



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU
CRIMINAL CASE 4 OF 2006

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES HEHO NDIRANGU.....ACCUSED

RULING

Charles Heho Ndirangu was charged with the offence of **murder** contrary to **Section 203 as read with Section 204** of the **penal code**. The particulars of the offence stated that on the 25th day of December 2005 at Muchiri Farm Muramati Ndaiga Location in Laikipia District of the Rift Valley Province the accused person murdered John Gachuhihi Wambugu. The prosecution relied on evidence by a total of six witnesses in their bid to prove the charge.

At the close of the prosecution's case, counsel for the accused person submitted that the accused person should be discharged for reasons that he was arrested on the 25th day of December 2005, he was not arraigned in court until the 30th January 2006. His fundamental rights, as accorded under the provisions of **Section 72 (3)** of the **Constitution of Kenya** were infringed upon, by the police who kept the accused person in police custody beyond the period stipulated in the constitution that is fourteen (14) days.

The explanation as to why the accused person was kept in custody beyond the 14 days is contained in the evidence of **Sgt. Evans Chea** who carried out the investigations in this matter. He testified that the accused person was arrested on Christmas day. There were many public holidays in between. When the accused person was arrested, he had injuries which necessitated his being taken to hospital for treatment. The police had to complete the post-mortem examination on the body of the deceased and other investigations.

On 23rd January 2006 the accused person was escorted to the hospital for psychiatry examination and medical examination. The police escorted the accused person to the High Court Nyeri since this offence took place near Nanyuki and Nyeri is the nearest High Court. They were however advised that offences of murder occurring within the Rift Valley province should be registered in the High Court Nakuru. It took time to get a police motor vehicle and fuel to transport the accused person to Nakuru. That was the explanation given by the investigating officer for the delay in their failure to avail the accused person within the stipulated period of 14 days.

The court is called upon to determine whether the Constitutional rights of the accused person were infringed upon by the police for failure to produce him in court within fourteen (14) days, or within a reasonable time. The key words under the provisions of **section 72(3) (b)** are as follows:

“(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.”

The prosecution have offered reasons why the accused person was not arraigned in court within the provided 14 days or within reasonable time. It is the duty of this court to establish whether the reasons offered by the prosecution are reasonable. The offence took place on 25th December 2005, which was a Christmas day and a public holiday. This was preceded by several other public holidays. Even litigation under **Civil Procedure Rules rule 49** recognises that the period between 21st day of December in any year and the 6th day of January in the following year both days included are to be omitted from any computation of time. I have given an analogy of the Civil Procedure, to demonstrate that there are difficulties that may be caused due to many public holidays, and also to appreciate that the explanation offered by the prosecution regarding the public holidays is also recognized in the other realms of law.

The other reason that I have taken note of is the fact that this offence took place at Muchuhiri Farm, Muramati, Ndaiga Location in Laikipia District. This is the furthest corner of the eastern part of the Rift Valley. The nearest High Court would have been either Meru or Nyeri. Nakuru is twice the distance of the two Courts. The police first of all took the suspect to Nyeri and they were advised that Laikipia is within Rift Valley and the jurisdiction is within the Nakuru High Court.

It is also a matter of public interest that the police are limited in terms of the number of vehicles and sometimes even fuel to transport suspects in court. This is a matter of public knowledge; the candid explanations offered by the investigating officer are in my view reasonable explanations as to why the suspect was not arraigned in court within 14 days from the date of his arrest. I do not think that there was wilful neglect of duty by the police or there was blatant breach of the Constitution when the accused person was arraigned in court after 35 days considering all the above circumstances. Should the accused person feel aggrieved and perhaps wishes to pursue this as a constitutional issue, I believe he still has the opportunity of seeking damages even under the civil law. The suspect was also taken to hospital for treatment which is another aspect to take into consideration.

When a Court is called upon to determine on these fundamental rights as provided under **section 72 (3)** which has become an every day fare in the Courts of late, the Court is also expected as the custodian of the rule of law, to balance the protection of the larger public interest.

The court has a duty to take into account all the relevant circumstances in interpreting the provisions of the Constitution. A ‘*template notion*’ of merely finding that one’s Constitutional rights were infringed upon, when they were not arraigned in court within 14 days without giving a chance to the prosecution to give reasons and without taking into account the reasons advanced would be taking away the inherent power of this court to exercise discretion in the interest of justice and a fair trial. This is also envisaged by the provisions of **Section 72(3)(b)** of the **Constitution**.

I agree with the holding in the case of **David Karobia Kiiru vs. Republic High Court Misc. Application No. 863 of 2007** where Justice Ojwang expressed himself as follows:

“Section 72(3) of the Constitution is being cited as the basis for terminating a criminal trial which is in progress before [a] court.

“When, in law, should the High Court put an end to the constitutional function of trying criminal cases, as a State function authorised by law (s. 26 of the Constitution of Kenya)?

“It is clear that such a claim, when rested upon the constitutional document itself, must be thought through carefully: because criminal prosecution is a public-interest, governance process, itself founded on the constitutional document. So, if that process is Being challenged by citing the same Constitution, then conflicts within the provisions of the Constitution become apparent: and in that case, it is within the jurisdiction of the High Court to interpret the Constitution, and to declare what its true meaning is. I hold, therefore, that the [citing] of a line, or a clause, or a section of the Constitution [by itself], will not be the answer, when such competing claims emerge: it is for this Court to declare the law of the Constitution, in those circumstances.”

In this particular case I find that the prosecution was able to show reasonable cause why the accused person was not arraigned in court within the 14 days. I have considered the logistical problems, the public holidays and the fact that the accused person required medical treatment after the offence took place. For these reasons the proceedings will not be terminated. The prosecution closed their case after calling six witnesses. I have evaluated the evidence by the prosecution. I find the accused person has a case to answer.

Ruling read and signed on 24th day of July, 2008.

M. KOOME

JUDGE