



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 27 of 2006

REPUBLIC

-VS-

FRANCIS MUTHEMBA MUNGA

ALICE WANJUHI NJENGA

SAMMY THUKU NYONYO

RULING

The accused have 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 21st February, 2003 at Kingeer Village, in Kiambu District within the Central Province, with others not before the court murdered SAMUEL NGUGI WANJIKU.”

Previously, this case was before Ojwang J. who only managed to take the evidence of one witness on 9th October, 2006. Consequently, the trial was adjourned on several occasions due to different reasons. Thereafter, on 17th July, 2007, the trial Judge declared the case a mistrial. Subsequently, I allocated the file to Mutungi J., so that the trial could start de novo. However, on 20th February, 2008, the defence counsel viz, Mr. Mbaluka informed the court that he had instructions from the accused to raise a preliminary objection under the constitution before the trial commences. On 21st February, 2008, the defence counsel filed a notice of preliminary objection under Section 23 of the Constitution of Kenya, High Court Practise and Procedure Rules 2006. When the application came up for hearing on 22nd May, 2008, Ms Mwaniki, a State Counsel complained that though the State Law office had requested two investigating officers to go to their office to prepare affidavits, they failed to turn up. She further conceded that their office could **not** give any explanation since they were **not** holding the accused in custody. Due to the failure by the officers to turn up in their office, Ms Mwaniki opted to leave the matter at the discretion of the court. On his part, Mr. Mbaluka submitted that the rights of the accused have been violated since they have been kept in custody for a period of 4½ months. Further to the above, he also submitted that the accused were arrested on 8th November, 2005 and later arraigned in court on

21st March, 2006. He pointed out that the above was contrary to Section 72 (3) of the Constitution of Kenya. That apart, he also submitted that since there was no explanation for the delay, then the accused should be “acquitted”. He also submitted that the charge and trial was a nullity. He concluded his submission by referring the court to the authorities that he had listed.

This court has carefully considered both the submissions and the entire history of the case. It is a settled principle of law that where an accused person is brought to court late, then the prosecution must give an explanation for the same. In the case of

NDEDE –VS- REPUBLIC (1991) KLR PG 568

The Court of Appeal held inter, alia,

“where, as happened in this case, at the time of the taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of arrest etc, then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court.

On the other hand in the case of

GERALD MACHARIA GITHUKU –VS- REPUBLIC

CRIMINAL APPEAL NO.119 OF 2004

the Court of Appeal quoted with approval the following passage from the case of

ALBANUS MWASIA MUTUA –VS- REPUBLIC

CRIMINAL APPEAL NO.120 OF 2004 (unreported):

“On the other 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 the persons charged with criminal offences, particularly the human rights guaranteed to them under the constitution.

It is apparent in this case that the accused were held in custody for a period of about 4½ months. The State Counsel viz, Ms Mwaniki conceded that their office could not provide any explanation due to the intransigence, arrogance and impunity of a few police officers. It is my sincere hope that the Attorney-General and Police Commissioner will put in place appropriate measures to contain the said officers.

In view of the above, the court hereby finds that the police violated the constitutional rights of the accused by detaining them in their custody for 4½ months and that, apart from violating their rights under Section 72 (3) (b) of the Constitution also amounted to a violation of their rights under Section 77 (1) of the Constitution which guarantees them a fair hearing within a reasonable time. The above delay also meant that the accused could not be subjected to a fair trial within a reasonable period. The upshot is that I hereby uphold the preliminary objection and “acquits” the accused persons. I also hereby declare the proceedings in Criminal Case No.27 of 2006 to be nullity

“ab initio”. Lastly, I hereby direct that all the three accused should be released forthwith unless held lawfully. Those are the orders of the Court.

MUGA APONDI,

JUDGE

30TH MAY, 2008.

Ruling read signed and delivered in open court in the presence the accused, Mbaluka Defence Counsel and M/s Mwanza State Counsel.

MUGA APONDI,

JUDGE.

30TH MAY, 2008.