



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Case 8 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

MWALIMU M. CHIWAYA.....ACCUSED

RULING

The accused Mwalimu Mbui Chiwaya was arraigned before this court on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63, Laws of Kenya). The particulars are that the accused on the 25th March 2007, at about 9.00 a.m., at Lukore Location in Kwale District within the Coast Province murdered Michael Joseph Charo. It would appear that the original file is misplaced. The accused however says he was brought to court on 18th May 2007 and appeared before Maraga J. He denied the charge and the new record opened when the original file was misplaced shows that the accused has severally attended court for mention of his case and also for hearing. But the case for one reason or another has not commenced. However, on 26th June 2008 the accused through his counsel George Egunza served the Attorney General through the Director of Public Prosecutions with a "Notice of Application to dismiss charges pursuant to Section 72 (3) (B) of the Constitution". A copy of that notice was filed herein.

On 8th September 2008 the said notice was canvassed before me as a Preliminary Objection. Mr. Mulongo Learned counsel was briefed by Mr. Egunza for the accused to argue the Preliminary Objection. Mr. Onserio Learned State Counsel represented the Republic. In his oral submission before me, Mr. Mulongo relied on the grounds stated in the said notice.

Mr. Onserio conceded the objection on the ground that the police had no credible explanation for the delay in arraigning the accused.

The primary grounds of objection are expressed as follows:

"1) That upon his arrest by the police on the 1st day of April 2007 (see statements of IP John Mwakisha marked "CD-14(9)" and Cpl. Francis Nderitu "CD 13") failed to arraign the accused person in court within 14 days of his arrest or from the commencement of his detention which fell on or before the 15th April 2007. He was presented to court before the Honourable Mr. Justice Maraga on 18th day of May 2007 some 30 days after the statutory period.

2) That the prosecution is obliged where there has not been a

strict compliance with Section 72 (3) of the constitution to offer an explanation to the court for the delay in bringing the accused to court even if the accused has not raised the matter. The prosecution has failed, refused and or neglected to offer a valid, lawful and/or satisfactory explanation to the court for the said delay in bringing the accused to court.”

I have read the statement of IP Mwakisha which is contained in the committal bundle. It is dated 18th April 2007. He states, *inter alia*, that he arrested the accused on 1st April 2007. That fact is confirmed by Cpl. Francis Nderitu whose statement is also in the committal bundle.

Under Section 72 (3) (b) of the Constitution the following principles are deduced.

- 1) A person who detains a suspect must bring him/her to court as soon as reasonably practicable.
- 2) Reasonably practicable means 24 hours for non-capital offences and 14 days for capital offences.
- 3) Those periods stated in 2 above may be extended for good cause.
- 4) The good cause that may justify the extension of the period of detention is to be shown by the person detaining the suspect.

The accused in this case was brought to court 30 days outside the period prescribed for capital offences. For the prosecution to successfully resist the accused’s objection, it had the burden to establish good cause to justify the extended detention of the accused. It has not done so. In Albanus Mwasia Mutua – v – Republic (CR APP. NO. 120 of 2004)UR the Court of Appeal gave examples of what may constitute good cause. Their Lordships observed as follows:

“.....It could be that he (suspect) fell ill during the fourteen days the police were entitled to hold him in custody; that he was admitted in hospital and was detained in hospitalas a result of which the police were unable to produce him in court. It could also be that the appellant had been presented to the Court earlier but his case was terminated for one reason or another, he was discharged, and subsequently recharged afresh. Constitutionally, the burden was on the police to explain the delay.”

The importance of those observations is that the period given under the constitution for bringing a suspect to court can be extended for good cause and that the person detaining the suspect beyond the said period should demonstrate the good cause.

The Court of Appeal also underscored the role of the Court in the Albanus Mwasia Mutua case when they said as follows:

“On the one hand it is the duty of the courts to ensure that crime where it is proved is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences particularly the human rights guaranteed to them under our Constitution.”

However, the Court of Appeal continued:

“The jurisprudence which emerges from the cases.....appears to be that an unexplained violation of a constitutional right will normally result in an acquittal.....”

Once again note the saving of the Court’s discretion in the observation. The principle is not that any unexplained violation of a Constitutional right will automatically result in an acquittal.

Applying those principles to the case at hand, I am of the view that the prosecution should have explained the admitted delay of 30 days in arraigning the accused in court. They were accorded adequate opportunity to explain the delay. No attempt was made to give any form of explanation. Infact, the response to the objection raised by the accused is that the police have no credible explanation for the

entire delay of 30 days the accused was detained beyond the statutory period provided under the constitution.

In the premises, I find and hold that the accused was unlawfully detained for the said period of 30 days. His rights guaranteed under the provisions of Section 72(3) of the Constitution were violated. The violation vitiates this trial which I hereby terminate and acquit the accused of the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Kamoti holding brief for Egunza for the Accused and Onserio for the State.

F. AZANGALALA

JUDGE

23RD SEPTEMBER 2008