



REPUBLIC OF KENYA

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

**Criminal Case 34 of 2006**

**REPUBLIC .....PROSECUTOR**

**-VERSUS-**

- 1. RICHARD MWATHI NYAMBURA.....1<sup>ST</sup> ACCUSED**
- 2. MICHAEL KARIUKI NYAMBURA.....2<sup>ND</sup> ACCUSED**

**RULING**

Both accused persons pleaded not guilty to charges of murder, on 3<sup>rd</sup> May, 2006. Earlier on, on 13<sup>th</sup> April, 2006 and 27<sup>th</sup> April, 2006 the accused had been brought before the Court, though, for reasons set out in the Court record, plea-taking did not then take place; the Court ordered their remand in custody.

Trial began on 15<sup>th</sup> November, 2006 but was later, on the same date, adjourned at the request of counsel for the accused. The record shows that trial was not subsequently resumed, and on 10<sup>th</sup> March, 2008 it was indicated that the accused persons wanted a state-funded counsel, in place of the one they had retained; and on 2<sup>nd</sup> April, 2008 learned counsel **Mrs. Muhuhu** indicated that she intended to withdraw from representing the accused. On 18<sup>th</sup> April, 2008 **Mrs. Muhuhu** indicated that she had reached an understanding with the accused persons, and she would continue to represent them. **Mrs. Muhuhu** also indicated to the Court, on that occasion, that she intended to move the Court for orders terminating trial and acquitting the accused persons prematurely.

On 11<sup>th</sup> June, 2008 the prosecution's four witnesses were allowed to return home before testifying, to pave way for the hearing of the accused persons' *preliminary point*.

In the Notice of Preliminary Objection dated 4<sup>th</sup> June, 2008 and filed on 5<sup>th</sup> June, 2008 the accused persons contended as follows:

1. "that their constitutional and fundamental rights....as envisaged in s. 72(3) and s. 77(1) of the Constitution have been and are being violated by these proceedings which were rendered null and void by virtue of the said violations of the Constitution";
2. "that **Richard Mwathi Nyambura** was arrested on 14<sup>th</sup> February, 2006 while **Michael Kariuki Nyambura** was arrested on 15<sup>th</sup> February, 2006 and were both kept in Police custody without trial for 73 days and 72 days respectively and were subsequently taken to Court on 27<sup>th</sup> April, 2006 thereby breaching s. 72(3) of the Constitution"

3. “that as a result of the said violation of the accused persons constitutional and fundamental rights, the accused be acquitted and set free.”

The two accused persons swore supporting affidavits annexed to their objections to continued trial.

The 1<sup>st</sup> accused avers that he was arrested on 14<sup>th</sup> February, 2006, and arraigned in Court on 13<sup>th</sup> April, 2006. Although that gives 58 days as the period during which the 1<sup>st</sup> accused was held before arraignment, he depones that he was held by the Police for a total of 73 days before being arraigned in Court.

The 1<sup>st</sup> accused depones that he has been advised by his advocate on record that the Police should have held him for only up to 14 days, before having him arraigned in Court. The 1<sup>st</sup> accused further deponed that “no explanation whatsoever was tendered before the Court, as to why [he] was not charged within the mandatory 14 days as required by law....”

The 2<sup>nd</sup> accused for his part, depones that he was arrested on 15<sup>th</sup> February, 2006 but was not arraigned in Court till 13<sup>th</sup> April, 2006 – which would be a total of 57 days before arraignment. But the deponent states that he was held for a total of 72 days before being arraigned in Court. He states that his advocate has advised him that he should have been held by the Police for only up to 14 days, before arraignment in Court. He depones that “no explanation whatsoever was tendered before the courts, as to why [he] was not charged within the mandatory 14 days as required by law....” and he says this was “a violation of [his] constitutional and fundamental rights as envisaged by s. 72(3) (b) and s. 77(1), (2) (b) and (c) of the Constitution.”

On 13<sup>th</sup> October, 2008 the Investigating Officer in the case, **Sgt. Barnabas Ng’eno**, swore a replying affidavit to the objection of 4<sup>th</sup> June, 2008 in which he addressed the matters contained in the two supporting affidavits.

It is deponed that the two accused were arrested on 15<sup>th</sup> February, 2006, following the killing of **Elizabeth Wanja**. A post-mortem examination was carried out on the body of the deceased, on 21<sup>st</sup> February, 2006, but the report thereof was not released by the pathologist until 1<sup>st</sup> March, 2006 the deponent averred that, following the death of **Elizabeth Wanja**, he forwarded swabs taken from the body, as well as other exhibits, to the Government Chemist on 23<sup>rd</sup> February, 2006, for analysis: but the analysis report was only received much later, on 16<sup>th</sup> January, 2007. The deponent deponed that it was only after receiving the post-mortem form, on 1<sup>st</sup> March, 2006, that he was able to compile the investigation file, and to forward the same to the OCS for further action, which included forwarding the same to the D.C.I.O. When the file was returned to the OCS by the DCIO, it was then forwarded to the office of the Attorney-General, for perusal and advice on whether or not to charge both suspects with the offence of murder. It was on 26<sup>th</sup> April, 2006 that the deponent received the file from the Attorney-General’s Office together with duly-signed copies of the information to be laid in Court; and on that basis he took the accused persons to Court on 27<sup>th</sup> April, 2006.

