



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CIVIL APPLICATION 198 OF 2007

REPUBLICCOMPLAINANT/RESPONDENT

VERSUS

PETER ANYANGO ABAYOACCUSED/APPLICANT

R U L I N G

The Accused has been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence as stated in the information are as follow:

“On the 7th November, 2006 at Mathari Kitathuru in Nairobi within the Nairobi Area, jointly with others not before court murdered MOSES KIMARU GITU.”

The accused in this case was arraigned in court on 6th March, 2007. Subsequently, the plea was taken on 13th March, 2007 after the family of the accused instructed the defence Counsel viz, Mr Agina. Immediately after the plea was taken, Mr Agina informed the court of his intentions to make an application for the information to be quashed. The application before the court has been brought through notice of motion pursuant to Section 3(3), 36, 37, and 276 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, Section 72(3) (b);(5); 77(1) (q) of the Constitution of Kenya and all enabling enactments.

The applicant prays for the following orders:

- (a) That the information laid before court against the applicant by the Attorney – General of the Republic of Kenya be quashed.
- (b) That the applicant, Peter Onyango Abayo be “acquitted” forthwith.

According to Mr. Agina, the applicant was arrested on 13th November, 2006 and thereafter handed over to Muthaiga Police Station where he was detained till 3rd March, 2007. That is a period of approximately four months. The defence took issue with the fact that when the applicant was brought to court no explanation was given for the delay. Further to the above, he also pointed out that the applicant should have been arraigned in court within 14 days in order to comply with the provisions of the law. In support of his submissions, he quoted the following authorities.

(a) ALBANUS MUTUA VERSUS REPUBLIC

CRIMINAL APPLICATION NO. 120 OF 2004

(b) GERALD GITHUKU VERSUS REPUBLIC

CRIMINAL APPLICATION NO. 119 OF 2004

In response, Ms Mwanza, State Counsel submitted that the incident occurred during a fight between two groups after which the would be witnesses were displaced due to fear of attacks. Subsequently, the investigating officer was only able to get witnesses on 16th November, 2006. Apart from the above, Ms Mwanza conceded that she did **not** know why the issuing of the post-mortem form took two months.

Thirdly, she also submitted that due to the funeral arrangements, the widow of the deceased was only available to record a statement on 28th December, 2006. Thereafter, further delay was caused by the bureaucracy in the CID offices and Attorney-General's Chambers. Ms. Mwanza urged the court **not** to rely on the quoted authorities. She further submitted that if a party is wrongly detained then he/she is entitled to compensation under Section 72(6) of the Constitution of Kenya.

Having carefully considered the submissions by both Counsels, it is apparent that the prosecution never gave any good reason why the post-mortem form was procured after a period of two months. Normally, the said form is collected on the same day that the autopsy is carried out.

Secondly, it did **not** make any sense why the police took about two months to record the statement of the widow of the deceased. That delay was unreasonable and inordinate.

Thirdly, after the file had been compiled, one would have expected the police to facilitate the procedures to obtain approval from the Attorney-General to charge the applicant for the offence of murder. Unfortunately, paragraphs (5), (6), (7), (8) and (9) of the affidavit signed by Inspector Ndambuki show that the matter was **not** given any serious attention. From the above chronicle of events, it is apparent that the accused/applicant was held in custody for about four months without any explanation given to the accused. That apart, the explanation given to this court rather belatedly, shows that the police did **not** handle the matter diligently and professionally. As a result, there was undoubtedly a gross violation of the applicant's constitutional rights as guaranteed by Section 72(3) of the Constitution of Kenya. It is also apparent that the rights of the applicant under Section 77(1) of the Constitution which guarantees him a fair hearing within a reasonable time were also breached. I do hereby concur with the reasoning of the Court of Appeal in the case of;

ALBANUS MWASIA MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NO. 120 OF 2004

In which it stated that:

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”

In view of the gross violation of the constitutional rights of the applicant, I hereby quash the information before the court and “acquit” the applicant of the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code. The applicant should be released forthwith unless held lawfully.

Those are the orders of the court.

MUGA APONDI

JUDGE

17TH MARCH, 2008

Ruling read signed and delivered in open court in the presence of:

.....for Republic

.....for Accused

MUGA APONDI

JUDGE

17TH MARCH, 2008