



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 15 of 2008

REPUBLIC PROSECUTOR

VERSUS

PATRICK MURIITHI NDERI ACCUSED

RULING

The Accused Patrick Muriithi Nderi was charged before this court with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He entered a plea of not guilty and his trial was set for 19th May 2008. On that day, the case could not proceed as the state counsel was absent. It was then stood over to 1st July 2008. On this occasion Mr. Kimani, learned counsel appearing for the accused, put the state on notice that he would be raising a preliminary objection as to the constitutionality or otherwise of the accused's trial so far. On 22nd September 2008, **Mr. Kimani** raised the issue in terms that, the accused was arraigned in court on 11th March 2008. He had been arrested on 12th February 2008. There was therefore a delay in the arraignment of the accused person in court. In the absence of any explanation acceptable to this court that the accused was brought to court within fourteen days as stipulated under the law or as soon as was reasonably practicable then the accused is entitled to an acquittal.

To counter these assertions, **Mr. Mule**, learned state counsel called to the witness stand, one, **Inspector Isaac Ibrahim**, the investigating officer in the case. The officer testified on oath that on 12th February 2008, the accused presented himself to Baricho police station and reported that he had quarrelled with his wife at night and had assaulted her. He was then arrested. The wife eventually passed on. On 13th February 2008, the officer took the accused to Nyeri PGH for psychiatric evaluation but found the Psychiatrist on leave. Further due to the animosity obtaining between the family of the deceased and accused due to the incident there was delay in obtaining a post mortem report. There was a dispute as to who between the two families should foot the post mortem bill. It was not until 20th February 2008 that the dispute was resolved and the two families came to the station and recorded their statements. Subsequent thereto a post mortem was conducted on the deceased the following day. On 27th February 2008, the officer compiled his file which he then forwarded to the DCIO for onward transmission to the PCIO and state counsel for advice. On receipt of instructions to charge accused he immediately did so on 11th March 2008. To the officer, therefore, the delay was not deliberate nor inordinate.

Sections 72 (3) (b) of the Constitution of this country provides interlia:

Any 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 as soon as is reasonably practicable, and where he is not 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 sub-section have been complied with.”

Essentially what the section is saying is that for a capital offence such as the one the accused is faced with, he could only have been incarcerated in police custody for no more than fourteen days upon arrest before arraignment in court. In the event of any delay beyond the stipulated period aforesaid then duty is cast upon the police to explain to the satisfaction of the court that the accused was after all 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 as aforesaid 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 an automatic acquittal notwithstanding that the case against him may very well be overwhelming. In the case of **Albanus Mwasia Mutua v/s Republic – Criminal Appeal No. 120 of 2004**, the court of appeal after citing several past authorities on similar situations concluded 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 in support of 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 adopted by the same court in the case of **Paul Mwangi v/s Republic – Criminal Appeal No. 35 of 2006** where the court proffered 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, the court stated:

“So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance 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”

Thus, the law as to the treatment the courts will give to cases where violation of section 72(3) (b) of the constitution is alleged 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 the courts can act on the allegation. Courts of law do not act in a vacuum nor would a court of law act on half-baked evidence. As stated in the case of **Dominic Mutie**

Mwalimu v/s Republic (2008) eKLR “..... under section 72(3) of the constitution, where a person charged with a non-capital offence is brought before 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 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. 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” I totally agree, share and endorse these sentiments.

In the circumstances of this case, it is conceded that the accused was arrested on 12th February 2008 but it was not until 11th March 2008 a month later that he was arraigned in court. According to the investigating officer, much of the time was taken up by the two respective families of the deceased and accused haggling over who should meet the post mortem expenses. It was not until the 20th February 2008 that the dispute was resolved and the following day the post mortem was conducted. Without the post mortem report, there is no way that the accused would have been arraigned in court on a charge of murder. Again none of the members of the two families had recorded statements with the police by then. They only did so after the dispute regarding the post mortem was resolved. Again without these statements, it is doubtful that the accused would have been presented to court since some of them were crucial witnesses. The officer indicated also that upon arrest of the accused, he presented him before Nyeri PGH the following day for mental evaluation but was informed that the Psychiatrist was on leave. I have no reason to doubt this evidence. In any event who does not know that there is only one Psychiatrist at Nyeri PGH, Dr. Owino! There is a dearth of psychiatrist in the said medical facility. Everything considered, I am satisfied that the prosecution has proved that the accused was brought to court as soon as was reasonably practicable. The delay was not deliberate. It was occasioned by circumstances beyond the police control. They had nothing to do with dispute pitting the two families against each other over the issue of the post mortem. They could not have influenced the events either way and without the post mortem their goose was cooked. For all the foregoing reasons, I find no merit in the preliminary objection and it is accordingly dismissed.

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

M. S. A. MAKHANDIA

JUDGE