



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 70 of 2007

REPUBLICPROSECUTOR

VERSUS

DANIEL OKETCH OWILLA.....ACCUSED

RULING

On 17/8/2007, the Applicant/Accused, **DANIEL OKETCH OWILLA**, was charged with the murder of **VIOLET ADHIAMBO AKETCH**, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

From the information, the accused murdered the deceased on 15/2/2007 at Limuru Tea Estate, in Kiambu District.

When the case came up for hearing on 31/10/07, the accused raised a Preliminary Objection on a point of law, notice of which had been given on 8/10/07, that the Constitutional rights of the accused had been violated by the prosecution by contravening Sections 72(3) (b) and 77(1) of the Constitution of Kenya, and accordingly the criminal proceedings in this case are illegal, null and void and should be so declared by this court.

In the course of his submissions in support of the application – the Preliminary Objection – Learned Counsel for the accused/applicant, Mr. Wamwai, submitted as follows:

The accused was arrested on 15/2/07, the date the alleged offence was committed. Thereafter the accused was detained at Tigoni Police, Kiambu, up to 1/10/07 when he was produced in Court for plea. The accused was thus held by the Police for 7 ½ months, before being brought to court.

Under Section 72(3) (b) of the Constitution, continued the Learned Counsel, the accused was supposed to appear for plea within 14 days of his arrest, this being a capital offence. As a result of the foregoing, stated the Defence Counsel, the fundamental rights of the accused had been violated, and continue to be violated by the present proceedings. Once the Constitutional rights of the accused have been violated, added the defence counsel, the trial becomes a nullity regardless of the evidence and the court is duty bound to uphold and enforce the provisions of the Constitution. The rights of the accused, under Section 77(1) of the Constitution, to a fair trial have also been violated by the delay. Despite Notice of Preliminary Objection having been served on the prosecution in good time, no explanation had been given by the prosecution for the delay in bringing the accused before court, given that the postmortem was done on 20/2/07, and the Report of the Government Analyst was out on 12/3/07; Hence, the covering Report of the Investigating Officer, Inspector Christopher Rotich – O.C.S. Tigoni Police Station that the accused overstayed in cells while awaiting the Report of the Government Chemist, does not

explain the delay up to 1/10/07 when the accused was brought to court.

In Reply, the Learned State Counsel, Mr. Bifwoli, began by admitting that there was a delay in charging the accused, and the explanation by the O.C.S., Tigoni does not explain what was happening between 12/3/07 when the Government Chemist gave his Report, which was forwarded to the office of the Attorney General on 13/8/07, and when the accused was formally charged on 1/10/07.

The Learned State Counsel admitted that the delay was absurd.

However, the State Counsel urged this court not to grant the orders prayed for because of the following reasons. First, because the life of an innocent, five year child had been taken away by her own father who ought to have protected the deceased. A life had been lost, and that is also a fundamental right.

Secondly, there are two competing fundamental rights – that of the applicant/accused and that of life of the deceased. Granting the current application means that the fundamental rights of the deceased will never be addressed in any other forum. On the other hand, added the Learned State Counsel, the accused has many other avenues such as **Harbeas Corpus** which could have been lodged with the court; as well as suing for compensation against the Police. None of the above are available to the deceased. The accused never pursued any of the available options. Instead, he slept on his rights, and this application is an after thought to avoid liability.

The Learned State Counsel concluded by submitting that granting this application will be punishing the deceased for the faults of the police.

Finally, the State Counsel submitted that this court's jurisdiction had not been properly invoked. The proper procedure, continued the Learned State Counsel, would have been as per Rules 12; 13; and 14 of the **The Constitution of Kenya [Supervisory Jurisdiction And Protection of Fundamental Rights and Freedoms of the Individual] High Court Practice and Procedure Rules, 2006.**

Under the above Rules, the application should be by way of a petition, supported by an **affidavit**. As the application herein has not complied with the above rules, concluded the State Counsel, this court's jurisdiction has not been properly invoked and the application should be struck out, as it is not exempt from the above Rules.

The application is mischievous, submitted the State Counsel.

Having carefully gone through the pleadings and the submissions by learned counsel for both sides, and the authorities – both statutory and case law- cited and relied upon, I have reached the following findings and conclusions.

