



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Case 16 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

1. NYAMAWI NDORO CHAKA

2. MWACHAKA CHAKA.....ACCUSED

R U L I N G

On 6th June, 2005, the 1st accused, NYAMAWI NDORO CHAKA was brought to court in connection with alleged murder. Until 29th May, 2007, he was the only person charged with the murder of one Mnazi Kengo Joto in High Court Criminal Case No. 16 of 2005. On that date, Mr. Onserio, appearing for the State, told the court that a second person involved in the murder giving rise to this case had been arrested. On that note, the hearing of the case against the first accused was adjourned.

The second accused, Mwachaka Chaka, was first brought to court on 8th June, 2007, in High Court Criminal Case No. 12 of 2007 when the matter was adjourned to 12th June, 2007 for the taking of the plea. On the latter date, the two cases were consolidated and the court directed that proceedings would henceforth be recorded in the file for HCCr. Case No. 16 of 2005.

On 12th June, 2007, the two accused were jointly charged with the murder of the deceased contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge were that on the night of 22nd and 23rd day of April, 2005 at about 12.30am at Chanzou Village, Chengoni Location in Kwale District within Coast Province, jointly murdered Mnazi Kengo Joto. Each of them pleaded not guilty.

On 23rd October, 2007, Mr. Muhuni for both accused filed a notice of preliminary objection as to the validity and competence of the charges and proceedings herein on the ground that the same violated Section 72(3) and Section 77(1) of the Constitution of Kenya which require that the accused ought to have been charged in court within 14 days of their arrest so as to guarantee a fair hearing within a reasonable time. When this preliminary objection came for hearing, Mr. Muhuni said that the same was raised under 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. He

argued that the 1st accused was arrested on 23rd April, 2005 and brought to court on 20th June, 2005. The delay was 46 days, or 1^{1/2} months. He also contended that the 2nd accused was arrested on 12th May, 2007 and only brought to court on 20th June, 2007 after a delay of 26 days which was almost a month.

He referred to Sections 72 and 73 of the Constitution and submitted that the constitutional rights of the accused were violated by not producing them in court in time as required by the Constitution. He also referred the court to GERALD MACHARIA GITHUKU v. REPUBLIC, Nairobi Criminal Appeal No. 119 of 2004; ALBANUS MWASIA MUTUA v. REPUBLIC Nairobi Criminal Appeal NO. 120 of 2004; and REPUBLIC v. ATHUMANI KURUSI MUNYAMBU & JANGAA MINYAMBO, Mombasa Criminal Case No. 24 of 2005 consolidated with Criminal Case No. 2 of 2007 and urged the court to acquit the accused.

On his part, Mr. Onserio for the State argued that under the 2006 Rules, Counsel for the accused should have come to court by a petition supported by an affidavit; and that the applicants ought to have obeyed Rules 11, 12 and 13 of the aforesaid Rules, but did not do so. He then said that the Republic will be ready to offer an explanation if the Advocates for the accused come to court in the proper way.

In reply, Mr. Muhuni said that he filed his notice of preliminary objection under Rule 23 under which the court is required to treat the matter as a preliminary point and deal with it.

Having considered the submissions by both counsel, I take the view that the matter at hand is governed by 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. This rule states as follows:-

“Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the issue.”

The language of that rule speaks for itself. Once the High Court is seized of a matter in which a constitutional issue arises, the court treats such an issue as a preliminary point and proceeds to determine it forthwith without antecedent formalities. However, if and when such an issue arises in any other manner, then recourse should be had to rule 11, and a petition filed as required by rule 12. In the instant case, it was not necessary to file a petition as the High Court was already seized of the matter.

Mr. Muhuni for the accused argued that the 1st accused was held in custody for more than 14 days which, he submitted, contravened Section 72(3) of the Constitution. This section is in the following words:-

“A person who is arrested or detained:-

- (a) for the purpose of bringing him before a court in execution of the order of a 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 as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within 14 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.”