The deponent averred that the delay in taking the accused persons to Court “was not intentional but was caused by circumstances beyond [his] control.” The deponent’s actions had also been dependent on other actors, notably the OCS who had “insisted on waiting for the results from the Government Chemist, before the accused persons were charged.....”

Counsel on both sides were aware of the facts deponed in the several affidavits, as they proceeded to urge their respective positions regarding the contention that the accused merited early acquittal, before the case had been substantially heard; before the recognized stage of *preliminary submissions*; and before the stage of *final submissions*.

**Mrs. Muhuhu** reiterated the accused persons’ averments in their affidavits: that their fundamental rights had been infringed; that the prosecution was in breach of the safeguards of the Constitution; that,

therefore, the ongoing proceedings were null and void, as they were merely deepening the violations to the accused persons' constitutional rights.

As already noted, the 1<sup>st</sup> accused was *not* held for 75 days before being brought to Court; he was held for 58 days – i.e. *44 days* outside the 14 days indicated in s. 72(3) (b) of the Constitution; and the 2<sup>nd</sup> accused was detained for *43 days* outside the said 14 days.

**Mrs. Muhuhu** attributes illegality to the said extra days of detention, on the ground that “there was no explanation of delay tendered.” Certainly, at the time of first arraignment in Court, the record does not show that *explanations* of delay were given; but certainly again, the Investigating Officer has now, at this early stage of hearing the *first witness*, come up with a detailed explanation of the circumstances attending the said delay in bringing the accused persons before the Court.

This Court, it becomes obvious, will have to decide the questions, firstly, whether *reasonable explanation* has been given by the prosecution; and secondly, whether there is any impropriety of legal proportions, where such explanation *flows from*, rather than *leads to* the accused persons' challenge. Still another point to be decided is whether the Constitution ordains *fourteen days* as the very maximum period during which the Police may properly detain a suspect before bringing the suspect before the Court. This Court will also have to determine the question whether, were it to find that the accused persons had been detained for longer than is allowed by s. 72(3) (b) of the Constitution, then it would *have to* acquit them, without any scope at all for discretion in the matter.

**Mrs. Muhuhu** relied on *case authority* to support her argument. She cited the Court of Appeal decision in **Ndede v. Republic** [1991] KLR 567, in aid of the proposition that the prosecution has a duty to explain the circumstances attending the delay in arraigning the accused in Court; and she urged that the prosecution has not, in this case, tendered reasonable explanation.

Counsel also cited the Court of Appeal decision in **Gerald Macharia Githuku v. Republic**, Crim Appeal No. 119 of 2004, to support the broad proposition that it was the *duty of the Court itself* to protect the constitutional rights of an accused person.

Counsel cited the Court of Appeal decision in **Albanus Mwasia Mutua v. Republic**, Crim. Appeal No. 120 of 2004 to support the general point that an unexplained delay in bringing an accused person before the Court, would normally result in an acquittal of the suspect.

For the respondent, learned counsel **Mr. Ong'ondo** submitted that when the accused persons had been remanded in custody, it was by orders of the Court itself – and so such remand cannot be challenged as being contrary to law.

**Mr. Ong'ondo** urged that the detailed replying affidavit of the Investigating Officer should be viewed as giving reasonable explanations of delay in arraigning the accused persons in Court – and therefore it is not the case that the detaining authority had been in breach of s. 72(3) (b) of the Constitution.

Counsel also urged that even where the Court would find the period of detention before arraignment in Court to have been unduly long, there was no *requirement* of the Constitution that acquittal be ordered; for s. 72(6) had empowered the Court to make orders for *compensation*, in a proper case; and counsel gave as an example of the Court's exercise of discretion in such a situation, this Court's decision in **Republic v. Joseph Ndirangu Nungari & Another**, Nairobi H. Ct. Cr. Case No. 42 of 2006.

Learned counsel urged that the Court's time was not to be engaged in vain; and in this case the prosecution has always been ready to proceed with the hearing.

On the contention that it was an undischarged prosecution duty to set out by explaining the delay which occurred in this case, in arraigning the accused persons in Court, **Mr. Ong'ondo** submitted that in murder trials in Kenya, every accused has counsel in attendance; and therefore, in a natural sequence of events, the accused persons' advocate should take the professional step of drawing the Court's attention to any

such shortfall in the proceedings as might work prejudice to those in the dock.

Of the decisions in *Albanus Mwasia Mutua* and *Gerald Macharia Githuku*, counsel submitted that these cases did frown upon unexplained confinement of the accused, before arraignment in Court – but that in the instant case, the period of such confinement had been adequately explained by the Investigating Officer.