It is a common ground that the state – prosecution – delayed in bringing the accused before the Court, thereby contravening the provisions of Section 72(3) (b) and Section 77 (1) of the Kenyan Constitution. That then violated the fundamental rights of the accused in the present case. That being the case, the decision in the current application, given existing [previous] authorities, should be straight forward. But the learned State Counsel has raised very interesting issues in his efforts to oppose the application by the accused. These issues look novel and deserve this court's attention for avoidance of any doubts and to clear the air for the future.

On the submission that this court's jurisdiction has not been properly invoked by virtue of the failure to abide by the High court Practice and Procedure Rules, 2006, this court has, in CRIMINAL CASE NO. 40 OF 2007 – REPUBLIC VS. JAMES NJUGUNA NYAGA, at pages, 10 & 11 held, in part that:

“there is no procedure on how to raise a Preliminary Objection on a point of law, in the course of legal proceedings before a court....any party has a right to raise any Preliminary Objection, on a point of law, at any stage of the proceedings. Such a Preliminary Objection may be raised either

orally or formally. Affidavits.....are required where issues or matters of fact are being raised [or proved]. Not so when the issue is on a matter of law.”

The above is captured in rule 23 of **High Court Practice And Procedure Rules, 2006**, which provides as under:

“where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a Preliminary Point and shall hear and determine the same.”

In the present application, the question as to the legality or otherwise, has arisen in the course of the murder case with which the applicant is charged, in light of the provisions of Sections 72(3) (b) and 77(1) of the constitution.

Accordingly, I find and hold that the application before me is properly before the court, and this court’s jurisdiction has been properly invoked.

On the need to balance the two competing fundamental rights – that of the deceased to life and that of the accused to liberty – there are, in my view, guiding principles to be kept in clear focus else the submissions become flawed. To compare the rights of the living with those of the dead (if there are any such rights for the dead) is not the easiest of propositions. The rights enshrined in the constitution of Kenya are basically for the living, not the dead. The writ of **Harbeas corpus** referred to as an option for the accused/applicant is there whether or not the victim of the actions of the accused resulted in death.

Further, criminal prosecution of a suspected offender is not a vindication by the victim of the crime. Such prosecutions are in the name of the state – for the public protection, rather than individual victims of the crime. There is nothing to prevent the victim of a crime from filing a civil suit for, say, wrongful death against the perpetrator of the crime for compensation even though such suit is by the administrator of the estate of the deceased and for the benefit of the estate of the deceased – the victim of the crime.

Briefly, to argue that the options available to the accused/applicant are not available to the deceased, is an expression of the juridical problems which arise from comparing incomparables. To conclude, or propose that by granting the prayers in this application the court will be punishing the deceased for the faults of the police is a submission that calls for no examination by this court. Suffice it to say that death is the final and utmost punishment for all mortals, and no other punishment can be visited upon the dead, as such.

Finally, the Learned State Counsel submitted that by waiting for over seven months before challenging the legality of his detention the accused abated his claim. That submission is full of contradictions and misconceptions. The submission overlooks the fact that the liberties of the accused are taken away from the moment he was arrested/detained, and until the lapse of the fourteenth day, the detention is constitutionally unchallengeable. Further, it is a fact that most murder suspects in this country cannot afford legal counsel, till they are formally charged with the capital offence when pauper brief is provided for them by the State, and in practice that is when challenges such as this one are raised. Lastly, there is no limitation period in criminal matters, much less acts which are null and void **ab initio**, as this prosecution.

In my humble and considered view the question of the accused/applicant abating his claim is premised on legally and practically unsound basis.

In conclusion, I find and hold that once the unexplained delay in bringing the accused before the court is conceded by the prosecution, there is no known cure to the nullity of the proceedings, such as the ones before this court. I find and hold that the constitutional rights of the accused/applicant, as per the provisions of Section 72(3) (b) of the Constitution, were contravened, thereby violating the applicant’s fundamental rights to liberty and fair hearing.

Accordingly, and because of the foregoing, I declare Criminal Case No. 70 of 2007 to be null and void

as it is premised and has its genesis on an illegality. I therefore order the immediate release of the accused unless he is otherwise lawfully held.

DATED and delivered in Nairobi, this 22nd Day of January, 2008.

O.K. MUTUNGI

JUDGE