REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Case 51 of 2007

REPUBLIC ::PROSECUTOR

VERSUS

1. **MICHAEL NGUYU**
2. **BENSON MWANZIA NZIOKA**
3. **MWANZIA MUTULA:::ACCUSED**

RULING

1. The suspects persons herein by a Notice of Preliminary Objection dated 23.10.2007 and filed on 25.10.2007 have asked this court not to take further action in the matter but instead to declare the proceedings against them null and void for reasons that their Constitutional rights as envisaged by section 72(3) (b) and section 77(1)((2) (a) and (b) have been violated.

2. In submissions before me, Mr. Uvyu, learned Counsel appearing for the suspects has argued that the 1st and 2nd suspects were arrested on 15/8/2007 while the 4th suspect was arrested on 24.8.2007. For avoidance of doubt, the 3rd suspect in this matter, Stephen Muteti Mbevi has since died. In any event, that they were all arraigned before this court on 26/9/2007 and yet they ought to have been brought before the court, 14 days after arrest. Relying on the decision in **Albanus Mwanzia Mutua -vs- Republic,Criminal Appeal No.1201/2004** as followed by Mutungi, J. in **Republic -vs- John Njuguna Criminal Case No.40/2007 (Nairobi**), and **Anne Njogu -vs- Republic Criminal Appeal. No.551/2007**, Mr.Uvyu asks me to declare the continued incarceration of the suspects a gross violation of their fundamental rights as enshrined in the Constitution, and order their released from custody forthwith. Mr. Omirera, learned Principal State Counsel in his submissions has pointed me to an affidavit sworn on 4/2/2007(it really ought to be 4/2/2008) and in it one Peter Kibet Kirui has laid out what he terms "***reasons for the delay in arraigning the accused persons aforementioned within 14 days as stipulated in the Constitution."*** He depones that at 14.30 hrs on 15.8.2007, a report was received at Yatta Police Station that "several members of the public had on the night of 14th and 15th August, 2007 at about 10.00 a.m fatally assaulted Benjamin Mwangangi Munyalo (the deceased) and he, Peter Kibet Kirui was instructed to investigate the report." He immediately commenced such investigations and received information that the Applicants amongst others were involved in the death. That on the same day, he arrested the 1st and 4th suspects and on the next day arrested the 2nd and 3rd suspects. Other suspects, he said, went underground thereafter and on 23.8.2007 also and on 24.8.2007, he took statements under inquiry from the four suspects. On 24.8.2007 he took witness' statements and on the same day attended the postmortem on the deceased's body. Aware that time was not on his side he said that he consulted the

DCIO Machakos on 24.8.2007 and on 27.8.2007 he was informed that the High Court was on vacation and no proceedings could be undertaken until 15.9.2007. He proceeded with investigations and on 9.9.2007 recorded statements from two other witnesses. He then compiled his file and on further enquiry was informed by the DCIO, Machakos that the judge at Machakos had not resumed duty and would only do so in late September 2007. Thereafter when the judge returned to work, the suspects were arraigned in court on 26.9.2007. That therefore "***the delay in arraigning the accused persons within the 14 days was beyond our control since the High Court at Machakos was not sitting between the 15th September 2007 and 26th September 2007.***"

3. Mr. Omirera has on the basis of the above averments submitted that a reasonable explanation for the delay has been given and the proceedings should not be nullified as prayed.

4. The duty of this court when confronted with a situation such as this one was well set out in the case of **Albanus Mwanzia Mutua**(supra) and in it, the Court of Appeal expressed it as follows:-

" ***On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution.***"

5. Conscious of this duty, the law regarding the period for which a suspect charged with an offence punishable by a sentence of death, is to be arraigned in court, is found at section 72 (3) of the Constitution which provides as follows:-

"***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."

6. In this case, the suspects were arrested on 15th and 16th August, 2007 respectively. They ought to have been arraigned in court on or before 30.8.2007 but were instead only arraigned some 26 days later. Section 72 (3) (b) obligates the detaining authority to do two things:-

a. bring them before a court as soon as is reasonably practicable and where that is not done. then within 14 days in a case of murder such as this one.

b. prove that the suspects were actually brought forth to court as soon as is reasonably practicable in the circumstances of the case.

