



REPUBLIC OF KENYA

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

Criminal Case 52 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

ANTONY MBUGUA NGANGA.....ACCUSED

R U L I N G

The accused, **ANTHONY MBUGUA NGANGA** was, on 10th August 2007, charged with the murder of **AGNES NYAMBURA KAMAU**, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

The murder is alleged to have been committed on 8th/9th April, 2007 at Ngegu Village, Kiambu, in Central Province.

On 5th September 2007, the accused gave Notice of Preliminary Objection to the prosecution, on the grounds that the proceedings were instituted in violation of the provisions of Section 72 (3) (b) and Section 77 (1) (2) of the Constitution and were thus illegal, null and void. This is on the basis that the accused was arrested by the Police on 9th April 2007 and was brought to court on 20th August 2007 when he took the plea.

Section 72 (3) (b) of the Constitution allows only 14 days within which an arrested person on reasonable suspicion of murder should be brought to court.

Anything outside that period is unconstitutional and unless explained to the satisfaction of the court, the proceedings are illegal, null and void, and the arrested person should be released.

It is the submission of the accused that the delay in bringing him to court is undisputed, unexplained and he should be released.

In support of his application, the accused cited and relied on four authorities; namely:

- (a) Albanus Mwasia Mutua, vs. Republic Criminal Appeal No. 120 of 2004.**
- (b) Gerald Macharia Githuku, vs. Republic Criminal Appeal No. 119 of 2004.**

(c) **Republic vs James Njuguna Nyaga, HCCR Case No. 40 of 2007.**

(d) **Anne Njogu & 5 others vs. Republic Misc Criminal Application No. 551 of 2007.**

In opposition to the application, the prosecution, through learned State Counsel Mr. Mgondo, relied on an Affidavit deponed by PC Benjamin Nzibo on 13th September 2007. PC Nzibo, of Kiambu Police station, was the Investigating officer, and the gist of his Affidavit, in an effort to explain the delay, is the protracted investigations, and that an apprehension report had been made before the Chief Magistrate, Kiambu Law Courts, within the 14 days provided for by the Constitution. The Affidavit also shows that the matter was referred to the Hon. the Attorney General on 24th July 2007 and the accused charged with murder as herein earlier stated.

The Learned State Counsel brushed away all the authorities cited by the accused by submitting, without any elaboration, that the authorities were “*made per incurium.*” It was the prosecution’s case that Section 84(1) talks of redress which does not exclusively mean acquittal or release of the accused, and that if the law maker wanted to do so, they would have so stated.

In conclusion, the prosecution submitted that in all the cited authorities, herein above, nowhere does the court mention the rights of the victim – i.e the right to life, and the courts have not reasoned their decisions. The decisions are against the public interest and out of touch with the spirit of the Constitution concluded the Learned State Counsel, Mr. Ongondo.

Having carefully perused through the submissions by both sides, the following came out very clearly.

There is no dispute that the accused was held in police custody beyond the 14 days permitted by Section 72(3)(b) of the Constitution before being brought to court. The jurisprudence which has evolved around this area is briefly that unless the prosecution, can, and does, satisfactorily explain the delay in bringing the accused before court within the stipulated period, any proceedings instituted thereafter are illegal, null and void and the accused must be released.

There is an apparent misunderstanding with regard to an apprehension Report referred to by the Affidavit of the Investigating Officer. Such Report is not, and cannot, constitute a substitution of the right of the accused to be brought to court within the constitutional period of 14 days. The Constitutional Provisions talk of the arrested person being brought to court, not an apprehension report being made to court.

This court has previously and repeatedly, held that bearaucratic procedures within the different prosecution docket do not constitute satisfactory explanation for the delay recognized by Section 72(3)(b) of the Supreme Law of the Land.

What constitutes explanation for delay, obviously will vary from one case to another. But the issue was extensively dealt with by the Court of appeal in **Criminal Appeal No. 182 of 2006 ELIUD NJERU NYAGA V. REPUBLIC** where a number of instances, not exhaustive though, were given. The explanations given by the prosecution in the case before me do not in any way come near what is envisaged by Section 72(3)(b) of the Constitution and how those provisions have been interpreted by the courts.

I have endeavoured to understand the prosecution’s submission that the authorities cited and relied upon by the accused were made **per incurium** by the courts, without any success. The decisions were handed down by competent courts of this country, and are all based on the very constitutional provisions on which the current application before me is based. Accordingly I hold that this submission is legally unsound and lacks merit.

In conclusion, and taking into account all the foregoing reasons, I find and hold that the Constitutional and Fundamental Rights of the accused were, are, and continue to be, violated by these proceedings, which I declare to be illegal, null and void.

Accordingly I hereby order the release of the accused. Forthwith unless he is otherwise lawfully held.

It is so ordered.

DATED delivered in Nairobi, this 23rd Day of September, 2008.

O. K. MUTUNGI

JUDGE