



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 47 of 2006**

REPUBLIC.....APPLICANT

-VS-

JOEL KIMANI KINYANJUI.....RESPONDENT

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 follows:

“On the 17th March, 2006 at Mariani village, Kamwangi Division, Thika District, within Central Province murdered TERESIAH WAITHERA MATHU.”

The hearing of this case started in earnest on 13th March, 2007 and thereafter the court heard two witnesses. However, on 31st October, 2007 Mr Anambo came on record and informed the court that the accused was willing to plead “guilty” to the lesser charge of manslaughter. After several mentions, the State through Ms Mwanza, State Counsel rejected the offer on 11th December, 2007. When the case came up for further hearing on 27th February, 2008, the defence counsel informed the court that he had filed a notice of preliminary objections against the trial. On 8th April, 2008, Mr Anambo submitted that their application was brought under Section 72(3)(b), 77(1), 2(b) and (c) of the Constitution of Kenya – since the constitutional rights of the accused had been violated. Further to the above, he reminded the court that under Section 72 (3) of the Constitution a person who has been arrested on suspicion of committing a capital offence has to be arraigned in court within fourteen days. Apart from the above, he also referred the court to Section 77(1) of the Constitution which guarantees a suspect, a fair hearing within a reasonable time. In addition to the above, he also informed the court that the accused was arrested on 17th March, 2006 and later taken to Gatundu Police Station where he was held upto 22nd May, 2006 when he was arraigned in court. That means that the accused was held in custody for 53 days. That was despite the fact that there was no plausible explanation from the State. Neither did the State seek any extension of the time to hold the accused in excess of 14 days as required by the law.

In support of his submissions, Mrs. Anambo quoted the following authorities:

Mutua versus Republic

Crim App No. 120 of 2004

Githuku versus Republic

Crim App No. 1900 of 2004

Republic versus James Njuguna Nyaga

Apart from the above, Mr Anambo concluded his submissions by taking issue with the fact that the investigating officer never presented any affidavit to explain the inordinate delay in bringing the accused to court.

On her part, Ms Mwanza conceded that she was unable to get an affidavit from the investigating officer. However, she was aware that the accused had presented himself to Gatundu Police Station and that the post-mortem was carried out on 21st March, 2006. Subsequently, the file was compiled and sent to the CID headquarters on 27th March, 2006 before being forwarded to the Attorney-General for advice on 10th April, 2006. Ms Mwanza further submitted that on 26th April, 2006 the directions and information to charge the accused were given. Further to the above, she also submitted that Section 72(3) of the Constitution requires that the prosecution should explain the delay in court – and that the delay in itself does not nullify the proceedings in court. According to Ms Mwanza, the delay was due to the procedure to get the consent from the Attorney-General. She concluded her submissions by stating that the accused has a right to compensation under Section 72(6) of the Constitution in case his rights have been violated.

This court has carefully considered the above submissions together with the quoted authorities. It is rather unfortunate that the State Counsel viz, Ms Mwanza was unable to give the court the explanation for the delay since the investigation officer never swore any affidavit nor did he avail himself in court. The only information that was availed to Ms Mwanza was the fact that the post-mortem was carried out on

21st March, 2006 and that the file was compiled and sent to the CID Headquarters on 27th March, 2006. Thereafter, the Attorney-General gave directions and information to charge the accused on 26th April, 2006. That exercise alone took a whole month. Significantly, Ms Mwanza never denied the fact that the accused was held in police custody for a period of 53 days. In the case of

ALBANUS MWASIA MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NUMBER 120 OF 2004

The court of Appeal stated as follows:

“At the end of the day, it is the duty of 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 case we have cited in the judgment appears to be that an unexplained violation (the emphasis is mine) 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 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) 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.”

Applying the basic principles in the above case, it is apparent that the state never made any serious effort to explain the delay in bringing the accused to the court. Neither did the State come to court in time to explain that they were holding the accused and that they required more time to finalize their investigation. It is obvious that the delay in bringing the accused to court after 53 days was not only unreasonable and oppressive but was a gross violation of the constitutional rights of the accused. Apart from the above, the delay also amounted to a violation of the accused’s rights under Section 77(1) of the Constitution which guarantees him a fair hearing within a reasonable time. In view of the gross violation of the constitutional rights of the accused as outlined above, I hereby quash the information before the court and **“acquitt”** the accused accordingly. The accused should be released forthwith unless held lawfully.

Those are the orders of the court.

MUGA APONDI

JUDGE

Ruling read signed and delivered in open court in the presence of the accused.

.....Defence Counsel

.....State Counsel

Order: Assessors to be paid allowances.

MUGA APONDI

JUDGE.

22ND APRIL, 2008