

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 17 of 2006

REPUBLICPROSECUTOR

VERSUS

ERNEST SAKWA KWEYU alias YAWA.....ACCUSED

R U L I N G

Ernest Sakwa Kweyu alias Yawa, the accused person herein, is before this court on the information of the Attorney General dated 7th September 2006, duly charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code. The particulars are that on the night of 2nd July 2006 at about 9.00 p.m. at Mwaroni Village, Diani Location within Kwale District of the Coast Province he murdered Kyalo Nzioka. When the case came up for hearing, the accused raised a preliminary objection contained in the notice dated 26th May 2008. His main complaint is that his constitutional rights guaranteed under Section 72 (3) (b) of the Constitution of Kenya were breached. The prosecution was given a chance to explain itself out. The prosecution opposed the Preliminary objection by filing the replying affidavit of Mark Otieno, the investigation officer.

It is the submission of Mr. Obara, learned advocate for the accused that the charge facing the accused should be declared null and void hence should be dismissed on the ground that the accused was held in police custody for 72 days before being taken to court. In his replying affidavit, Mark Otieno claimed that the delay was caused by the illness of the accused. It is said that the accused person was arrested on 3rd July 2008 and was taken ill on 14th July 2006 while in police custody. He was admitted to Msambweni District Hospital on 27th July 2006. He was discharged but he appeared weak and sickly. He was finally taken to Coast Provincial General Hospital on 9th August 2006 to undergo mental examination and for blood analysis. It is said it took time to obtain and analyze exhibits and blood samples. The same were analysed and concluded on 31.8.2006. It is also said that fuel ran out hence there was transport crunch hence the delay to bring the accused to court until 12th September 2006. When faced with the aforesaid reasons, the accused admitted that he was sick hence causing part of the delay. Mr. Obara told this court to find that the prosecution explained the delay of 24 days leaving 48 days delay unexplained.

Under Section 72(3) (b) of the constitution of Kenya, the prosecution is required to present before a court, an accused person facing a capital offence within reasonable time and within 14 days. It would appear from the aforesaid provision of the constitution that though time to take an accused person before court is fixed; a delay may be excused if there is acceptable and reasonable explanation is given for the delay. The court of Appeal expounded the import of Section 72(3) b in **Criminal Appeal No. 217 of 2005, Dominic Mutie Mwalimu =vs= Republic (unreported)** as follows:

“The alleged breach of a constitutional right is based on S.72 (3) (b) of the constitution which provides:

“A person who is arrested or detained-

(a)

(b) Upon reasonable suspicion of him having committed, or being about to commit a criminal offence and who is not released, shall

(c) be brought before a court as soon as is reasonably practicable and where he is not brought before a court within twenty-four hours of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with". (Emphasis ours).

A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours).

The section further provides that where such a person is not taken to court within either the twenty-four hours for a non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court *as soon as is reasonably practicable* rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person is charged with a non-capital offence is brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court *as soon as is reasonably practicable* notwithstanding, that he was not brought to within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not *ipso facto* prove a breach of the Constitution. The wording of Section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the court must act on evidence."

The prosecution has explained the causes of the delay in replying affidavit of Mark Otieno sworn on 5th June 2008. There is no affidavit filed by the accused to controvert the averments in the aforesaid affidavit. A careful perusal of the aforesaid replying affidavit will reveal that the reasons for the delay included first the fact that the accused fell ill. Secondly that there was fuel shortage at Diani Police Station and thirdly that it took time to receive results of the government analyst report of exhibits and blood samples. I find these reasons to be plausible though the delay was a bit long. I will countenance the delay on the ground the reasons given are reasonable and acceptable.

For the above reasons I dismiss the preliminary objection and direct the case to proceed to full hearing.

Dated and delivered at Mombasa this 19th day of September 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Maseki h/b Mr. Obara for the accused and Mr. Monda Learned Senior State Counsel.