This is what led the Court in the **Mutua case** (supra) to declare that constitutionally, "***the burden was on the police to explain the delay.***" Can the explanation given in this ***case*** be one that would be taken as having shown that the suspects were taken to court "***as soon as is reasonably practicable?***"

7. Mr. Uvyu has argued that the absence of a judge in Machakos for the period 30/8/2007 to 26/9/2007 is not a reasonable explanation, and that his clients were not arraigned as soon as was reasonably practicable. But what does "***reasonable practicable***" mean? Gandron, J. in ***Slivak -vs- Lurgi (Australia)Pty Ltd (2001) 205 CLR 304 at PP 322-323*** observed as follows:-

"***The words reasonably practicable have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words 'reasonably practicable' are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts."***

8. Granted, his Lordship was confronted by a civil suit but the words if looked at in their ordinary meaning have the same meaning irrespective of the nature of the case. In their ordinary meaning "***reasonably"*** means,

"***Arguably, believably, credibly, logically, sensibly, acceptably"*** see the Concise Thesaurus 2002 ed.

"***Practicable"*** on the other hand means;

"***Achievable, attainable, doable, feasible, performable, possible, viable, within the realm possibility***"- Concise Thesaurus (supra)

9. Taken together therefore the only meaning to be gathered is this; something that can sensibly and credibly be possible or viable and within the realm of possibility.

10. It is clear to my mind that the Applicants were arrested during the High Court Summer Vacation. The vacation is provided for by Rules 1 and 2 of the High Court (Practice and Procedure) Rules but Rule 1(4) aforesaid provides that:-

"***The above vacations shall not apply to criminal sessions or sittings of the High Court for the purposes of hearing Criminal Appeals at Nairobi or elsewhere throughout Kenya."***

11. The summer vacation is meant to commence on the 1st August and terminate on the 15th September of each year but if the Rule excludes the application thereof of criminal sessions such as is applicable to this case, then however strongly I am inclined to accept the explanation given by the learned State Counsel, I cannot see that what legislation has excluded, I can accept in this Ruling as nonetheless a reasonable explanation. I say this with tremendous misgiving because the term vacations are to be observed under Rule 2(1) of the Rules aforesaid "***in the Courts and offices of the High Court***" but of course where only one judges sits in a station, there cannot be a vacation if he were to sit and hear criminal matters and criminal appeals at the same time as is the import of Rule (1) 4 aforesaid. The intention of the Legislature is however clear and as Fulford, J. said in ***Republic -vs- Ashton, Republic -vs- Draz and Republic -vs- O Reilly [2006] EWCA*** **Criminal 794, [2007] 1 WLR 181** in deciding whether a procedure is invalid or not, the Court must ask itself what the intention of the Legislature was and only when the intention is not clear can the court go on to consider the interests of justice generally.

12. Having so held, since the explanation given is not supported by the facts or the law, it follows that it can only be termed an unreasonable explanation and the holding in **Albanus Mutua** must hold true. Further, the Applicants were not arraigned before court as soon as was reasonably practicable and the delay of 26 days is unreasonable and unconstitutional.

13. Before I uphold the objection, I should add this; the High Court is now inundated by applications from suspects invoking the **Albanus Mutua** case to their circumstances and seeking release from custody. I am aware that release from custody is not the only remedy for breach of fundamental rights under Chapter 5 of the Constitution, section 72 included. The Constitutional Court in **Arony -vs- Republic** said as much and went on to award damages for breach of certain fundamental rights. The Court of Appeal in declining to order the release one of the Appellants in **Samuel Ndungu Kamau and Another [2007] e KLR** said that any constitutional remedy under section 84 of the Constitution was still an option available in circumstances similar to those obtaining in this case. The Police and Office of the Attorney General must wake up to the reality of this situation and suspects must also not assume that in all instances they must be released for breach envisaged by section 72(b) of the Constitution. Invariably some may succeed and others may not.

14. Turning back to the objection before me, very reluctantly and with much sympathy to the spirit of the deceased and his family, I must uphold it and declare that the continued detention of the suspects herein is unconstitutional. They shall be ordered released unless they are otherwise lawfully held.

15. Orders accordingly.

Dated and delivered at Machakos this 19th day of February, 2008

ISAAC LENAOLA

JUDGE