



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

Criminal Case 23 of 2006

REPUBLICPROSECUTOR

VERSUS

STEPHEN KIBE MAKUMI.....ACCUSED

RULING

The accused/applicant herein – STEPHEN KIBE MAKUMI – was, on 2/3/2006, charged with the murder of DAMARIS NJERI MWANGI, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63 Laws of Kenya.

The alleged offence was committed on 19/10/2005 at Kibera Laini Saba in Nairobi.

On 17/1/08, the accused/applicant challenged the legality of the proceedings vide his Notice of Preliminary Objection, which was duly served upon the prosecution.

The gist of the Objection is founded on the undisputed facts that the accused was arrested on 28/10/2005 but was not brought to court until 2/3/06, when he was charged with the offence of murder as herein above stated.

From the above facts, the Learned Counsel for the Defence submitted that these proceedings are illegal, null and void, as they were instituted in contravention of the provisions of Section 72(3) and 77 of the Constitution.

In the submissions, the defence alleges that the accused was held in custody for 96 days, before being brought to court. That is clearly a miscalculation which overlooks the crucial dates of arrest and being charged, as well as the 14 days for which the police are constitutionally entitled to hold the arrested person in custody without bringing him to court.

The key point, which is a common ground, is that the police held the accused in custody beyond the 14 days permitted by Section 72((3) (b) of the Constitution which is a violation of the fundamental and constitutional rights of the accused, unless such delay can satisfactorily be explained by the prosecution.

It is the submission of the defence counsel, Mr. Nyachoti, that the police have failed to explain the delay and accordingly the accused should be released as the proceedings are illegal.

In Reply, the Learned State Counsel, Ms. Mwaniki, while conceding that there was delay in bringing the applicant before court beyond the 14 days, avers that the delay is explained in the Affidavit of P.C. William Chapsoo dated and filed in Court on 7//4/2008 and that the accused was brought to court as soon

as was reasonably practicable.

Further, the prosecution submitted that there is no provision in the quoted Constitutional provisions authorizing acquittal, even if the provisions were violated. There is, however, continued the counsel for the prosecution, provision for compensation to the accused, as per Section 72(6) of the Constitution, but not acquittal from the charge.

The bone of contention in this application, as with the majority of all Preliminary Objections which have preceded it, is what constitutes “unexplained delay?” in terms of, and as anticipated by ,the provisions of Section 72(3) of the Constitution?

The two learned counsels cited and relied on: for the accused/applicant. Misc. Cr. Application No. 551 of 2007 ANN NJOGU & 5 OTHERS VS THE REPUBLIC: and Cr. Case No. 40 of 2007, both decisions of the High Court; while the prosecution/Respondent cited and relied on: Cr. Case No. 91 of 2004 DANIEL WANYOIKE MBUGUA & GEORGE ISAAC ONYANGO VS. REPUBLIC, a decision of the High court and Cr. Appeal No. 182 of 2006 – ELIUD NJERU NYAGA V. REPUBLIC – a Court of Appeal decision. The prosecution also relied on Section 72 (6) of the Constitution in support of their submission that even if the arrest was unlawful the accused should only be compensated rather than being acquitted.

Having carefully considered the pleadings and the submissions and authorities by learned counsel for both sides, I have reached the following findings and conclusion.

What constitutes **explained delay** in bringing the accused before court, as envisaged by the provisions of Section 72 (3) (b) was directly dealt with by the Court of Appeal in Cr. Appeal No. 120 of 2004 – ALBANUS MWASIA MUTUA VS. REPUBLIC where the court stated, in the relevant parts: “.....**He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for the delay. It could be that he fell ill during the fourteen days the police were entitled to hold him in custody; that he was admitted in hospital and was detained in hospital for the eight months as a result of which the police were unable to produce him in court. It could also be that the appellant had been presented to the court earlier but his case was terminated for one reason or the other, was discharged and subsequently recharged afresh. Constitutionally, the burden was on the police to explain the delay.**”

I understand the above incidents given by the Court of Appeal, which incidents are not exhaustive to mean that for the delay to be satisfactory the cause should fall within one of the two categories: Where due to (health reasons) the accused being indisposed or admitted in a hospital, could not be brought to court or even if he/She was brought, legally he was not fit to plead. The other category is where due to lack of Court of competent jurisdiction the police had no court before which to arraign the accused.

Based on the above, the explanation as per the Affidavit produced by the prosecution, is nothing but beaurocratic red tape lased with untenable division of roles within the prosecution docket. These include the difficulties in tracing the relevant witnesses; time taken to go through the postmortem process and get the medical Report ready; the time taken at the State Law Office to grant consent to prosecute etc. The police investigators; the Government Chemist/analyst; the pathologist and the office of the Hon. Attorney General, are in law, what constitutes the prosecution. All those units make one whole and passing the buck by any of those units is legally untenable and falls below what, to the court, would constitute **explained delay**.

On the alternative redress to the accused/applicant, as per Section 72(6) of the Constitution, it is the State Counsel’s position that even if there was unlawful arrest or delay, that can be compensated, but should not lead to an acquittal.

The subsection relied upon provides as under:

“A person who is unlawfully arrested or detained by another person shall be entitled to

compensation therefore from that other person.”

There is no assertion by the accused/applicant that he was unlawfully arrested or detained. The challenge is on the legality, rather than lawfulness, of these proceedings the same having been instituted after the constitutionally permitted period of 14 days had expired and without satisfactory explanation.

The contradiction in the submission is to concede that proceedings instituted after the 14 days have lapsed are illegal, null and void **abinitio**, but still proceed to hold that compensation, as referred to in Sub-section (6) of Section 72 of the Constitution can still be founded on the same null and void proceedings.

Secondly, the submission seems to suggest that release or acquittal because the proceedings have their genesis on an illegality and compensation under Subsection (6) are mutually exclusive. That is not the thrust of Section 84(1) of the Constitution which provides as under (under the relevant parts):

“Subject to Subsection (6), if a person alleges that any of the provisions of Sections 70 to 83 (inclusive) [which covers Section 72 (3) (b)] has been, is being, or is likely to be, contravened in relation to him...then without prejudice to any other action with respect to the same matter which is lawfully available, that person.....may apply to the High Court for redress.”

Without stressing the obvious, release/acquittal of the accused/applicant from the charge of murder facing him in these proceedings is no bar to the applicant in moving, under a civil suit against any person/persons for compensation for unlawful arrest or detention, if he can prove his case.

The upshot of all the foregoing is that I find and hold that the applicant’s fundamental and constitutional rights, as stipulated under Section 72(3) (b), were violated. These proceedings are founded on an illegality and are therefore null and void.

Accordingly, I hereby order the release of the accused forthwith unless he is otherwise lawfully held.

DATED and delivered in Nairobi this 19th Day of May, 2008.

O.K. MUTUNGI

JUDGE