



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 9 of 2007

REPUBLIC.....APPLICANT

VERSUS

NOOR ALIO OMAR.....DEFENDANT

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 January, 2007 at around 5.15p.m. at Bulla-Jamuhuria Location in Mandera District within North-Eastern Province, unlawfully murdered MAKAI HILLOW ISSACK.”

From the record, it is apparent that the accused was arraigned in court on 21st February, 2007. Since the accused was not represented, the plea was deferred to 27th February, 2007 and a hearing date was also given. Consequently, the trial started in earnest on 6th June, 2007 after the assessors were selected by the court. During the trial, the court was able to hear six witnesses who had been availed by the prosecution. Thereafter, on 9th April, 2008, the defence Counsel viz Mr Odiwuor Kelly applied for an adjournment on the ground that he was under instructions to file a preliminary objection. The said application was heard by the undersigned on 28th July, 2008. In his submissions, the defence Counsel stated that the application was intended to protect the fundamental rights of the accused. According to him, the accused was arrested on 24th January, 2007 and was charged on 20th February, 2007 (actually the correct date is 21st February, 2007). Mr Odiwuor referred the court to Section 77(1) of the Constitution and stated that the same provides for a fair hearing within a reasonable time. He further submitted that the accused was held in custody for 29 days despite the fact that the executive has no arbitrary powers over individuals. To support his submissions, he quoted the following authorities:-

REPUBLIC VERSUS JAMES NYAGA

CRIMINAL CASE NO. 40 OF 2007

ANN NJOGU AND 5 OTHERS VERSUS REPUBLIC

MISC CRIMINAL APPLICATION NO. 551 OF 2007

ALBANUS MWASIA MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NO. 120 OF 2004

On the other hand, Ms Wafula, State Counsel explained that, though there was a delay, it was due to insecurity between Mandera and Nairobi. She also explained that the police vehicle had got bogged down. Ms Wafula urged the court to take judicial notice of the facts that Mandera is far from Nairobi and that there is insecurity in between due to marauding bandits. Apart from the above, she lamented that the application was brought late in the day – after they had called several witnesses. She reckoned that the prosecution was only remaining with one witness before they could close their case.

This court has carefully considered the submissions by both Counsels. From the record, it is apparent that the accused was held in custody for a total of 28 days. That means that he was held 14 days in excess of the mandatory period. Obviously when the application was made by the defence Counsel, the court had already heard six witnesses. Though the list of witnesses show that the prosecution had intended to call a total of nine witnesses, Ms Wafula explained that they only intended to call one more witness before they close their case. That decision by the prosecution is not unusual. Secondly, the court notes that there has been general insecurity between Nairobi and Mandera for a period of time. This is usually caused by isolated incidents of bandits along that route. The above incidents are occasionally reported in our vibrant and independent media and hence the court cannot pretend any ignorance on the said issue. Thirdly, it is apparent to the court that whereas the constitutional rights of the accused were grossly violated under Section 72(3) of the Constitution of Kenya – the right of the deceased to life under Section 70(a) and (b) were similarly violated. Prior to her death, the deceased was also entitled to the right of life, security of the person, protection of the law, of assembly and association. The court is grateful to the defence Counsel for quoting the case of:-

ALBANUS MWASIA MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NO. 120 OF 2004

However, 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 cases we have cited in our 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 in support of the charge.”

With due respect to the learned defence Counsel, I would like to distinguish the above case from the present one. In the present case, the State Counsel has given an explanation for the delay. I am of the considered opinion that the same is reasonable and plausible under the circumstances. Secondly, when the Court of Appeal urged courts to enforce the provisions of the Constitution – it did not purport to exclude nor restrict the application of Section 70 and 72(6) of the supreme law. The attempts by the defence Counsel to selectively invoke portions of the Constitution is untenable and unacceptable to the court. As I stated earlier in other cases, the Constitution must be read and interpreted fully for anybody to understand the intentions and wisdom of the makers of the same.

In view of the above analysis, I hereby find that there was gross violations of the rights of the accused under Section 72(3) and 77 of the Constitution. The total circumstances of the case dictate that he should be compensated adequately under Section 72(6) of the Constitution. Since the right to life of the deceased was violated under Section 70 of the Constitution, the State has given a reasonable and plausible explanation and that the case is highly advanced, I hereby reject the application. The case will proceed to its logical conclusion to allow the court decide the same purely on merits.

Those are the orders of the Court.

Ruling read signed and delivered in open Court in the presence of the accused:-

OdiwuorDefence Counsel

Ms WafulaState Counsel

MUGA APONDI,

JUDGE.

26TH SEPTEMBER, 2008

Court:- Further hearing on 10th and 11th November, 2008. Accused remanded in custody.

MUGA APONDI,

JUDGE.

26TH SEPTEMBER, 2008.