



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 43 of 2007

REPUBLIC.....PLAINTIFF

VERSUS

MAURICE BLAZIO ODHIAMBO.....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 20th day of January, 2007 at Huruma Ngei II in Nairobi within Nairobi area, murdered MOSES MOI NANDWA.”

From the record, it is apparent that the accused was first arraigned in court on 6th July, 2007 and thereafter, the plea was taken by the undersigned on 12th July, 2007. Consequently, the court selected the assessors and heard three prosecution witnesses. However, on 18th February, 2008, the defence Counsel viz, Mr Anambo informed the court that he had filed a preliminary objection that related to a point of law. During the hearing of the application, he submitted that the same had been brought under Section 72(3) and 77(1) and (2) (a) (b) and (c) of the Constitution. Further to the above, he also submitted that the Constitutional rights of the accused are being violated, and they are likely to be violated and continue to be violated – should the court proceed with the hearing of the case. According to the defence Counsel viz, Mr Anambo, the accused was arrested on 21st January, 2007 and was later taken to Kasarani Police Station where he was held in custody upto 12th July, 2007 when he was brought for plea. He was of the view that the accused was held in custody for 173 days – and that no satisfactory explanation had been given by the police for holding the accused for such a period. Apart from the above, he also submitted that **no** affidavit has been deponed by the investigating officer to explain the inordinate delay. Neither was extension sought by police to hold the accused in custody – for longer than what the law provides. In support of his submissions he quoted the following three cases:-

a. ALBANUS MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NO. 120 OF 2004

b. GERALD GITHUKU VERSUS REPUBLIC

CRIMINAL APPEAL NO. 119 OF 2004

c. REPUBLIC VERSUS JOHN KIMANI KINYANJUI

CRIMINAL CASE NO. 47 OF 2006

On the other hand, Ms Mwanza, State Counsel informed the court that Mr. Bifwoli who had the conduct of the case, did **not** wish to file any affidavit. In addition to the above, he confirmed that the accused had been kept in custody for 173 days. Though Mr Bifwoli sought an explanation from the police – nothing was forthcoming.

This court has carefully considered the above submissions. No doubt, the accused was held in custody for 173 days and the police declined to offer any explanation despite the efforts made by Mr Bifwoli. The reasons for such conduct are better known by the police themselves.

In the case of;

ALBANUS MWASIA MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NO. 120 OF 2004

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 in support of 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.”

From the above, it is apparent that there was gross violation of the Constitutional rights of the accused under Section 72(3) and 77 of the Constitution of Kenya. The unjustified delay has denied the accused a fair hearing within a reasonable period as envisaged by the law. Due to the gross violation of the Constitutional rights of the accused, I hereby declare the trial null and void ab initio. The upshot is that I hereby concede to the application, “**quash**” the information and “**acquit**” the accused of the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code. The accused should be released forthwith unless held lawfully. Those are the orders of the court.

MUGA APONDI

JUDGE.

Ruling read signed and delivered in open court in the presence of the accused.

Mr Anambo Defence Counsel

Mr. Imbali State Counsel

Order:- Two assessor viz, Nancy W Kinuthia and David Gesaka Zablon to be paid allowances.

MUGA APONDI

JUDGE.

24TH SEPTEMBER, 2008