REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 91 of 2005

REPUBLIC …… PROSECUTOR

VERSUS

ARAFAT DAUDI……...……..…….ACCUSED

R U L I N G

The accused ARAFAT DAUDI was charged with the murder of SONOSI YUSUF SONOSI**,** contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya, which murder allegedly took place on 3/2/2005 at about 7.30p.m. at Kibera Makina, within Nairobi Province. The accused was charged with the murder herein above, on 1/9/2005.

The hearing commenced on 26/6/2007 and closed on 19/11/07 when the prosecution completed their evidence, in the cause of which they had called eight (8) witnesses who testified before this court. On the same date, the date for the Ruling on whether or not the accused had case to answer, based on the evidence adduced by the prosecution, was set for 10/12/07 after both Counsels said they were leaving the matter to the court, on which date this court delivered the Ruling, finding and holding that the prosecution had established a **prima facie** case and the accused had a case to answer.

Subsequent upon the above Ruling that the accused had a case to answer, the court set 18/2/08 as the date for the resumption of the hearing of the case, on which date the Defence would adduce their evidence.

On 18/2/08, the matter could not proceed as the defence Counsel – Mr. Macharia – was absent. The matter was rescheduled to be mentioned on 10/3/08. On the said mention date, again the defence counsel was absent and the hearing was scheduled to resume on 12/3/08.

It was on 12/3/08, when the court sat to hear the defence evidence that Mr. Macharia, counsel for the accused said that he had, on 21/2/08, filed a Preliminary objection on a point of law, under Rule 23 of the High Court Practice and Procedure Rules, 2006, challenging the legality of these proceedings, and a date for the hearing of the application was set for the 13/5/08.

This ruling is accordingly limited and confined to the above Preliminary Objection.

At the outset, it is important to point out that right from day one, that is on 26/6/07, when the hearing commenced, the accused was represented by Legal Counsel, Mr. Macharia, up to 10/12/07, when this court delivered the Ruling that the accused had a case to answer.

So much for what transpired prior to the filing of this Preliminary Objection, which in my view is important in understanding the Ruling that follows here below.

The gist of the Preliminary Objection and the submissions by the learned counsel for the accused/applicant, Mr. Macharia, is as follows:

The accused was arrested on 3/2/05, and was brought to, and charged, in court on 15/9/05, that is seven (7) months or 210 days after his arrest. That, submits the defence, is a clear breach of Section 72(3) of the Constitution which permits a maximum of 14 days before a murder suspect is brought to court. The gravamen of Section 72(3) of the Constitution of Kenya, is that a person arrested/detained on suspicion of a capital offence must be brought to court as soon as is reasonably practicable, and at any rate before the expiry of 14 days. The provision goes further and states that the burden of proving compliance with the above provisions rests upon the prosecution.

The learned defence counsel went on and submitted that the prosecution never gave any explanation for the delay at the date of the plea and the duty falls on the prosecution, and the court which has a duty to raise the issue. Further, argued the defence counsel, the issue should be raised either at the beginning or at any time, whether the prosecution has closed its case or not.

For the above proposition the defence counsel relied on Cr. Appeal no. 35 of 2006, PAUL MWANGI MURUNGA VS. REPUBLIC and Cr. Appeal no. 1 of 1989 NDEDE V. REP. [1991] KLR 567.

In Reply, learned State Counsel, Mr Ndemo, averred that the Preliminary Objection was raised when the prosecution had closed its case and the court had ruled that the accused had a case to answer. The defence – accused – has also a duty to raise the issue of delay, and not only the prosecution, at the earliest opportunity. The prosecution, stated the State Counsel, must be afforded an opportunity to explain the delay, at any rate before they close their case, not later.

