



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 25 of 2007

REPUBLIC.....PROSECUTOR

**VERSUS**

ELIUD NJERU NYAGA.....ACCUSED

RULING

By an information dated 12<sup>th</sup> June, 2007 and laid in this court on the same day by the Attorney General, the accused, **Eliud Njeru Nyaga** was charged with the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. It was alleged therein that the accused on the 6<sup>th</sup> day of June, 2005 at Matandara village in Kirinyaga District of the Central Province murdered **Jamlick Muturi Njeru**.

The accused pleaded not guilty to the charge when presented to this court on 25<sup>th</sup> June, 2007. The case was then set down for hearing on 11<sup>th</sup> February, 2008. On 25<sup>th</sup> September 2007 **Mr. Muchiri wa Gathoni**, learned counsel appearing for the accused in the case filed and served on the Attorney General a Notice of Preliminary Objection dated 24<sup>th</sup> September, 2007. The Preliminary Objection was premised on the grounds:

- “(1) THAT the accused person was unlawfully detained in police custody for more than 14 days contrary to *section 72 (3)* of the constitution.**
- (2) THAT by being unlawfully detained for more than two months in police custody, the fundamental rights of the accused were thereby violated.**
- (3) THAT the accused person was entitled to a fair trial within a reasonable time but which was violated contrary to *section 77 (1)* of the constitution.**
- (4) THAT any prosecution resulting from such an illegality is null and void.....”**

When the case opened before me on the 11<sup>th</sup> February, 2008, **Mr. Muchiri wa Gathoni** took up the preliminary objection first. He submitted that the accused was arrested on 6<sup>th</sup> June, 2005 and was not taken to court until 11<sup>th</sup> August, 2005. That the accused was therefore held in police custody for 65 days. This was in contravention of the provisions of *section 72 (3)* of the constitution of Kenya. Counsel submitted that the rights of the accused having been violated and contravened, subsequent proceedings were a nullity. To counsel therefore the accused was entitled to an acquittal. For these submissions

counsel relied on the following court of appeal authorities:

- (1) **Albanus Mwasia Mutua V. Republic Criminal Appeal No.120 of 2004 (Unreported).**
- (2) **Gerald Macharia Githuku VS. Republic Criminal Appeal number 119 of 2004 (Unreported) and**
- (3) **Morris Ngacha Njuguna & others V. Republic Criminal appeal number 232 of 2006 (unreported).**

In response, **MS Ngalyuka**, called to the stand, Chief Inspector **Gabriel Lesikon**, the investigating officer in the case to explain the delay if at all. **Lesikon** admitted that indeed the accused was arrested on 6<sup>th</sup> June, 2005 by members of the public on allegation that he had thrown his child in a water canal. He re-arrested the accused from members of the public. He stated that between 6<sup>th</sup> June, 2005 and 24<sup>th</sup> June, 2005 he was recording statements from witnesses. He thereafter forwarded the file to the District Criminal Investigations Officer (D.C.I.O.), Kirinyaga. It was not until 11<sup>th</sup> August, 2005 that he was advised to bring the accused to court and charge him with the instant offence. He explained away the delay in bringing the accused in court on time on the ground that it was due to their procedures and processes. He conceded that the accused was brought to court 65 days after his arrest.

**MS Ngalyuka** whilst conceding that there was indeed a delay of 65 days in charging the accused, nonetheless urged me to consider this case on its own peculiar facts.

A brief history of this matter is necessary. The accused person was initially charged, tried and convicted by **Justice Khamoni** on the self-same charge. He however lodged an appeal. The court of appeal heard the appeal and allowed it. However it ordered for a retrial on the basis that the learned trial Judge erred in failing to sum up the case for the assessors before he arrived at his verdict. It would appear therefore that the delay that the accused is complaining of has something to do with the initial trial before **Justice Khamoni** and not the instant one. Before this court, the accused was charged in time. The delay of 65 days complained of was before the accused was produced before **Justice Khamoni** to take his plea in the initial trial therefor.

*Section 72 (3)* of the Constitution of Kenya provides that:

**“A person who is arrested or detained**

- (a) **For the purpose of bringing him before a court in the execution of the order of court: or**
- (b) **Upon reasonable suspicion or his having committed or being about to commit, a criminal offence, and who is not released, shall be 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.”**

It is common ground that the accused was not brought to court in time but after 65 days. That section lays a burden upon the person who states that the provision has been complied with to so prove to the court. What explanation has the state given? That the delay was occasioned by their own internal procedures and processes, whatever that means. I think that the state has failed to sufficiently explain as to why the accused was detained for 65 days before being brought to court. **Mr. Lesikon** was unable to expound or amplify on what he meant by their internal procedures and processes. It is not upto this court to surmise what he meant by those amorphous terms. The liberty of a citizen and indeed accused's right to a fair trial within a reasonable time cannot be sacrificed at the alter of the so called police internal procedures and processes which terms as already stated sound amorphous to me. From the explanation given by the state which I do not buy, it is clear that the state has failed to discharge the burden placed

upon it by *section 72 (3)* of the Constitution of Kenya.

Commenting on the need for the courts to guard jealously the provisions of the constitution that secure the liberties of the citizen the court of appeal in the case of **Albanus Mwasia Mutua** (supra) observed:

**“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 to support the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under *section 72 (3) (b)* of the constitution also amounted to a violation of his rights under *section 77 (1)* of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”**

Again in the case of **Gerald Macharia Githuku** (supra), the court of appeal reinforced the need for courts to be vigilant in enforcing constitutional provisions that secure the fundamental rights of a citizen. It stated:

**“.....Although the delay in bringing the appellants to court 17 days after his arrest instead of within 14 days in accordance with *section 72 (3)* of the constitution did not give rise to any substantial prejudice to the appellant and although on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of *section 72 (3)* of the constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.”**

The accused’s rights herein were violated by the state’s failure to charge him within the mandatory fourteen (14) days period. The explanation given is not sufficient, persuasive nor convincing much as the offence committed was serious and abominable.

Nonetheless I have to bear in mind the wise counsel of the court of appeal in **Albanus case** when it stated:

**“.....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 court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the constitution.....”**

If in the case of **Gerald Macharia Githuku** (supra) a delay of a mere 3 days led to the acquittal of the accused on the grounds that his constitutional rights had been violated, how about in the instant case where the delay was 65 days? I should I think follow the same route and acquit the accused. Accordingly the accused stands acquitted of the charge of murder. The accused is hereby set free forthwith unless otherwise lawfully held.

*Dated and delivered at Nyeri this 6<sup>th</sup> day of March, 2008.*

**M.S.A MAKHANDIA**

**JUDGE**