



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 32 of 2005

REPUBLIC PROSECUTOR

VERSUS

MICHAEL MAINA GICHARU 1ST ACCUSED

MAXWELL MWANGI MUTURI 2ND ACCUSED

PETER MWANGI MUTURI 3RD ACCUSED

ESTON MACHARIA THUMBI 4TH ACCUSED

R U L I N G

By an information dated 28th September 2005 and filed in this court on the 4th of October 2005 by the Attorney General, the accused, were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged therein that the accused on the 18th and 19th day of June 2005 at Gatumbi village in Maragua District of the Central Province jointly with others not before court, murdered **Francis Mwangi Nduati**.

The accused pleaded not guilty to the charge when presented in this court on 22nd October 2005. The case was then set down for hearing on 4th and 5th July 2006.

When the case eventually opened before me for hearing on the 22nd September 2008, after several adjournments, counsel appearing for the accused, namely **Mr. Muthui, Muhoho, Kimani** and **Nganga** respectively jointly raised preliminary objections to the charge and indeed the entire proceedings.

Both anchored their objections on the grounds that there was unexplained delay in arraigning the accused in court of about 3½ months. On the basis of the court of appeal decisions in **Gerald Macharia Githuku v/s Republic, Criminal appeal No. 119 of 2004, (unreported)** and **Peter Njuguna Gitau v/s Republic, Criminal case number 32 of 2007 (unreported)**, counsel urged me to hold that the accused persons' fundamental rights had been violated and were therefore entitled to an acquittal.

The state through **Mr. Mule**, learned state counsel appreciated the purport of the preliminary objection and conceded that there had indeed been a delay of 3 to 3½ months in arraigning the accused in court. The state however through the investigating officer, **Evanson Kamotho** endeavoured to offer an explanation to the effect that the accused were brought to court as soon as it was reasonably practicable as

envisaged for under section 72(3) of the constitution.

In his sworn testimony, **Mr. Kamotho** stated that the accused were all arrested within two days of the commission of the offence. He conceded however that the accused were arraigned in court long after the fourteen days permitted under the law had expired. The delay was partly occasioned by failure to have the accused medically examined in good time, lack of manpower at the police station and finally the break down of the only motor vehicle that the police station had. In so far as the medical examination of the accused is concerned, it was the contention of the investigating officer, that he took the accused to Murang'a District hospital for that purpose, he was however referred to Maragua District hospital within whose jurisdiction the offence had been committed. On taking the accused to Maragua District hospital he was told that they were not examining murder suspects. It took the intervention of the OCPD to have the accused taken to Thika District Hospital for such examination on 20th July 2005. At the police station, he was the only Chief Inspector and accordingly he was not in a position to pursue investigations into the case as fast as he could. He had no deputy. Finally, he stated that the only vehicle the police station had broke down and thus he could not easily move around in the cause of his investigations in the case.

Section 72 (3) of the Constitution of Kenya provides that:

“A person who is arrested or detained –

(a) For the purpose of bringing him before a court in the execution of the order of court:

or

(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.”

It is common ground that the accused were not brought to court timeously but after 3½ months. The section cited hereinabove lays a burden upon the person who states that the provision has been complied with to so prove to the court. What explanation has the state given?

According to PW8, the investigating officer, the delay which he concedes was unreasonable and inordinate was however occasioned by lack of manpower and logistics. I think that the state has failed to sufficiently explain as to why the accused were detained for 3½ months before being brought to court. The investigating officer could not exactly tell when he took the accused to Murang'a District hospital for the very fast time, nor even Maragua District hospital for that matter. He had nothing to show that he presented the accused to Murang'a and Maragua District hospital for mental examination and he was rebuffed as claimed. He conceded that all the statements from witnesses had been recorded by 27th July 2005. That in fact all the witnesses came from the same locality as the deceased. That the post mortem was carried out on 28th June 2005. The investigation officer also conceded that he could have delegated part of his investigative work in this case to his juniors. He did not. So lack of manpower to my mind does not arise. He did not even bother to alert his superiors of his manpower needs if at all. He has thus not explained why after mental examination of the accused he was unable to prefer the charges against the accused immediately. His half hearted explanation that he was contacting the DCIO with a view to forward the investigations file does not jell with me. There is no reason why the file should have waited for the police motor vehicle to be repaired so that it can be used to deliver it to the DCIO at Makuyu. The investigating officer was at the time based at Kigumo Police Station. The distance between Makuyu and Kigumo, I am told is slightly over 20 kilometers. The investigating officer, if he had the interest of the accused and the provisions of the law at heart, he would have improvised some other means of delivering the file to the DCIO. Eventually, he never even delivered the file. Rather it was the DCIO who came for

it. The issue of the motor vehicle having broken down does not also sell in the circumstances of this case. To my mind, the investigating officer just did not care whether or not he was infringing on the accused constitutional rights.

As I have had occasion to state in the past, the liberty of a citizen and indeed accused's right to a fair trial within a reasonable time cannot be sacrificed at the alter of police convenience. From the explanation given by the state which I do not buy, it is clear that the state has failed to discharge the heavy burden placed upon it by *section 72 (3)* of the Constitution of Kenya. It has been unable to demonstrate that, it brought the accused before court as soon as reasonably practicable. The prosecution has a heavy burden on their shoulders to convince the court that the reasons that constitutes the delay were of a grave nature as compared to the accused's fundamental rights. What has come out is mere guesswork and speculation. The issue of lack of motor vehicle, manpower and being overwhelmed by work does not and I must repeat, arise.

Commenting on the need for the courts to guard jealously the provisions of the constitution that secure the liberties of the citizen, the court of appeal in the case of **Albanus Mwasia Mutua** (supra) observed:

“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.”

Again in the case of **Gerald Macharia Githuku** (supra), the court of appeal reinforced the need for courts to be vigilant in enforcing the constitutional provisions that secure the fundamental rights of a citizen. It stated:

“.....Although the delay in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with *section 72 (3)* of the constitution did not give rise to any substantial prejudice to the appellant and although on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of *section 72 (3)* of the constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.”

The accused's rights herein were violated by the state's failure to charge them within the mandatory fourteen (14) days period. The explanation given is not sufficient, persuasive nor convincing much as the offence committed was serious and abominable. Nonetheless I have to bear in mind the wise counsel of the court of appeal in **Mutua's case** aforesaid when it acquitted itself thus:

“.....on the one hand 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 court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the constitution.....”

If in the case of **Gerald Macharia Githuku** (supra) a delay of a mere 3 days led to the acquittal of the accused on the grounds that his constitutional rights had been violated, how about in the instant case where the delay was over 3½ months? Certainly this may sound and look like a child's play. The delay

is neither reasonable nor excusable. It has not been explained sufficiently either. Accordingly the accused stand acquitted of the charge of murder. The accused and each one of them is hereby set free forthwith unless otherwise lawfully held.

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

M. S. A MAKHANDIA

JUDGE