



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

Criminal Appeal 12 of 2006

REPUBLIC.....APPLICANT

-VS-

JULIUS KAMAU MBUGUA.....RESPONDENT

RULING

The accused has 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 19th September, 2005 at Gatunyu village in Thika District within Central Province, murdered MILCAH WANJIRU WAMANJI.’

From the record, it is apparent that the accused was arraigned before this court on 8th February, 2006. Thereafter, the court took the plea and fixed the case for hearing on 17th and 18th May, 2006. After several adjournments, the case started in earnest on 12th October, 2006. Eventually, the court heard nine witnesses before the prosecution closed its case. After the prosecution closed its case, the defence counsel viz, Mr. Ngunjiri made submissions of a no case to answer on 5th March, 2008. Earlier on 19th February, 2008, the defence counsel had filed an application under Section 84(1), 72(1), and (3), 74(1) and 81(1), of the Constitution of Kenya. The same alleged that the constitutional rights of the accused had been greatly violated since the accused had been unlawfully detained for a period of 107 days. He also submitted that the accused’s right to a fair hearing within a reasonable time as guaranteed by Section 77(1) of the constitution had been greatly violated. In his reply, the State Counsel, Mr. Ong’ondo complained that they were not given enough notice to enable them call a witness or cause an affidavit to be prepared by the concerned officer. Further to the above, he also complained that the late application denied them the opportunity to explain the cause of the delay. In conclusion, Mr. Ong’ondo referred the court to Section 72(6) of the Constitution that states that a suspect may be compensated for gross violation of his rights.

From the record, it is apparent that the prosecution has concluded its case and what was remaining was for the court to decide whether the accused has a case to answer or not. No doubt, this application was brought too late in the day. For over two years, the defence counsel has been representing the accused and he never saw the need to raise the issue of violation of constitutional rights – till the PW9 was presented to the court. As a general principle, the defence counsel had the duty and obligation to raise that issue at the earliest opportunity to enable the prosecution have a chance to call evidence in rebuttal. I do concur with the sentiments of the Court of Appeal in Criminal Appeal No.182 of 2006.

- ELIUD NJERU NGANGA -VS- REPUBLIC

where the court stated inter alia,

“We however note that in MUTUA’S case the delay involved was raised from the court of the Magistrate and the prosecution never sought to explain the reason for the delay In the present appeal ground four was only raised during the hearing [actually on the same day of the hearing of the appeal, with the leave of the court].

While we would reiterate the position that under the fair-trial provisions of the Constitution, an accused person must be brought to court within twenty four hours for non-capital offences, and within fourteen days for capital offences yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal.”

Unfortunately in this case, the application was made as an afterthought and as an additional defence to counter the evidence on record. Obviously the application was brought too late and did not afford the prosecution adequate time to avail evidence to rebut the same. Given the evidence on record, the court is of considered opinion that fairness and justice dictate that this case should be decided purely on merit. Due to the above, I hereby dismiss the application. The accused is at liberty to file a suit for compensation relating to any violations of his constitutional rights.

After carefully perusing the evidence of the nine witnesses, I hereby find that the prosecution has established a prima facie case against the accused to require him to be put on his defence in accordance to Section 306 (2) of the Criminal Procedure Code, Cap 75, Laws of Kenya. The accused has the option to address the court either personally or by his advocate. In the event that the accused opts to give a sworn statement, then he will be subjected to cross-examination. He also has a right to call any number of witnesses in his defence.

Secondly, the accused has a right to make an unsworn statement and call witnesses to his defence. In the event that the accused exercises the second option, then he will not be subjected to any cross-examination.

Thirdly, the accused is at liberty not to offer any evidence. In that event, the Court will call upon the State Counsel to sum up the case against the accused person. Consequently, the court shall then call on the accused person personally or by his advocate to address the court on his own behalf.

MUGA APONDI

JUDGE.

16TH MAY, 2008.

Ruling read signed and delivered in open Court in the presence of the accused and

.....)

.....) **for Republic**

.....)

.....)

.....) **for Accused**

.....)

MUGA APONDI

JUDGE.

16TH MAY, 2008