



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Criminal Case 60 of 2006

REPUBLIC.....APPLICANT

VERSUS

SEBASTIANO MIRITI SAMWEL

GEORGE MUGAMBI SAMWEL.....RESPONDENTS

RULING

The accused person herein is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is stated in the particulars of the offence that the he murdered Rael Kanyai on 13th March 2006 at Timau Market, Meru.

He appeared in court for the first time on 15th November 2006 but he could not plead due to doubts on his mental status. The psychiatrist subsequently gave him a clean bill of health and recommended that he was fit to plead, which he did on 24th July 2007.

While the case was pending hearing counsel for the accused person has raised the instant objection to the trial arguing that the accused person's right under section 72 (3) of the Constitution has been violated. Counsel submitted that the accused person is facing a capital offence and ought to have been brought before the court within 14 days from the date of arrest. She relied on *Albanus Muasya & Another v R.* My decision in the case of *R v Sabastiano Miriti Samuel and George Mugambi Samwel, HC. Cr. Case No. 50 of 2006* and urged me to acquit the accused for having been held by the police for eight (8) months.

Replying learned counsel for the respondent submitted that the objection does not lie as the same did not relate to the question whether the accused person had committed the offence he is charged with. Counsel relied on the authority of *Samwel Ndungu Kamau & Another v R., Criminal Appeal No.223 of 2006*. He also submitted that the State was ready to discharge its burden under 72(3) (d) of the Constitution and sought leave to produce evidence to explain the delay.

I have considered these submissions and the authorities cited in support of each side's proposition, Section 72(3) of the Constitution has lately been the subject of many decisions, both in the Court of Appeal and the High Court.

It is now a common practice to raise the alleged violation of the accused person's constitutional rights *in-limine* for the reason that should there be merit in the allegation then the same is disposed of immediately. That is in lime with the provisions of Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice

and Procedure Rules, 2006.

From the decided cases on the interpretation of section 72(3) of the Constitution, what is emphasized is the duty of the court to strike a balance between the protection of the society and the protection of individual's constitutional rights. In this regard, and in specific terms of section 72 aforesaid, the burden is placed upon the prosecution to demonstrate that the provisions of section 72 have been complied with and specifically that the suspect has been brought before the court as soon as is reasonably practicable. This burden is discharged by the prosecution tendering evidence, either by calling witnesses or in form of affidavit to explain to the satisfaction of the court the reasons for the delay.

In the case of *David Waiganjo Wainaina v R.*, Criminal Appeal no. 113 of 2005, the Court of Appeal said the following regarding the discharge of the burden on the prosecution:

“In the present appeal, there is no explanation why the appellant was detained in police custody for nine months before he was brought to court. In our view, it would not be difficult for the police/prosecution to investigate the delay and come up with an explanation. It is not enough to say that the state should have been given time to investigate and leave the matter there. The state must ask for time to carry out investigation. It would be improper to expect this court to take over the role of the state to investigate inordinate delays”.

The issue of delay in the matter was first raised on 22nd October 2007. Two adjournments following before finally the same was canvassed on 21st January 2008, three months later. Towards the end of his submissions, counsel for the State seemed to seek leave on the one hand to bring evidence to justify the delay while on the other hand he urged the court to dismiss the objection.

The case of *Samwel Ndungu Kamau v R.* (Supra) held, *inter alia*, that where a suspect alleges that his constitutional rights have been violated the best forum to ventilate, that is the High Court. The court said:-

“The complaint that the 2nd appellant was not brought to court promptly was raised before us for the first time. This court has only appellant jurisdiction with regard to criminal and civil jurisdiction. The provision of section 72(3) (b) above are framed in a way which presupposes that a complaint with regard to violation would either be raised at the trial or in an application under section 84 of the Constitution, where witnesses are normally called or affidavit evidence is presented to prove or rebut a factual proposition. When such a complaint is raised for the first time before this court, it may not be possible to investigate the truth or falsity of the allegation.”

It therefore falls upon this court to investigate. Learned counsel for the State has not been helpful as he has had more than sufficient time to obtain all the information the prosecution requires to discharge their burden under section 72 aforesaid.

I have stated and reiterate that the role of this court is to strike balance between the well being and protection of the society and the suspect's constitutional rights. In this regard, I have to accord the prosecution an opportunity in order to finally resolve this matter.

It is ordered that the State shall file and serve upon counsel for the accused person an affidavit in response to the objection raised within seven days from today's date.

Dated and delivered at Meru this 19th day of Feb. 2008.

W. OUKO

JUDGE