**Mr. Ong'ondo** urged that there was no basis in law for an unconditional release for the accused persons which **Mrs. Muhuhu** had asked for; the accused had been suspected of having committed an offence, they will have a fair day in Court, and they have a chance of being vindicated.

A Notice of Preliminary Objection such as the one herein, is markedly distinct from a similar one in *civil law*, which has been described as an objection on a pure point of law: *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd*. [1969] E.A. 696; *Oraro v. Mbaja* [2005] 1 KLR 141.

Such an objection, in criminal proceedings, is invariably a substantial matter to be established by *evidence*, which evidence comes in the form of depositions. *Was there* reasonable cause for holding the accused persons in detention for longer than 14 days, before having them arraigned in Court, on a charge of murder?

It is a matter of reasoned judgment whether or not *reasonable explanation* has been given for a phenomenon. As there are no hard-and-fast lines circumscribing what is *reasonable*, it is a common forensic technique to press one side of the contention in such a skewed manner as would tip the balance in favour of one of the sides. But this is where the Court's judicial assessment comes in, and its hallmark is objectivity that rests on clear facts and *circumstances* of merit.

It is on that basis that I have assessed the *facts* emerging from the several affidavits now before me. I have concluded that, whereas the accused rests his case squarely on the perception that the Constitution is a vital document, and nothing should appear to challenge that position, the prosecution has shown how vital steps that take time, had to be accomplished before the accused could be arraigned in Court; and as soon as those steps had been taken, there was no delay in bringing the accused before the Court. The prosecution's case also brings out certain exaggerations in the details deposed in the accused persons' supporting affidavits; and this element must be taken to detract from the accused persons' case at this point, since they are required by law to make depositions truthfully.

I have come to the conclusion that the prosecution did provide a reasonable explanation of the delay in arraigning the accused in Court, in the terms of s. 72(3) (b) of the Constitution.

**Mrs. Muhuhu** urged that the prosecution should have come into Court, at the very beginning, profuse with explanations of the said delay in bringing the accused persons before the Court. But in the common law tradition, which is our heritage, actions in the Court process come by natural turns, and no motion in that process moves gratuitously. The proper case is *stated* by the proper person, at the right time; and due *response* then comes, in a methodical manner, from the party who becomes obligated to respond. This gives cut-and-thrust to the Court motions; and it provides a convenient entry-point to the Judge who is, by that process, enabled to reach a cogent determination of the question. It is apparent to me that the adversarial system of dispute settlement, which forms an intrinsic aspect the common law, does not always favour Court's action *ex mero motu*. It was only right and normal, in my opinion, that the accused persons *by their advocate*, should stand and speak when they did, and then await the prosecution's answer.

Learned counsel **Mrs. Muhuhu** also urged, in effect, that there is an unvarying *fourteen-day* rule regulating the time for the prosecution to produce an accused person in Court, for the purpose of being arraigned on a charge. This is a question which this Court has had an opportunity to consider in the past, in *Dickson Ndichu Kago v. Republic*, Nairobi H. Ct. Misc. Crim Application No.639 of 2007. I would still hold to what is stated in that earlier case, that there are *four* governing principles attached to s. 72(3) (b) of the Constitution which relates to the trial-rights of a suspect, namely:

- (i) the person who detains the subject, must bring the subject to Court “as soon as reasonably practicable”;
- (ii) basically “reasonably practicable” means 24 hours for non-capital offences; and 14 days for capital offences;
- (iii) that basic principle is qualified: depending on the circumstances of a particular case, those minimum periods defined in the provision may be extended, for good cause;
- (iv) *good cause*, such as may perfectly justify such extension of the period of detention, is to be established by the person who detained the subject.

I therefore disallow learned counsel’s conception of an unchanging fourteen-day rule, which the prosecution in the instant case ought to have complied with, failing which a violation of the accused persons’ trial rights is disclosed.

Learned counsel also contended that premature acquittal must follow hard on the heels of any finding that there has been an undue delay in arraigning suspects in Court, following their arrest and detention. I do not think so; because the prosecution process is accompanied with *several categories of constitutional claims* running in parallel, one of them, of course, being the accused’s trial rights. The Court’s discretion is the basis for resolving such competing constitutional claims; and the Court may acquit in a proper case, or order compensation, as may be found appropriate, where the accused’s rights have been prejudiced.

After considering the facts of this case, as generated at this preliminary stage, as well as the applicable principles of law, I have come to the conclusion that the objections raised cannot be sustained. I dismiss them, and order that the trial process on the main cause shall proceed, in accordance with hearing directions to be given in Court.

***Orders accordingly.***

**DATED and DELIVERED** this 21<sup>st</sup> day of January, 2009.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J**

**Court Clerk: Huka**

**For the Accused Persons: Mrs. Muhuhu**

**For the Prosecution: Mr. Ong’ondo**