



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Case 44 of 2004

REPUBLICPROSECUTOR

VERSUS

1. CHONGOGWE MUGUNYA MENZA

2. MENZA MUGUNYA MENZAACCUSED

PERSONS

RULING

Chongongwe Mugunga Menza and Menza Mugunya Menza, the accused persons herein, are before this court on the information of the Attorney General dated 6th October 2004, facing a charge 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 July 2004 at Mbuyuni Village Mwanda Location n Kwale within the Coast Province, jointly murdered Mohamed Hamisi Menza. After receiving the evidence of two witnesses in support of the prosecution's case, the accused persons filed a notice of Preliminary Objection dated 9th July 2008. In the aforesaid notice, the accused persons urged this court to declare that their constitutional rights guaranteed under S.72(3) (b) of the constitution of Kenya have been breached hence the case should be dismissed. The preliminary objection had to be disposed of first before the main case is heard.

When served with the notice, the Attorney General opposed the same by filing the replying affidavit of David Munene, being one of the investigating officer in this case. It is alleged that the accused persons were arrested on 31.08.2004 but were not arraigned before court until 7th October 2004. It is the argument of Mr. Magolo, learned counsel for the accused persons that the accused persons were held

at police station before being taken to court beyond the 14 days' period fixed by the Constitution. For the above reasons the learned argued that the charge should be declared null and void.

Mr. Monda, learned Senior State Counsel urged this court to dismiss the preliminary objection because the prosecution has explained the cause for the delay. In the replying affidavit of Daniel Munene, it is said that the 2nd accused person, Menza Mugunya Menza fell ill and he had to be taken for treatment at Taru Health Centre. It is also said that Taru Police Station had no motor vehicle to transport the accused persons to court. In fact it is averred that a motor vehicle had to be borrowed from Mariakani Police Station. The investigating officer in fact said that the police had to visit the scene of crime using Motor vehicle registration No. KAM 167 Q, the property of K.N.U.T., Kwale District. Mr. Magolo,

learned Counsel for the defence urged this court to find that the reasons given by the prosecution were not sufficient to enable this court excuse the delay.

I have considered the oral arguments of learned counsels from both sides. I have also taken into account the grounds set out on the face of the notice of preliminary objection and the facts deponed in the replying affidavit of David Munene. It is admitted that there was a delay to take the accused persons to court within the 14 days fixed by the constitution. However, the prosecution has given the reasons for the delay in the replying affidavit of David Munene. There is no affidavit filed by the accused persons to controvert the averments contained in the replying affidavit. This court has been urged to find that the reasons given are not sufficient through the submissions of learned defence counsel. I have considered the reasons given. Thos reasons include the fact that the 2nd accused fell ill and he took time to heal. It is also said that the Taru Police Station lacked transport

and the police had to borrow a motor vehicle from Mariakani Police Station to bring the accused persons to court. The law allows this court to excuse the delay if it is shown that there are sufficient reasons which caused the delay. I am convinced the reasons given are acceptable and sufficient. The view I have taken is supported by the position taken by the Court of Appeal in **Criminal Appeal No. 217 of 2005 Dominic Mutie Mwalimu =vs= Republic (Unreported)** in which the Court of Appeal expressed itself as follows:

“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.”

Having reached the above conclusion, it is obvious that the Preliminary Objection must be dismissed which I hereby order.

Dated and delivered at Mombasa this 30th day of September 2008.

J. K. SERGON

J U D G E