REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 38 of 2003

REPUBLIC ……. PROSECUTOR

- Versus -

LUCAS MONO CHINYESI …… ACCUSED

R U L I N G

The Applicant herein was charged with murder contrary to Section 203 as read with 204 of the Penal Code. The particulars of the offence, which were dated and filed in court on 18th November, 2003, were that the applicant, on the 17th day of October 2003, at Mwarakaya Village in Mwarakaya Location within Kilifi District of the Coast Province, murdered Francis Kahindi Mwasaha. After hearing a few witnesses, the Presiding judge was transferred from this station making it necessary for the trial to start de novo.

The plea was taken afresh on 2nd October, 2006, and a plea of not guilty duly entered. As the parties were going through the preliminary motions which included plea bargaining, the accused, herein referred to as the Applicant, filed through his Advocate a preliminary objection on a point of law. The objection read as follows –

"The accused person was brought to court in violation of section 72(3) of the Constitution having been held in custody for more than 14 days before being brought before court."

The Applicant thereupon sought to have the trial arrested.

Mr. Oddiaga for the Applicant referred to the charge sheet and argued that the same demonstrated that the applicant was arrested without a warrant on 17th October, 2003, and brought to court on 11th November, 2003. He submitted, therefore, that the Applicant was in custody for longer than the period provided for in the Constitution which required that he should be brought to court within 14 days of arrest. No reasons were advanced at any time as to why the Applicant was not brought to court within the period mandated by the Constitution, and on that basis Mr. Oddiaga submitted that the applicant's Constitutional rights were violated. He thereupon referred to ALBANUS MWASIA MUTUA v. REPUBLIC, Criminal Appeal No. 120 of 2004 (Court of Appeal, Nairobi) and urged the court to acquit the Applicant.

Mr. Onserio for the Republic/Respondent opposed the application mainly on the procedure adopted in the making of the application. He referred to the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the individual) High Court Practice and Procedure Rules, 2006 and submitted that according to those Rules, an application such as this one should be made by a petition supported by an affidavit. Instead, the applicant had elected to come under Rule 23. He

referred to the order for the commencement of this matter de novo and submitted that the hearing had not commenced and that according to the 2006 Rules, the application should have made by petition under Rules 11 and 12.

In reply to this response, Mr. Oddiaga submitted that the court had earlier ruled that the Applicant should file a proper notice and that this ruling had been complied with. That matter could not therefore be revisited. He also submitted that the Applicant had raised the issue under Rule 23 which was in order because the matter was before the court and the court was seized of the matter.

Having considered the application and the submissions of both counsel, I note that Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules, 2006, reads as follows –

"Where a constitutional issue arises 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."

Contrary to Mr. Onserio's submissions, this court is seized of this matter since the plea has already been taken and only this constitutional issue stands in the way of the commencement of the trial. This matter therefore arises squarely under Rule 23. Having the potential to dispose off the entire trial at an early stage, such an issue ought to be heard and determined at the earliest possible time, as this might save invaluable judicial time. However, whenever a constitutional issue arises in any other manner, no doubt it should be dealt with under Rules 11 and 12. As for now, this issue is to be dealt with as a preliminary point.

Mr. Oddiaga's submissions are supported by the record, which shows that the Applicant was indeed arrested on 17th October, 2003, without a warrant. It further shows that the date of apprehension report to court was 11th November, 2003. The applicant was thereafter brought to court on the 24th day after his arrest, which was 10 days more than the period prescribed in Section 72(3) of the Constitution. That section states as follows –

"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."

The constitutional issue in this matter was filed and served on or about 24th October, 2007. There has been adequate time for the prosecution to prepare to demonstrate that the Applicant was brought before the court as soon as was reasonably practicable. This, the prosecution did not do, nor did they even attempt to do so. The Applicant's allegation is therefore uncontroverted, and this leaves the court with no option but to hold that Applicant's constitutional rights were violated as claimed.

Having so found, the next issue is what course does the court take from here.

The Court of Appeal, whose decisions are binding on this court, said in ALBANUS MWASIA MUTUA v. REPUBLIC (Nairobi) Criminal Appeal No. 120 of 2004 –

" 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 in support of the charge."

The use of the word "normally" in the phrase "… will normally result in an acquittal …" is quite significant. It suggests that there may be situations in which acquittal may not result. If, for instance, an accused person was held for two or three days more than the fourteen days allowed under section 72(3), is the gravity of the violation the same as that of a suspect who has been held for six months? If not, is it possible to explore situations in which the court may have a discretion to award compensation under section 72 (6) of the Constitution instead of granting blanket acquittals?

Until guidelines are given as to when acquittal may not result, if at all, I am bound by the doctrines of precedent and stare decisis and accordingly guided by the decisions of the Court of Appeal. I accordingly acquit the Applicant and hereby order his immediate release unless he is otherwise lawfully held.

Orders accordingly.

Dated and delivered at Mombasa this 26th day of May, 2008.

L. NJAGI

JUDGE