The prosecution further submitted that it was improcedural and unfair for the defence to raise the issue of delay at this stage when they had all the time from beginning of the trial, and the Investigating officer was called as one of the witnesses, and that was the proper person to explain the delay. The State closed its submissions by stating that under Section 72(3) of the Constitution the burden rests on the prosecution to explain the delay. But for the prosecution to explain, stressed the Learned State Counsel, somebody must raise the tissue. It was never raised for the prosecution to explain. The prosecution cited and relied on Cr. Appeal No. 182 of 2006 – ELIUD NJERU NYAGA VS. REPUBLIC. Finally, the prosecution submitted that when an arrested person is brought in court late, there is a presumption that the law has been complied with. Unless that is done, continue the prosecution, S. 72(3) does not come into play.

Having carefully perused, and in fact studied, the pleadings, the submissions by the two learned counsels and the authorities cited and relied upon by both sides, I have reached the following findings and conclusions.

The application before me brings into focus two conflicting decisions by the highest court in this country – the Court of Appeal. The submissions and position taken by the defence counsel – Mr. Macharia is based on the decision in Criminal Appeal No. 35 of 2006 – **PAUL MWANGI MURUNGA VS. REPUBLIC,** delivered at Nakuru on 22/2/2008, by their Lordships R.S.C. Omollo and J.W. Onyango Otieno JJA. The third Judge, Githinji, J.A., did not to sign the judgment.

There, in answer to a question the court had itself framed, as to whether "**the enjoyment of these basic constitutional rights is to be confined to those who are able to muster representation by twenty advocates, and what happens to those who are now popularly referred to as the poor and vulnerable".,** the court stated, in the relevant parts, as follows:

"**We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a Judge about the unlawful detention in the custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person is taken to court and accordingly, they know or ought to know, whether the arrested person has been in custody for more than the twenty four hours……and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we *reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation, then the court, as the ultimate enforcer of the provisions of the Constitution must raise the issue.* That is what this court said in the case of NDEDE VS. REPUBLIC."**

Pausing at this juncture, it is noteworthy that their Lordships never, in the whole of their judgment in the above case of **MURUNGA,** made any reference to their earlier judgment in Criminal Appeal No. 182 of 2006- **ELIUD NJERU NYAGA VS. REPUBLIC** delivered at Nyeri on 18/5/2007. The Defence Counsel, Mr. Macharia did not refer to that authority either.

In that case of **NYAGA,** presided over by R.S.C. Omollo J.A. [who also presided over the MURUNGA case] sitting with P.K. Tunoi and E.O. O'Kubasu JJA, after reviewing their previous judgment in Criminal Appeal No. 120 of 2004 – **ALBANUS MWASIA MUTUA VS. REPUBLIC,** stated, in the relevant parts of their judgment, as follows:

"***So that in MUTUA'S case the prosecution had had an opportunity to explain the cause of the delay but failed to offer an explanation. In the appeal before us the ground raising the violation of the Constitutional right was raised only on the morning of the hearing when the court granted leave to M/S Mwai to file the Supplementary memorandum of appeal out of time. We are accordingly unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity, and therefore that there was no reasonable explanation for the delay. Even Section 72(3) of the Constitution…..recognizes that there can be a valid explanation for failure to bring an accused person to court as soon as reasonably practicable.*** [Earlier on the court had given a list of instances, not exhaustive though, which can be acceptable to court, as explaining the delay]. The court continued:

By filing their complaint about the delay only in the morning of the hearing, the appellant clearly deprived the prosecution of an opportunity to offer an explanation, if any, as to why the appellant…..was only brought to court ……. ***We reject ground four of the grounds of appeal".***

Given the conflicting decisions by the Court of Appeal, and the consequences thereof, I have no choice but to go by the one ruling which I consider closer to the case before me and the one which is not only reasonable to me, but also the one that presents the least potential repercussions. That is the judgment in Criminal Appeal No. 182 of 2006 – the **ELIUD NJERU NYAGA** case, already cited herein earlier, and the relevant parts thereof underlined or put in bold letters.

