REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 2 of 2008

REPUBLIC……..……PROSECUTOR

VERSUS

DAVID IRUNGU MURUTHI…...……..……..ACCUSED

R U L I N G

David Irungu Muruthi was arraigned before court on 18th January, 2008 on an information dated 17th January, 2008 and filed in court on the following day charging him with Murder contrary to *Section 203* as read together with *Section 204* of the Penal Code. He pleaded not guilty to the charge and his trial was scheduled for 19th May, 2008. On that date, Mr. Kimani, learned counsel for the accused gave notice of his intention to raise a constitutional issue with regard to the accused's trial so far. However since the investigating officer was not present in court, Mr. Orinda learned Principal State Counsel successfully applied for adjournment.

The matter finally came before me for hearing on 24th September, 2008. Mr. Kimani, learned counsel for the accused took up the preliminary objection along the following lines. That the accused was arrested on the 5th December, 2007. However, it was not until 18th January, 2008, slightly over a month later that he was arraigned in court. That witness statements had been recorded by 29th December, 2007 and post mortem conducted on 13th December, 2007. The law requires that an accused person facing a capital charge be arraigned in court within 14 days. The appellant having been arraigned in court in excess of the fourteen days permitted by the law, it was contention of the learned counsel that his constitutional rights as enshrined in *Section 72 (3)* of the constitution were thereby violated. In the absence of any reasonable explanation by the police for the delay, the accused was entitled to an acquittal. For this submission counsel relied on the case of Gerald Macharia Githuku V Republic, C.A. Criminal Appeal Number 119 of 2004 (*unreported*).

To counter the foregoing assertions, Mr. Orinda, learned Principal State Counsel put Police Constable John Kamau in the witness box in a bid to explain the delay. P.C. Kamau testified that the accused was arrested by members of the public on the night of 5th December, 2007. On the same day he re-arrested him. However, members of the deceased took sometime before having the post mortem conducted on the deceased. Indeed it was not until 9 days after the arrest of the accused that the post mortem was conducted. Further the police had a problem getting a medic to assess the mental status of the accused and fill his P3 form. The accused was twice brought to Nyeri PGH for that purpose but on both occasions, the provincial psychiatrist was unavailable as he was attending a seminar in Nairobi.

Immediately he compiled the police file he forwarded the same to the D.C.I.O for onward transmission to the P.C.I.O thence to the state counsel for advice. When thereafter he received the greenlight to charge the accused on 18th January, 2008, he did so immediately by arraigning him in court. To him the slight delay was excusable as it was due to circumstances beyond his control.

Section 72 (3) (b) of the Constitution of Kenya provides interlia:-

"A person who is arrested or detained

(a) ……

(b) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days 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."

Essentially what the section is saying is that for a capital offence such as the one the accused is facing, he could only be detained for no more than fourteen days upon arrest before he is arraigned in court. In the event of any delay beyond the stipulated period aforesaid then a duty is cast upon the police who have been deemed to have breached that constitutional provision to explain to the satisfaction of the court that the accused was afterall brought before court as soon as was reasonably practicable.

This court has, in several decisions, made it clear that where an appellant is held in custody for a period beyond the period provided by law which in this case is fourteen days from the date of his apprehension without acceptable explanation for such delay, the court would consider such extra period as being a period under which the person is under unlawful custody and in such circumstances, his constitutional rights will be deemed to have been violated or breached, entitling him to automatic acquittal notwithstanding that the case against him may very well be overwhelming. In the now celebrated case of Albanus Mwasia Mutua VS Republic Criminal Appeal No.120 of 2004, the court of appeal put the issue beyond pre-adventure when it stated thus:

"At the end of the day it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under *section 72 (3) (b)* of the constitution also amounted to a violation of his rights under *section 77 (1)* of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."

The above principles were again re-echoed by the same court in the case of Paul Mwangi VS Republic Criminal Appeal No.35 of 2006 where the court indicated what explanations a court might consider in respect of a delay to avail an accused person to court within the period prescribed under *Section 72 (3) (b)* of the Constitution. Having done so, and considering the period of delay in that particular case, it went on to state:

"So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well counternance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the court in Mutua's case."

Yet again in the case of Dominic Mutie Mwalimu V Republic, (2008) eKLR the same court made this telling observations:

"Under *section 72 (3)* of the constitution where a person charged with a non-capital offence is brought before the court after twenty four hours or, where he is charged with a capital offence, after fourteen days, complains that the provisions of the constitution have 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 stipulated time. The mere fact that an accused person is brought to court either after 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. Each case has to be decided on its own facts and circumstances and in deciding whether there has been a breach, the court must act on evidence….."

Taking all the foregoing into consideration it would appear that the law as to the treatment the courts will give to cases where *Section 72 (3) (b)* of the Constitution has been violated without acceptable and reasonable explanation is now well settled. That, however, depends on such violation being established. The facts must exist to show that the police have detained a person in unlawful custody before courts can act on the allegation. Such facts would be readily available in the record before the court in case of appeal or would be adduced in evidence in case of the trial court as in the circumstances of this case. Courts of law therefore do not act in a vacuum nor would a court of law act on half-baked evidence.

In this case the prosecution has conceded that there was a delay of about 1 month in charging the accused. The prosecution has proffered explanation for the delay. One, members of the deceased family did not cause the post mortem to be conducted on the deceased immediately and or in good time, secondly, they had a problem accessing the psychiatrist for purposes of mental evaluation of the accused and to fill his P3 form. On two occasions that the accused was brought to Nyeri, PGH for that purpose, the psychiatrist was away in Nairobi attending a seminar. On the basis of the foregoing, I am satisfied that much as there was slight delay in arraigning the accused in court to face the instant charge, the delay has been sufficiently explained. Much as the police had a role in the delay, the deceased's family too was not without blemish either. The police could not have arraigned the accused in court without a post mortem having been conducted on the deceased. They had no way of pushing the family of the deceased into speedily conducting a post mortem. Similarly the accused could not have been arraigned in court without his mental status being evaluated and P3 form filled. The evidence of the investigating officer on this aspect of the matter has not been controverted nor seriously challenged. It has not been suggested that there was another psychiatrist who the police could have taken advantage of but declined to do so. This court is aware that there is a dearth of psychiatrists in this province. Indeed there is only one, as far as I am aware. If the only psychiatrist available has to attend a workshop, seminar, e.t.c all in advancement of his career, who can blame him!

I think that the police have been able to satisfy me that considering the circumstances, they were able to bring the accused before the court as soon as was reasonably practicable. Accordingly I am unable to sustain the accused's complaint based on violation of his constitutional rights under *Section 72 (3) (b)* of the constitution. The preliminary objection thus fails and is dismissed accordingly.

Dated and delivered at Nyeri this 30th day of October, 2008.

M.S.A. MAKHANDIA

JUDGE