



REPUBLIC OF KENYA

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

Criminal Case 26 of 2007

REPUBLIC.....APPLICANT

VERSUS

PHILLIP JUMBA WANYANGE.....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. The particulars of the offence as stated in the information are as follows:-

“On the 18th June, 2006 at Githurai Estate, in Nairobi Province, murdered ELIZABETH AMWAI”.

From the record, it is apparent that the accused was first arraigned in court on 27th March, 2007. Consequently, the plea was taken by undersigned on 5th April, 2007 after the accused was assigned a defence Counsel. On the same date, the parties were accorded a hearing date. Subsequently, the trial started in earnest before Mutungi J on 9th October, 2007. The trial Judge was only able to hear one witness. Thereafter, the said Judge declared the trial – a mis-trial following the difficulties that he had encountered of absence of assessors. After the parties were granted a fresh hearing date, the accused filed a preliminary objection through his defence Counsel. During the hearing of the application, Ms Arati complained that the accused had been held in custody in excess of the required 14 days. She further explained that the accused was arrested on 18th September, 2006 and was arraigned in court on 27th March, 2007. That means that the accused was held in custody for a period of about six months. She was of the opinion that the accused’s right to a fair trial had been breached. In support of the above submissions, the learned Counsel quoted the case of:-

ALBANUS MUTUA VERSUS REPUBLIC

CRIMINAL APPEAL NO. 120 OF 2004

In the above case, it was held that it was the duty of the police to explain the delay. Further to the above, Ms Arati also submitted that the explanation must be made in good faith and that the same must also be reasonable. That apart, the explanation must also show the difficulty in bringing the accused to court. She was of the opinion that any proceedings after breach of Section 72(3) of the Constitution will be a nullity.

On the other hand, Ms Mwaniki a State Counsel conceded that Section 72(3) of the Constitution requires

that a suspect shall be brought to court as soon as is reasonable. She also admitted that when the suspect has been detained for more than fourteen days, then the burden to explain falls on the one who has detained him. Apart from the above, Ms Mwaniki pointed out that the prosecution had already filed an affidavit that explains the delay. Besides the above, she also explained that though the offence took place on 18th June, 2007, the accused was arrested on 18th September, 2007. That means that the accused was arrested almost three months after the incident. According to Ms. Mwaniki, the witnesses were family members and the accused was alleged to have killed his own daughter. She further explained that it was only by 6th November, 2006 that the investigating officer was able to finish compiling the file after covering crucial areas. It was only by 14th March, 2007 that the investigating officer was fully able to compile the file and got instructions to charge the accused. In support of the above submissions, she quoted the case of:-

REPUBLIC VERSUS DANIEL MBUGUA AND GEORGE ONYANGO

CRIMINAL CASE NO. 91 OF 2004

REPUBLIC VERSUS SHEM WAIGWA

MISC. APPLICATION NO. 186 OF 2003

REPUBLIC VERSUS PAUL NJEHIA KANUGU

CRIMINAL CASE NO. 96 OF 2005

She pointed out that in the latter case, the court held that none of the Constitutional rights was superior to the other. Apart from the above, the learned Counsel also quoted the following cases:-

KAZUNGU MKUNZO VERSUS REPUBLIC

CRIMINAL APPEAL NO. 239 OF 2004

CHARLES KARINA VERSUS THE TRANSPORT LICENSING BOARD

MISC. APPLICATION NO. 1214 OF 2004

REPUBLIC VERSUS JOSEPH NUNGARI & STEPHEN NUNGARI

CRIMINAL CASE NO. 42 OF 2006

Ms Mwaniki concluded her submissions by urging the court to dismiss the application since the offence is serious and touches on public interest. In the same breadth she also urged me to invoke Section 72(6) of the Constitution instead of terminating the proceedings.

From the record, it is obvious that the alleged offence was committed on 18th June, 2006. On the other hand, both Counsels, are agreeable that the accused was arrested on 18th September, 2006. From the record, it is crystal-clear that the accused was arraigned before the undersigned on 27th March, 2007. The defence Counsel never denied the fact that the deceased is a daughter to the accused and that the key witnesses are close relatives. No doubt, such an incident must have caused a lot of trauma and shock to the close relatives and obviously, they needed time to compose themselves and accept the misfortune that befell the family. Killings within families is not usually a daily occurrence and hence different people have various levels and capacities to deal with such misfortunes. There are no known formulas,

parameters, or periods of dealing with trauma. The court hereby concedes that there was a delay in availing the accused to the court. However, that delay has been explained and the court hereby accepts the same. The court is of the considered opinion that the accused should move an appropriate court to award him compensation for breach of his Constitutional rights under Section 72(6) of the Constitution of Kenya. The upshot is that, I hereby dismiss the application and direct that the case proceeds forthwith to enable the court decide the matter on merit. Those are the orders of the court.

MUGA APONDI

JUDGE.

Ruling read signed and delivered in the presence of the accused;

Ms AratiDefence Counsel

Ms MwanikiState Counsel

MUGA APONDI

JUDGE.

22ND SEPTEMBER, 2008

Court: Further hearing on 26th and 27th November, 2008.

Accused remanded in custody.

MUGA APONDI,

JUDGE.

22ND SEPTEMBER, 2008