As stated in the chronology of events preceding the current application, in Criminal case No. 91 of 2005 – REPUBLIC VS. ARAFAT DAUDI – the accused was represented by an able legal counsel, in the name of Macharia, from the opening of the proceedings to the close of the evidence by the witnesses called by the prosecution. The accused/applicant was represented by the able counsel during this court's Ruling that the prosecution had made a **prima facie** case, and that the accused had a case to answer. Hence, the hypothetical issue which faced the Court of Appeal in the **MURUNGA** case as to **those … popularly referred to as the poor and vulnerable"** does not arise.

In the **NYAGA** case [Criminal Appeal No. 182 of 2006] the issue of delay was raised in the morning of the hearing of the appeal. The Court of Appeal held that **by filing and raising the complaint that late, the appellant had clearly deprived the prosecution of an opportunity to offer an explanation, if any.**

In the application before me, the issue of delay was raised not only after the prosecution had closed

their case, but also after the court had ruled that the accused/applicant had a case to answer, and more importantly, when the court was already seated, at 10.55a.m. and ready to hear the defence evidence.

Under the above circumstances, I find and hold that the prosecution was denied or not given an opportunity to explain why the accused/applicant was not brought to court when he should have - sooner than when he was formally charged with the offence of murder.

It would be pure speculation on my part to conclude that the prosecution had no explanation for the delay. Given that Section 72(3) (b) of the Constitution recognizes that there can be a valid explanation for failure to bring an accused person to court as soon as reasonably practicable: it is reasonable to conclude that **it is not the delay per se** that is fatal, **rather it is the failure to satisfactorily explain the delay** that is fatal.

Towards the end of his submissions, the Learned defence counsel submitted that it is the duty of the prosecution to raise the issue of delay, and if the prosecution does not do so, then the court, as the ultimate enforcer of the provisions of the Constitution, must raise the issue. That is of course lifted from the Court of Appeal's holding in the **MURUNGA** case [Criminal Appeal No. 35 of 2006].

I have already given my reasons why I have chosen not to follow that judgment and why, given the painful choice before me, I prefer the judgment in the **NJERU NYAGA case, [Criminal appeal No. 182 of 2006],** which the Court of Appeal failed to refer to. It would be speculation on my part to conclude that their Lordships intended to overrule the NYAGA case. If that was the intention their Lordships did not lack the language to so state. They did not.

The submission, and the position taken by the accused/applicant, through his counsel, is disturbing and pregnant with potential repercussions. For example, should the court accept the argument that an accused person – who is represented by a legal counsel from the beginning to the end of the proceedings, like in these ones – and who is also presumed to know the law, and fails to do so at his own peril, can notice the failure of the prosecution to explain the delay; and the court has not raised the issue, for whatever reason, can just keep mum and get away with such silence? Doesn't the accused have a duty to raise the issue – **complain**, [to use the language of the Court of Appeal]? Would such conduct not encourage abuse of the court process? And what would stop such an accused person from raising the complaint just as the court is delivering its final judgment?

My humble view is that all the three players in any criminal proceedings – the accused; the prosecution, and the court – have a duty to raise the issue. And of the three players the one most affected is the accused, whose life is at stake and can least afford to stay mum and wait for either of the other two to raise the issue of delay.

Lastly, the court may be the ultimate enforcer of the Constitutional provisions. But does that mean that the court should cease to discharge its role of being an **independent and impartial court,** as per Section 77(1) of the Constitution and descent into the arena of the battle between an accused person and the prosecution?

The foregoing are my fears and concerns arising from the arguments and the position taken by the accused/applicant in this application. The courts should tread with caution where competing Fundamental Rights: the right to liberty, the right to life, and protection by the law, are concerned.

In the result, and for the above reasons, I find and hold that the challenge to the legality of these proceedings by the accused/applicant comes too late, under the circumstances.

Accordingly, I find the application lacking in both merit and legal basis, and I dismiss the same.

Accused has a case to answer, as earlier ruled by this court, and should prepare his defence, if any, before the hearing resumes on 7/10/2008.

I so rule.

DATED and delivered in Nairobi, this 1st Day of July, 2008.

O.K. MUTUNGI

JUDGE