



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Case 2 of 2008

KENNEDY MOINDI NYABUTO APPLICANT

VERSUS

REPUBLIC OF KENYA

THRO' THE ATTORNEY GENERALRESPONDENT

RULING

The applicant was charged with murder contrary to **section 203 as read section 204 of the Penal Code**.

The offence was allegedly committed on 23rd October 2007. Before the hearing was done, the applicant filed an application by way of originating notice of motion under **sections 65, 72(3) and 77(1) (2) of the Constitutional of Kenya**. He stated that his constitutional rights had been breached because he was arrested and held at Ogembo Police Station for more than 14 days before he was arraigned in court.

In his affidavit in support of the application, he deposed that he was arrested on 24th October 2007 and was kept in police custody until the 17th day of January 2008 when he was taken to court. That was a period of nearly 82 days. No reason was advanced by the prosecution for that long delay.

A replying affidavit was filed by police constable Stephen Mwei of Ogembo Police Station, the Officer who was investigating the murder case. He confirmed that applicant was arrested on 24th October 2007. He further deposed that all the statements by the relevant witnesses had been recorded by the 25th day of October 2007. However, there was delay in performance of the post mortem on the body of the deceased owing to the fact that the post mortem fees could not be raised in time.

Mr. Kemo, Senior Principal State Counsel, told the court that the post mortem fees was payable by the family of the deceased. They allegedly paid the same after a considerable period from the date of the arrest and the post mortem was performed on 6th November 2007. Thereafter the file was forwarded to the District Criminal Investigations (D.I.C.O), Gucha, for necessary advice and further action.

The D.I.C.O. was dissatisfied with the compilation of the file and returned the same to the station for further investigations and proper compilation. The file was re-submitted to the D.C.I.O. on 26th November 2007 and he forwarded the same to the Attorney General's chambers on 3rd December 2007.

On 16th January 2007, the D.I.C.O. returned the file to Ogembo Police Station with directions from the state law office that the applicant be charged with murder.

It was further stated that the delay was occasioned by the bureaucratic process that is involved in compilation of murder files. P. C. Mwei stated that the delay was compounded by the fact that the police were heavily engaged during the period of election campaigns, I presume, in provision of security. Mr. Kemo urged the court to disallow the application.

The jurisprudence regarding this kind of Constitutional applications is now well settled. Under **section 72(3) of the Constitution**, a person who is charged with murder should be arraigned in court within 14 days from the date of his arrest. Where that is not done the burden of proving that the person arrested has been brought before a court of law as soon as is reasonably practicable rests upon the police or any person alleging the provisions of the above subsection of the Constitution have been complied with see **ALBANUS MWASIA MUTUA V REPUBLIC**, Criminal Appeal No.120 of 2004. In such cases, police must give an explanation that is objectively reasonable in light of the circumstances of the case. The explanation must also be bona fide. The explanation should also show such operational difficulties as may have prevented timeous arraignment of the suspect in court. The police must also show that they exercised genuine professional care and diligence in conducting their investigations preceding the arrest of the accused person, see **FAN XI AND OTHERS VS ATTORNEY GENERAL**, Misc. Criminal Application 860 of 2007 at Nairobi.

In this case, the police arrested the applicant one day after commission of the alleged offence. One day thereafter, all the statements by the relevant witnesses had been recorded. It is unacceptable for the police to say that the family members of the deceased person were responsible for payment of post mortem expenses in a murder case which was under their investigation. In such cases, postmortems are ordinarily carried out in public hospitals and/or mortuaries by doctors employed in civil service. The learned Senior Principal State Counsel did not tell the court that there has been any official change of policy regarding the above practice and it must therefore be assumed that the official practice is and ought to be that postmortems regarding cases which are being handled by the police are conducted for free in government hospitals or mortuaries.

In the event that any charges are payable, the same should be met by the department of police. Such payment, if at all, ought to be normal operational expenses of the police force.

I therefore find the explanation given in paragraph 8 of the replying affidavit unacceptable.

Even assuming that there was a genuine reason for the delay in performance of the post mortem, it has been stated the same was conducted on the 6th of November 2007 and the file was forwarded to the D.C.I.O on 9th November 2007.

The reasons advanced for the delay between that date and 17th of January 2008 are unreasonable and therefore unacceptable. It appears to me that the police had initially carried out improper investigations if the D.C.I.O had to order further investigations after the file was compiled and handed over to him. If that was the case, the investigating officer did not explain why that was so, considering that the police had no difficulties in contacting all the relevant witnesses. They had indeed not only done so but had also recorded all their statements.

The other alleged reason for the delay was the bureaucratic process in compilation of murder files that involves movement of such files from the police investigators to the D.C.I.O., to the Attorney General's office and back to the D.C.I.O. before a suspect is taken to court. While I agree that such a process may at times encounter some delay, in this case, no explanation was given as why the file remained in the Attorney General's office from 3rd December 2007 to 21st December 2007, a period of 18 days. Ordinarily, a State Counsel should be able to peruse such a file within a day or so and form an opinion as to whether a suspect should be charged with murder or not. Thereafter the file should be returned to the D.C.I.O. with all due dispatch since it is well known that time is of the essence. If for any good reason the required advice from the Attorney General's office

cannot be given to the police expeditiously, appropriate explanation should be given. In this case Mr. Kemo did not tell the court why the Attorney General's Office took so long in perusing the file and

advising the D. C. I.O. accordingly.

The D.C.I.O, having received the file on 21st December 2007 took no action on the matter until 17th January 2008. While the court takes judicial note of the fact that there were general election campaigns in the month of December 2007, I do not agree that there could have been any good reason as to why the applicant could not be taken to court immediately after the file was received by the D.C.I.O. It is not possible that all the police officers at Ogembo police station were involved in providing security during the campaign meetings. It appears that the police and the Attorney General's office were not diligent in complying with the law and merely crafted some excuses in an attempt to justify their indolence when the applicant filed this application.

All in all I find that the applicant's constitutional rights were violated and there being no reasonable explanation for that violation, I am inclined to grant the orders sought by the applicant. I hereby discharge the applicant of the charge of murder.

DATED, SIGNED and DELIVERED at KISII this 10th day of June, 2008

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Nyambati for the applicant,

Mr. Kemo, Senior Principal State Counsel for the Republic.

D. MUSINGA

JUDGE.