



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

Criminal Case 45 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

PENINAH WAGICHUGU MUNOI

MATHEW WAWERU KARIUKI.....ACCUSED

R U L I N G

Peninah Wagichugu Munoi and **Mathew Waweru Kariuki** hereinafter referred to as the 1st and 2nd accused persons were charged with the offence of murder contrary to *section 203* as read together with *section 204* of the Penal Code. It was alleged that on the nights of 30th and 31st August, 2007 at Gitoini village in Kirinyaga District within the Central Province they jointly murdered **Kariuki Kamau**.

The accused were arraigned in court on 19th September, 2007 to answer to the charge. They all pleaded not guilty to the charge and their trial was set for 11th February, 2008. On the said date, **Mr. Mandi** learned counsel for 1st accused indicated that he was going to raise preliminary objection premised on the alleged violation *section 72 (3)* of the Constitution of Kenya by the prosecution. I allowed **Mr. Mandi** to argue the preliminary objection first. **Mr. Mandi** submitted that the 1st accused's rights and fundamental freedoms were breached. That she was not charged in any court of law within the mandatory fourteen days as contemplated by *section 72 (3)* of the Constitution of Kenya. That the accused was arrested on 31st August, 2007 and was it not until 19th September, 2007 that she was brought to court. That no reasonable explanation had been given for the delay in charging the accused. Counsel went on to submit that the rights of the accused person enshrined in the constitution were not made in vain and that the law should be taken as it is and not otherwise. **Mr. Muchiri**, learned counsel for the 2nd accused supported and associated himself fully with the submissions of counsel for the 1st accused.

In response, **Ms Ngalyuka**, learned state counsel called to the stand **Chief Inspector Joseph Kyoyo** who was the investigating officer in the case to explain the delay if at all. The investigating testified on oath that the accused was arrested on 31st August, 2007. That on the same date the 2nd accused had reported an assault case and had been issued with a P3 form. On the 10th September, 2007, the investigations were over and the file was then transmitted to the Provincial Criminal Investigation Officer (P.C.I.O) for advise. The P.C.I.O advised them to arrest the 2nd accused. The 2nd accused was duly arrested. Thereafter the file was again forwarded to the Provincial State Counsel through the P.C.I.O. It was not until 19th September, 2007 that the state counsel advised him to arraign the accused person in court on a charge of murder. It was the view of the investigating officer that the delay in bringing the 1st

accused person was occasioned by the advise he had received to have the 2nd accused person arrested. Finally he also pointed out that the deceased passed on sometimes on 31st August, 2007.

To wrap it all, **Ms Ngalyuka** submitted that the delay in bringing 1st accused to court was only five days. However, the 2nd accused was charged within time. The delay of 5 days has been explained. It was occasioned by the advise to have the 2nd accused arrested. The delay of 5 days is not unreasonable. The learned state counsel concluded her submissions.

It is common ground that the delay in charging the accused only relates to the 1st accused. Otherwise the 2nd accused was charged within time. *Section 72(3)(a) and (b)* of the Constitution provides as follows:-

“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 of 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.”**

As can be gathered from a careful reading of the section a burden is placed upon the person who states that the provision has been complied with to so prove to the court. In this case the explanation given by the investigating officer for the delay of five days in charging the 1st accused was because of the advise he had allegedly received from his superiors to trace and arrest the 2nd accused so that jointly they could be charged with the offence. I do not find the explanation given unreasonable. From the explanation offered by the state it has discharged the burden placed upon it by *section 72 (3)* of the constitution.

I am aware of the court of appeal decisions on this very same issue in the cases of **Albanus Mwasia Mutua VS Republic, Criminal Appeal No.120 of 2004** and **Gerald Macharia Githuku VS Republic Criminal Appeal number 119 of 2004** (unreported). In the case of **Albanus**, the court 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.”

The **Albanus case (supra)** was clearly a more extreme case than that now before me. However, as the court stated in that case,

“.....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 the constitution....”

On the same issue, the court of appeal observed as follows in the case of **Gerald Macharia Githuku**(supra)

“.....We have come to the conclusion, after a careful weighing of these two considerations in the light of the facts of the present case, that although the delay of three days in bringing the appellant 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 facts of the two aforesaid authorities are however distinguishable from the facts herein. In those two cases, no attempts were made by the prosecution to explain the delay. That is not the case here. At least in the instant case, the prosecution has been able to explain away the delay of 5 days in preferring the charge of murder against the 1st accused. It was because, they were advised to have the 2nd accused arrested as well so that they could jointly charged. It should be recalled that the 2nd accused had previously filed a complaint of assault with the police. I think that in the circumstances and as correctly pointed out by **Ms Ngalyuka**, a delay of 5 days was not unreasonable. I am persuaded that the delay of 5 days did not give rise or occasion any substantial prejudice or injustice to the accused. On the material before me, I am satisfied that the accused was brought before court as soon as was reasonably practicable. Accordingly, I find the preliminary objection to be without merit and is hereby dismissed.

Dated and delivered at Nyeri this 6th day of March, 2008.

M.S.A. MAKHANDIA

JUDGE