



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

REPUBLIC

VERSUS

1. ALICE MULYUNGI

2. MUTHI

MUKWETI:.....:ACCUSED

RULING

1.The simple but crucial issue raised in the Notice of Preliminary Objection raised by Mr. D.R.T.Konya, Esq, advocate for the accused persons in this case is as follows:-

“That the constitutional rights of the accused persons as entrenched in section 72(3) (b) and section 77(1) (2) (a) (b) and (c) of the Constitution had been, are being, are likely to be violated by these proceedings which were rendered null and void by virtue of the said violations of the Constitutional rights of a fair trial and protection of the law...”

2. In submissions before me, Mr. Konya argued that the accused persons were arrested, detained and charged after 14 days from the date of arrest contrary to the express and mandatory provisions of the Constitution. That they should therefore be released forthwith as was the holding in Albanus Mwanzia Mutua vs Republic, Cr. Appeal No.1201/2004.

3. In response, Mr. Wang’ond, learned State Counsel while admitting that indeed the accused persons were arraigned in court more than 14 days after their arrest, the explanation given by one I.P **Danson Keke** in a Replying Affidavit sworn on 29.4.2008 was reasonable and that the proceedings should not be nullified nor should the accused persons be released. For avoidance of doubt the affidavit by I.P Keke reads as follows:-

“ Affidavit

I, No. 44716 Inspector Danson Keke of P.O. Box 139 Kitui do make oath and state as follows:-

1. That I am Inspector of Police in charge of Crime Kitui

Police Station.

2. That by delegation of authority the Commissioner of Police has authorized me to swear this affidavit on his behalf and explain the circumstances leading to the delay in charging the accused persons within 14 days as provided for in the Constitution.

3. That as the officer in charge I am charged with the duty and responsibility of investigating alleged offences, taking charges of all criminal files and exhibits and supervising junior officers.
4. That the incident took place on 9th September 2007 at around 4.00 pm when an assault case was reported at Kabati Police Post 40 (forty) kilometers away from Kitui Police Station.
5. That on 11th September 2007 the investigating officer Sgt Esther Mweu managed to obtain a vehicle from the District Officer because the Police Post does not have a vehicle.
6. That on the same day the 1st accused person was arrested and escorted to Kitui Police Station. The 2nd accused person had gone into the hiding and was being sought in Mombasa at the time.
7. That on 4th October, 2007 the 2nd accused was escorted from Mombasa Bamburi Police Station to Kitui Police under the escort of PC John Kenga. This was after a Police car became available.
8. That the deceased at that time was admitted at Kitui District Hospital but due to injuries he had was transferred to Kenyatta National Hospital.
9. That the 1st accused was released on bond on 12th September 2007 and was re-arrested on 19th September 2007 after a report was made that the deceased succumbed to his injuries.
10. That further investigations revealed that the 2nd accused was in hiding in Mombasa and was apprehended on 23rd September 2007 at Severein Sea Lodge Bamburi area by P.C Mark Emmanuel Sharanda based at Tourist Police Unit Bamburi and was escorted to Kitui police Station by PC Kenga.
11. That due to the fact that Kabati Police Post does not have its own vehicle, I am advised by investigating officer the post mortem was conducted on 25th September 2007 when a vehicle was obtained and witnesses were escorted to Kenyatta National Hospital where the post mortem was performed.
12. That I am advised by investigating officer she was advised to collect the postmortem on 3rd October 2007 by the pathologist who performed it; the investigating officer did notify the pathologist that the postmortem report was urgent as the time was running out.
13. That I am advised by the investigating officer that when she went to collect the postmortem on 3rd October 2007 she was advised that the pathologist was attending a seminar and the report was not ready as it had not been signed.
14. That the investigating officer was advised to go back for the postmortem report after a week and half when the pathologist was supposed to have returned from the seminar.
15. That I am advised by the investigating officer that when she went to borrow the vehicle from the D.O. the same was not available on the 15th October 2007 since he was using the vehicle consistently due to heightened political activity at the time.
16. That on 17th October 2006 the investigating officer visited our offices requesting to be helped with vehicle but the same was not available as we have only one.
17. That Kitui Police Station assisted the investigating officer and made available a vehicle on 23rd October 2007 and the postmortem report was obtained (enclosed herein and marked DKI) is a copy of the postmortem report.
18. That on 24th October 2007 both accused persons were produced to court.

