



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL CASE NO. 75 OF 2006
REPUBLIC.....PLAINTIFF
VERSUS
GEORGE KAMAU MAREGA.....RESPONDENT
RULING

The accused has been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:-

“On the 24th day of April, 2006 at Kahawa West within Nairobi Province murdered JANE MUTHONI WAINAINA.”

From the record, it is apparent that the accused was arraigned in court on 6th September, 2006. The plea was thereafter, taken on 17th October, 2006 and the dates for hearing were given by the undersigned. After several adjournments, the defence Counsel viz, Mr Mochache informed the court that he had received instructions to file a preliminary objection to the proceedings on the ground that the constitutional rights of the accused had been infringed. The said application was heard on 17th July, 2008 when the defence Counsel submitted that the application was based on Section 72(3) and 77 of the Constitution. The gist of the application was that there was a breach of the above provisions since the accused was brought to court late. According to the defence Counsel, the accused was arrested on 19th May, 2006 and was kept in custody for 120 days. Consequently, the accused was arraigned in court on 19th September, 2006. He described the delay as inordinate, unreasonable and an infringement on the accused’s constitutional rights to a fair trial. Further to the above, the defence Counsel urged the court to consider the trial a nullity and acquit the accused due to the unexplained and unjustified delay. In support of the above submissions, the defence Counsel quoted the following authorities:-

Republic versus David Muchangi Nyaga and Another

Criminal Case No. 110 of 2006

In the above case, the court stated that it is its duty to enforce the provisions of the law.

Albanus Mutua versus Republic

Criminal Appeal No. 120 of 2004

Paul Mwangi Murunga versus Republic

Criminal Appeal No. 35 of 2006

In the above case, the court stated that it was the duty of the prosecution to give reasons at the outset, why Section 72(3) of the constitution has not been complied with.

On the other hand, the State through Mr. Kivihia, State Counsel, conceded that there was a delay in presenting the accused to court. Apart from the above, he lamented that though he tried to get an explanation from the CID Headquarters, nobody came forward to give any.

From the above submissions, it is crystal-clear that the accused was arrested on 19th May, 2006 and thereafter kept in police custody. Subsequently, the accused was arraigned in court on 6th September, 2006. That was roughly after a period of 107 days. Both Counsels were not accurate on the number of days that the accused was held in police custody. Surprisingly, the CID Headquarters declined to give any explanation to the State Counsel viz, Mr Kivihia for the delay. In the case of;

Gerald Macharia Githuki versus Republic

Criminal Appeal No. 119 of 2004

The Court of Appeal stated inter alia;

“We have come to the conclusion, after a careful weighing of these two considerations in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with Section 72(3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of Section 72(3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.

In reaching this conclusion we have also been mindful of the fact that the appellant has now been in custody for in excess of 12 years and that his two co-accused have died while in custody.

We therefore hereby order that the appeal be allowed, the appellant’s conviction quashed and the sentence of death is set aside. The appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held”

On the other hand, in the case of;

ALBANUS MWASIA MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NO. 120 OF 2004

(Unreported) the Court of Appeal stated inter alia;

“At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72(3) (b) of the Constitution also amounted to a violation of his rights under Section 77(1) of the Constitution which guarantees to him a fair hearing

within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."

In the present case, it is abundantly clear that the fundamental rights of the accused as enshrined under Section 72(3) and 77(1) of the Constitution were breached by the police. The accused was illegally detained in police custody for 107 days and hence has been denied a fair trial within a reasonable time by an independent and impartial court established by law. No doubt, the police failed miserably to give any explanation whatsoever. In view of the above, I hereby concede to the application and declare the proceedings null and void ab initio. Further to the above, I hereby order that the accused/applicant be set at liberty forthwith unless otherwise lawfully held.

Those are the orders of this court.

MUGA APONDI,

JUDGE.

Ruling read signed and delivered in open court in the presence of the accused/applicant;

Mr MochacheDefence Counsel

Ms WafulaState Counsel

MUGA APONDI,

JUDGE.

26TH SEPTEMBER, 2008