Although Mr. Onserio for the Republic stated that the Republic would be ready to offer an explanation only if the accused filed a petition supported by an affidavit, after which the Republic would then reply by an affidavit, and even though that procedure was not followed, there is on record a replying affidavit sworn and filed on 11th March, 2008 by one Nemwel Nyakudi of Msambweni Police Station, who was the assisting investigating officer in this matter. His affidavit touches upon the 1st accused only. He

confirms in that affidavit that the accused was indeed arrested on 23rd April, 2005 for the offence of assault against the deceased. The deceased passed away on 30th April, 2005, and the offence was changed from assault to murder. As a result of this change, he deposes that he had difficulty in tracing the murder weapon because the witnesses became uncooperative concerning the murder, and that the murder weapon was not recovered until 10th May, 2005. That was already 17 days from the date of the arrest of the 1st accused. The second reason advanced for the delay was that the post mortem was not performed until 2nd June, 2005 because the resident pathologist was away in a seminar for three weeks.

The Constitution gives 14 days within which to complete the preliminaries in respect of capital offences, and 24 hours in all other cases. Although the 1st accused was arrested on 23rd April, 2005, he was never taken to court on the charge of assault for which he was held for seven days without explanation until the victim died. That was a breach of his rights. On the charge of murder, it took the police 46 days to bring the accused to court, which was more than 14 days by 32 days. That was unreasonable by any standards. In the first place, there is no reasonable explanation as to what transpired within the first 14 days. To say that the murder weapon had not been found is tantamount to suggesting that a murder suspect can be held sine die until the murder weapon is found. Put in another way, this is also akin to suggesting that a suspect should be held until the incriminating evidence against him is obtained. The deponent does not explain what dramatically led to the finding of the murder weapon on 10th May, 2005, and not any earlier. The argument that Dr. Mandalya was away in a seminar for three weeks is equally untenable. It does not explain whether he is the only pathologist who can perform a postmortem at the Coast Provincial General Hospital. Another pathologist would have been equal to the task. In any event, the assisting investigating officer does not even indicate when Dr. Mandalya left for the seminar and when he came back. For these reasons, I am not persuaded that the earliest date when the accused would have been practically brought to court was 3rd June, 2005, as the deponent avers.

Mr. Muhuni submitted that the 2nd accused was arrested on 12th May, 2007, and first brought to court on 12th June, 2007, thereby extending his detention to 26 days which was 12 days more than the 14 days allowed. While the record does not show the actual date of his arrest, there is on record Mr. Onserio's statement in court on 29th May, 2007, that the 2nd accused had been arrested by that date. It is also on record that the 2nd accused was first brought to court on 8th June, 2007, and not 12th June, as stated by Mr. Muhuni. Although the cases against the two accused were consolidated from 12th June, 2007, and the assisting investigation officer's replying affidavit was sworn on 11th March, 2008, the deponent confined himself exclusively to the 1st accused and said absolutely nothing about the second accused. There is no explanation whatsoever as to why the 2nd accused was held for more than the statutory period of 14 days.

In these circumstances, Mr. Muhuni's submissions on the plight of the 2nd accused are unchallenged and if there is any doubt in those submissions, such a doubt ought to be given to the 2nd accused. If, indeed, the Republic is not in a position to respond to a constitutional issue unless a petition is filed as argued by learned state counsel, then the very existence of a replying affidavit in this matter negates such an argument.

In the case of ALBANUS MWASIA MUTUA v. REPUBLIC, Nairobi Criminal Appeal No. 120 of 2004, after reviewing some cases previously decided on that point, the Court of Appeal concluded as follows:-

“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 judgement 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.”

These words were adopted and applied by Serгон J. in a persuasive ruling in REPUBLIC v. ATHUMANI KURUSI MUNYAMBU & JANGAA MINYAMBO, Mombasa High Court Criminal Case No. 24 of

2005 consolidated with Criminal Case No. 2 of 2007.

In an unexplained delay of 3 days in GERALD MACHARIA GITHUKU v. REPUBLIC, Nairobi Criminal Appeal No. 119 of 2004 , the Court of Appeal reiterated that it is the duty of the courts, on the one hand, to punish crime appropriately where it is proved, in a bid to protect society; and 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. After weighing these two considerations, the court then said:-

“We have come to the conclusion ... 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 he was as 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 ...”

Similarly, this court will not disregard such a transgression. If the Court of Appeal could look with disfavour at a delay of 3 days, then it would look with more disfavour at unreasonable and totally unexplained delays of 32 days and 12 days, respectively, in this matter.

For these reasons, I find that the constitutional rights of the two accused under Section 72(3) of the constitution were violated as alleged. The Preliminary Objection must therefore succeed.

I accordingly acquit both accused and order that they be set free forthwith unless they are otherwise lawfully held.

Dated and delivered at Mombasa this 18th day of April, 2008.

L. NJAGI

JUDGE