19. *That given the gravity of the matter namely deceased was brutally killed in broad daylight in front of his grandchild and daughter- in --law it is only fair that his case proceeds to hearing to its logical conclusion in court.*

20. *That delay in charging the accused persons was beyond our control as is apparent from the foregoing.*

21. *That I am advised by the learned State Counsel which advice I verily believe to be correct that the accused persons constitutional rights does not supersede the right of life for the deceased.*

22. *That what is deponed to herein above is true to the best of my information, knowledge and belief save for information the sources of which have been specifically stated.*

Sworn by the said DANSON KEKE at Machakos this 29th day of April, 2008.

Signed

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DEPONENT

BEFORE ME”

Signed

.....

Commissioner of oaths/Magistrate

Drawn and filed by:-

The State Counsel

Attorney General’s Chambers

P.O. Box 1041

MACHAKOS”

4. Section 72(3) (b) of the Constitution provides as follows

“A person who is arrested or detained-

(a) ...

(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 fourteen 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.”

5. To my mind and since it is admitted that the accused persons were taken to court 35 days after arrest (in respect of the 1st accused) and 31 days after arrest (in respect of the 2nd accused), can it be said that the police have discharged the burden of proving that they took the accused persons to court as soon as was reasonably practicable? Can the explanation by I.P. Keke which I have reproduced in full above, be such a reasonable explanation as to sway this court's mind to say that the objection should not be upheld?

6. In Michael Nguyu & Others vs Republic H.C.Cr. 51/2007 this court stated that the words “*reasonable practicable*” should bear their ordinary meaning which is “*something that can sensibly and credibly be possible or viable and therefore within the realm of possibility.*” The question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts- per Gandron J. in Slivak vs Lurgi (Australian) Pty Ltd [2001] 205 CLR 304 at 322-323.

7. Applying the above definition to the facts before me, I note from the Affidavit of I.P. Keke that :-

a) the offence was committed on 9.9.2007 at 4pm and the initial report made was one of assault. Although the 1st accused was arrested on the same day and locked up at Kitui Police Station, she was released on 12.9.2007 and re-arrested on 19.9.2007 when the victim of the alleged assault, died.

b) the 2nd accused was on 4.10.2007 escorted from Bamburi Police Station to Kitui Police Station although he was arrested on 23.9.2007.

c) between 19.9.2007 and 24.10.2007 when the accused persons were taken to court, the post-mortem was conducted on 25.9.2007 and the accused persons could not then be taken to court because the post-mortem report was not available until 23.10.2004. That would seem to be the only explanation given for failure to arraign the accused persons in court within 14 days as is the Constitutional duty of the Republic through the Attorney General.

8. It does not take any genius to conclude that the explanation given is wholly unreasonable and cannot discharge the burden of proof set out above. I say so with respect because a post-mortem report per se cannot be a document necessary to ensure that the accused persons are taken to court and remand orders sought. That Constitutional rights are violated for that reason alone is to put the criminal justice system in Kenya into complete disrepute and no court ought to sanction such actions. The duty of this court in such a situation was well set out in Albanus Mutua (supra) when the Court of Appeal stated as follows:-

“ On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution.”

9. I am of course aware that section 71(1) of the Constitution provides as follows:

“ No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted”

10. The accused persons may well have deprived the deceased of that right to life and may well deserve to be punished for it but as was stated in Ann Njogu & Others vs Republic Misc Cr. Application No. 551/2007, “ *irrespective of the weight of the evidence that the police might have in support of the case,*” any prosecution in the circumstances would be based on an illegality and on a null and void case! I agree wholly.

11. Having therefore held that the Republic has failed to prove that the accused persons were taken to court as soon as was reasonably practicable, it follows that the principle enunciated in Ndede vs Republic [1991]KLR 567 and later followed in Albanus Mutua's case (supra) that breach of section 72 (3) (b) entitles an accused person to immediate release, must be applied.

12. Accordingly, the continued detention of the accused persons having been declared unconstitutional,

the objection must be upheld and the accused persons shall be released forthwith, unless they are otherwise lawfully held.

13. Orders accordingly.

Dated and delivered at Machakos 4th day of June 2008

ISAAC LENAOLA

JUDGE

In the presence of: Mr. Konya for Accused

Mr.Wang' ondu for Republic

ISAAC LENAOLA

JUDGE