REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 90 of 2006

REPUBLIC …….…….PROSECUTOR

VERSUS

VICTOR JAIRUS NAKWEYA…….……..ACCUSED

R U L I N G

[On whether or not the accused has a case to answer]

The accused, VICTOR JAIRUS NAMWENYA was, on 27/9/2006, charged with the murder of GEOFFREY SALANO SIMITI, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

The offence is said to have been committed on 24/7/2006 at Kariobangi Light Industries, within Nairobi Area.

In the course of the hearing, which commenced on 14/05/2007 and closed on 24/4/08, the prosecution called 11 (eleven) witnesses in support of their case.

At the end of the prosecution evidence – the 11 witnesses – Learned Counsel for the accused, Ms. C. Adembo, submitted that the prosecution had failed to make a **prima facie** case to warrant putting the accused on his defence. She raised a number of issues with respect to the adduced evidence, including the following:

That there were other firearms in possession of the police officers called upon to quell the student riots at Lilly Secondary School, which could file similar bullets to that carried and used by the accused, who was one of the Police Officers involved in the operation and that those other firearms had not been tested and therefore not eliminated in the prosecution evidence.

Secondly, the defence submitted that the prosecution gave different dates with regard to when the postmortem was carried out and where, thus raising the possibility of more bodies than that of the deceased.

In opposition, the prosecution, through Learned State Counsel, Mr. Ongondo, submitted that the prosecution had adduced sufficient evidence pointing at the guilt of the accused and he should be called upon to defend himself.

On the issue of both the firearm and bullet head retrieved from the body of the deceased, Mr. Ongondo submitted that the evidence of P.W. 2, the ballistic and firearms, expert had clearly eliminated the possibility of the fatal bullet from having been fired by any other firearm than that of the accused. This was through the test firing of bullets using the firearm used by the accused that material date and time, and the Firearms Movement Register.

On whether there were other bodies other than that of the deceased upon which the postmortem was carried out on the disputed date and place, the prosecution submitted that the apparent date of 21/8/06 was a typing error and the correct date is as stated by the Pathologist and the postmortem form, which is 2/8/06.

Finally, in the course of her submissions, the defence counsel stated that the accused should be discharged and released because his constitutional rights of being brought to court within 14 days of his arrest had been violated, and the prosecution had not explained the delay. This submission is based on the provisions of Section 72 (3) (b) of the Constitution.

In opposition to the above submission, the prosecution stated that the issue of delay in bringing the accused had not been raised until at the stage of submissions by the defence counsel, when the prosecution had closed its case and therefore not afforded an opportunity to explain the delay, if any. He cited Cr. Appeal No. 182 of 2006 as a counter to the defence authority of Cr. Appeal No. 119 of 2004.

Having carefully considered the pleadings; the evidence adduced by the prosecution; the submissions and authorities cited by learned counsel for both sides, I have reached the following findings and conclusions.

I begin with the challenge of the legality of the proceedings on the grounds of delay in bringing the accused to court within the 14 days stipulated by Section 72 (3) (b) of the Constitution.

Under Section 72 (3) (b) of the Kenyan Constitution the accused must be brought before court as soon as is reasonably practicable, and at any rate before 14 days have expired. The provisions go on to state that the burden of proving that the provisions touching on "**as soon as reasonably practicable"** rests with the prosecution. The wording of the Section clearly admits that there may be delay in bringing the accused before the court. That delay **per se** is not in itself fatal. What is fatal is lack of satisfactory explanation as to why the accused was not brought to court until the time he/she was. And the incidents upon which such an explanation would be considered satisfactory and acceptable to the court, were mentioned by this country's Highest Court – the Court of Appeal – in Cr. Appeal No. 182 of 2006 - **ELIUD NJERU NYAGA**, in the course of which their Lordships stated, in the relevant parts:

"**In MUTUA'S case [Cr. Appeal No. 120 of 2004] the prosecution had an opportunity to explain the cause of the delay but failed to offer an explanation. In the appeal before us the ground raising the violation of the Constitutional right was raised only on the morning of the hearing when the court granted leave to….file the Supplementary Memorandum of appeal out of time. We are accordingly unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity, and therefore that there was no reasonable explanation for the delay. Even Section 72(3) of the Constitution, which deals with the period of bringing an accused person to court recognizes that there can be a valid explanation for failure to bring an accused person to court as soon as reasonably practicable."**

In the case before me, and on the above authority, the issue of delay has been raised when the prosecution had closed their case, and without their being given an opportunity to explain the delay. It is not possible for me to find and hold that the prosecution had no explanation for the delay in bringing the accused to court within the prescribed period of 14 days. They were not afforded the opportunity to explain the delay.

Accordingly that ground is rejected as a ground for not putting the accused on his defence.

Turning to the evidence adduced by the prosecution, I have carefully perused and analysed the same and have reached the finding and conclusion that the prosecution has adduced sufficient evidence to warrant putting the accused on his defence. The testimony of the pathologist and the ballistic expert calls on the accused to explain how a bullet fired from his firearm came to be in the body of the deceased.

I have considered and rejected the submissions by the defence that there were more than the one body of the deceased in this case on which the postmortem was performed. I am convinced that the apparent confusion raised by the date 21/8/06 is a typing error and the correct date is 2/8/06. This is from the postmortem report form and the witnesses who identified the body prior to the postmortem.

In conclusion, the prosecution, has adduced sufficient evidence to warrant putting the accused on his defence.

I so rule.

DATED and delivered at Nairobi this 29th Day of May, 2008.

O.K. MUTUNGI

JUDGE