



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

Criminal Case 81 of 2005

REPUBLIC

-VS-

FRANCIS MBOGO WAMBUGU

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 20th April, 2005 at Bahati Estate, House No.812/813 in Nairobi within Nairobi Area, murdered JADIEL WAMBUGU MBOGO.”

From the record, it is apparent that the accused was first arraigned in court on 4th August, 2005. Since then this case has not been heard for a variety of reasons which are all reflected in my ruling that I delivered on 20th September, 2007. Needless to state, it is not necessary at this juncture for me to repeat the same. Be that as it may, the defence counsel filed an application on 14th April, 2008. The said application has been brought under Section 23 as read with Section 72 (3) and 77 (1) of the Constitution of Kenya. During the hearing of the application on 21st May, 2008, learned defence counsel viz, Mr. Mbaluka submitted that the rights of the accused have been violated and bluntly disregarded by the prosecution. According to him, the accused was arrested on 29th April, 2005 and was later arraigned in court on 4th August, 2005. That was a period for over four months. He was of the view that the above was in clear breach of Section 72 (3) of the Constitution. Further to the above, he also submitted that there were no special circumstances nor justification to have warranted the delay for 131 days. Mr. Mbaluka took issue with the explanation by the prosecution that the delay was caused by the hostility of the accused. Apart from the above, he also submitted that if the police had reasonable belief that the accused was insane, then they should have taken him for mental assessment and psychiatric treatment. Mr. Mbaluka further explained to the court that the file was forwarded to the Attorney-General on 20th July, 2005 – which was two months after the arrest of the accused. Due to the above, he urged the court to “acquit” the accused. In support of his submissions, the defence counsel quoted the following authorities:

Albanus Mutua –vs- Republic Criminal App No.120 of 2004 Gerald Githuku -vs- Republic Criminal Appeal 119 of 2004 Ndede –vs- Republic (1991) KLR Criminal Appeal No.40 of 2007 Republic -vs- James Njuguna Nyaga Criminal Case No. 40 of 2007

On the other hand, Mr. Gikonyo, State Counsel conceded that the accused was arrested on 26th April, 2005 by police officers attached to Jogoo Police Station. Consequently, Inspector Sembe took over the case on 11th May 2005 and booked the accused at Buru Buru Police Station till he was arraigned in court on 4th August, 2005. According to Mr. Gikonyo, while the accused was under police custody, he exhibited extreme hostile behaviors by banging walls of the cells, refusing to eat and behaved in an insane manner. Thereafter, the accused completely refused to leave the cell to be taken to hospital for mental examination to determine his mental status. Mr. Gikonyo further stated that the above conduct persisted till the investigating officer forwarded the file to the Attorney-General on 20th July, 2005 without the requisite mental report of the accused. Eventually, on 25th July, 2005 the police finally managed to subdue the accused and refer him to Dr. Kamau. In turn, he referred him to Dr. Margaret Mak'Anyengo of Kenyatta National Hospital for psychiatric evaluation. On 2nd August, 2005, the Attorney-General forwarded the file to the police with information containing a similar date. On 4th August, 2005, the accused was arraigned in court for the charge of murder. Mr. Gikonyo is of the view that the accused was the architect of the delay. The State Counsel requested the court to take judicial notice of the conduct of the accused. Specifically, he referred the court to the move by the accused to reject four defence counsels.

From the record it is apparent that the accused was arraigned in court on 4th August, 2005. The prosecution has **not** denied the fact that the accused was arrested on 29th April, 2005. That means that the accused was held in custody for about 3 months before being arraigned in court. Without showing any prejudice against the accused, this matter has now been handled by different Judges in the Criminal Division. The reasons are explicitly shown in the file. Besides the above, it is also a fact that the accused has rejected four defence counsels on record for reasons better known to himself. The learned State Counsel has explained in details the problems that the police encountered in handling the accused. Though the court is **not** biased against the accused who is presumed to be innocent till proved otherwise, I feel that the accused was not co-operative after his arrest. Dr. Mucheru did **not** rule out the fact that the accused may have been suffering from depression. Such an opinion cannot be ignored since the same has been given by a Consultant Psychiatrist who had examined the accused.

Given the above, I hereby find that the State has given a reasonable and plausible explanation for the delay in bringing the accused to the Court. One cannot overrule the fact that the accused may have been unwell at that particular time and tht could explain why he could not communicate well with the police. In view of the above, I hereby find that the State has discharged its duty of giving an explanation. The upshot is tht the preliminary objections is hereby dismissed. Case to proceed as scheduled. Those are the orders of the Court.

MUGA APONDI,

JUDGE,

16TH JUNE, 2008.

Ruling read signed and delivered in open court in the presence of the accused: Mbaluka Defence Counsel and Gikonyo State Counsel.

MUGA APONDI,

JUDGE.

16TH JUNE, 2008.