



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 69 of 2007

REPUBLIC.....PLAINTIFF

-VS-

RAPHAEL MATANO MALIKA.....RESPONDENT

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 16th July, 2007 at Mlolongo Market,
Embakasi within Nairobi Area Province,
murdered JACKLINE SYOMBUA.

From the record, it is apparent that the accused was first arraigned in court on 24th September, 2007. Since the accused was unwell, the plea had to be deferred to allow him receive medical treatment. Eventually, the undersigned took the plea on 24th January, 2008 and went ahead to fix the case for hearing. Though the State had called two witnesses, the defence counsel informed the court on 15th April, 2008 that he wished to raise a preliminary objection. During the hearing of his application, the defence counsel viz, Mr. Kihara submitted that the rights of the accused as envisaged by Section 72 (3) (b) and 77 (1), (2) (b) and (c) of the Constitution of Kenya had been violated. According to Mr. Kihara, the accused was held in police custody from 16th July, 2007 upto 1st October, 2007 when he was produced in court. (Actually, the accused was produced before me on 24th September, 2007). The defence counsel calculated that to be 76 days. Apart from the above, Mr. Kihara also submitted that he was served with a replying affidavit on 23rd June, 2008 that surprisingly showed the accused as the deponent. He further submitted that the above could not be possible and meant that the investigating officer had **not** given any explanation for the delay. In support of his submissions, the defence counsel relied on the following authority:

REPUBLIC –VS – BONIFACE KAMAU MUTHONI

CRIMINAL CASE NO.102 OF 2004

In the above case, the court stated that the prosecution has to explain any delay.

On the other hand, Ms Wafula, State Counsel conceded that the replying affidavit is fatally flawed and that the burden to explain the delay, lay with the State. Besides the above, she also explained that the requirement that the investigating officer files an affidavit is not a rule of law but that of custom. Apart from the above, Ms Wafula also explained that Dr. Ndiang'ui never signed the typed post-mortem form since he was out of the country. According to Ms Wafula, the accused was brought to court as soon as was reasonably practicable. In support of her submissions, she quoted the case of

DOMINIC MWALIMU –VS- REPUBLIC

CRIMINAL APPEAL NO. 217 OF 2005

From the evidence on record, it is apparent the accused was arrested on 16th July, 2007 and was actually arraigned in court on 24th September, 2007. That actually means that the accused was held in police custody for a period of about 69 days. The State Counsel viz, Ms Wafula has conceded the fact that the replying affidavit is fatally defective. That was after it was pointed out that the purported deponent was actually the accused. That apart, she also pointed out that the post-mortem report was not signed because Dr. Ndiang'ui was out of the country. As correctly stated by Ms. Wafula, the State has a duty to explain any delay in bringing the accused to court. The affidavit before the court raises several fundamental issues that need to be addressed clearly. Firstly, the accused surrendered himself voluntarily at Mlolongo Police Post. That in itself is unusual and hence it is important for the court to find out through evidence what led to that kind of conduct. It is also important to the court to find out what investigations were carried out by the police after the report and what were the findings. Secondly, the defence counsel has not disputed the fact that Dr. Ndiang'ui went out of the country before signing the post-mortem form. Para (9) of the affidavit shows that the said doctor had gone for further studies.

Given the above, the court finds as a fact that the State has discharged its duty by giving a reasonable and plausible explanation for the delay. The said explanation has been given explicitly by the State Counsel. Given the above finding, it is my considered opinion that the accused should press for adequate and sufficient compensation under Section 72 (6) of the Constitution of Kenya. The court wishes to quote with approval the sentiments expressed by the Court of Appeal in that in case of:

DOMINIC MUTIE MWALIMU – VS- REPUBLIC

CRIMINAL APPEAL NO.217 OF 2005

In the said appeal, the Court stated inter alia,

‘Thus, where an accused person charged with non-capital offence 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 court 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 factor* 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.

My considered view is that the total circumstances of the case and interest of justice and fair play, dictate that the case should be heard to its logical conclusion. The court appreciates the fact that the accused is innocent unless proved otherwise. It is upon the prosecution to prove their case beyond any reasonable doubt. The upshot is that I hereby dismiss the application and direct that the case proceeds as scheduled. Further hearing on 10th and 11th December,

2008.

Accused remanded in custody.

MUGA APONDI,

JUDGE.

Ruling read, signed and delivered in open court in the presence of the accused: Mr. Kihara Defence Counsel and Mrs. Tuta, State Counsel.

MUGA APONDI,

JUDGE.

31ST OCTOBER, 2008.