



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Case 6 of 2004

REPUBLICPROSECUTOR

VERSUS

NZUSI KALUME TSUMA.....1ST ACCUSED

SAID LWAMBI MWADZIWE.....2ND ACCUSED

KITSAO KITSAO KADENGE KALINGA.....3RD ACCUSED

RULING

Nzusi Kalume Tsuma, Said Lwambi Mwadziwe and Kitsao Kadenge Kalinga, being the 1st, 2nd and 3rd accused persons are before this court on information of the Attorney General dated 5th July 2004 jointly charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code. The particulars of the offence are that on the 20th day of September 2003 at Nguu Tatu Village, Kisauni Location in Mombasa district within the Coast Province they jointly murdered Muregi Mugosi Mwangala.

The 1st and 3rd accused persons herein have each taken out a motion dated 8th August 2008 under Section 72 (3) (b) of the Constitution of Kenya, in which they applied to have the case dismissed because the police held them beyond the 14 days set by the constitution before being taken to court. By the time of filing the motions, this court had received the evidence of six (6) prosecution witnesses. The 1st accused claimed that he was arrested by the police on 29th September 2003 but was only taken to court on 25th March 2004 about 147 days after the period fixed by the constitution. The 3rd accused on the other hand claimed that he was arrested on 5th January 2004 but was only taken to court on 26th January 2004, about 27 days after the period fixed by the constitution. It is the submission of Mr. Gekonde learned advocate for the accused persons that the charge of murder preferred against the persons should be dismissed because they were held in breach of the constitution without any justification or lawful excuse. It is also alleged that the accused persons were held for such a long period of time for purposes of extracting forced confessions from them.

The state denied the accusations directed against the prosecution by filing the replying affidavit of Richard Asira, the investigating officer of the case. In that affidavit, Richard Asira, admits that Kitsao Kadenge, the 1st accused herein was arrested on 5th January 2004 and could not be taken for mental assessment until 5th February 2004 because the Provincial Psychiatrist was on leave and only resumed

duty on 4th February 2004. It is averred in the replying affidavit that the motor Vehicle attached to Bamburi Police Station lacked fuel for the period covering 6th February and 22nd February 2004. On 23rd February 2004, the 1st accused was successfully taken to court, that being the earliest practicable time.

As of said Lwambi and Kalume Tsuma the 2nd and 3rd accused persons, Richard Asira, averred that the duo were arrested on 29th September 2003, and 5th October 2003 respectively. It is claimed that at the material the police lacked fuel to transport the accused persons to court. It is also averred that the accused persons had not been mentally examined by the Provincial Psychiatrist because the Psychiatrist was on leave until 7th November 2003, when the reports were collected. The accused persons were finally taken to court on 11th November 2003. there is also the assertion that the kind of investigations required a lot of time in that the bones which were recovered had to be taken for analysis by a bone expert who was not immediately available having gone for further studies. I have considered the submissions made by Mr. Gekonde, learned advocate for the accused persons and those of Mr. Monda, learned Senior State Counsel.

I have further taken into account the grounds set out on the face of the motions and the replying affidavit of Richard Asira. It is admitted by Mr. Monda, that the accused persons were held beyond the period fixed by the constitution. A plain reading of Section 72 (3) (b) will reveal that such a charge must be dismissed if there is no explanation for the delay. If the prosecution gave an explanation, then the court may countenance the delay if the reasons given are acceptable and plausible. The court of Appeal expressed itself succinctly as follows in **Criminal Appeal No. 217 of 2005 Dominic Mutie Mwalimu vs= Republic (Unreported)**.

“The alleged breach of a constitutional right is based on S.72 (3) (b) of the constitution which provides:

“A person who is arrested or detained-

(a)

(b) Upon reasonable suspicion of him 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 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”. (Emphasis ours).

A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours).

The section further provides that where such a person is not taken to court within either the twenty-four hours for a non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court *as soon as is reasonably practicable* rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person is charged with a non-capital offence is brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court *as soon as is reasonably practicable* notwithstanding, that he was not brought to within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not *ipso facto* prove a breach of the Constitution. The wording of Section 72(3) above is in our view clear that each case has to be considered on the

basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence.”

I have considered the reasons given for the delay. The reasons are contained in the replying affidavit of Richard Asira. There is no affidavit by the accused persons to controvert these averments. I have no reasons to doubt those averments. I find the reasons given to be acceptable and plausible. For the above reasons I will excuse the delay and proceed to dismiss the motions. Let the case be fixed for hearing.

Dated and delivered at Mombasa this 29th day of September 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Monda L.S.S.C. and

N/A for Gekonde for the 3rd accused

N/A Kariuki for 1st and 3rd Defendant