

JUDGE