



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 30 of 2007

REPUBLICPROSECUTOR

VERSUS

1. PETER KARIUKI MATHI

2. HENRY THUKUU KIRAGUACCUSED

3. JOSEPH CHEGE NGATIA

R U L I N G

The accused, PETER KARIUKI MATHI, HENRY THUKUU KIRAGU and JOSEPH CHEGE NGATIA were on 5/3/2007 charged with the murder of JOHN GITHAGE KIARIE, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

The offence is alleged to have been committed on 11/10/2006 at Kamiti Maximum Prison within Nairobi Area.

On 24/1/08, the accused filed a Preliminary Objection challenging the legality of these proceedings under Section 72 (3) (b) of the Constitution on the grounds; inter alia that the accused were detained on suspicion of committing the murder on 10/11/06. The 1st and 2nd accused were brought to court on 3/4/07, while the 3rd accused was brought to court on 11/4/07.

The three accused took the plea on 25/4/07.

On the basis of the above, which is not contested by the prosecution, it is the case by the applicant's that they were held in custody for almost 6 (six) months, which is contrary to the Constitutionally permitted period of 14 days after the arrest. On that basis the accused submit that their Fundamental Rights were violated and the proceedings are illegal, null and void and they should be released forthwith.

Section 72(3) (b) under which the application is brought stipulates that a person arrested upon reasonable suspicion of having committed a capital offence must be brought to court as soon as is reasonably practicable, and at any rate within 14 days after his/her arrest. Any proceedings instituted outside that period are illegal, null and void and the accused must be released unless the prosecution can satisfactorily explain the delay.

In opposition to the application, the prosecution, vide an Affidavit deponed by Chief Inspector Mohamed Huka, on 3/7/08, have sought to explain the alleged delay as under.

First, that there was no arrest of the accused persons because at the time of the alleged offence the accused were in lawful custody at Kamiti Maximum Prison for an unrelated offence and the deceased was their cellmate. Accordingly, the question of the 14 days stipulated in Section 72 (3) (b) does not arise as there was neither an arrest nor confinement in police cells. The only confinement was that at Kamiti Prison where the accused/applicants were by virtue of an unrelated offence.

The prosecution added that the case is comparable to investigations by the police while the suspect is not arrested. Accordingly, concluded the Learned State Counsel, the 14 days stipulated in Section 72 (3) (b) of the Constitution, never begun to run.

I have carefully perused the pleadings and submissions by counsel for both sides. This is an interesting case in that whereas they admit that the accused was not brought to court within the required 14 days, there is no delay because the case does not fall within the provisions of Section 72(3) (b). And that, according to the prosecution, is because the accused were never arrested as they were already in Kamiti Prison, by virtue of lawful authority – for offences not related to the one by virtue of which they are before this court.

The prosecution seems to be trying to hoodwink the court, and the process of justice.

The case revolves around two factual and two legal issues. The questions are: Do the facts in this case fit within the provisions of Section 72(3) (b) of the Constitution, and whether a person who is in custody enjoys the protection accorded by Section 72(3) (b) of the Constitution.

The factual questions are whether the accused were actually arrested and whether they were brought before court within the Constitutionally stipulated period.

I begin with the second factual question, and the answer is conceded by the prosecution both in their Affidavit and submissions. The accused were not brought to court within 14 days. The prosecution's question as to "when the time began running?" is clearly chicky because Section 72(3) (b) provides as under (the relevant words):

"A person who is arrested or detained....shall be brought before a courtwithin 14 days of his arrest or detention....."

In other words, the provision deals with both arrest and or detention.

In the case before me, the accused were, and that is conceded by both sides, in Kamiti Prison, but for offences not related to this one. But they were taken from Kamiti Prison, by the Police to Kiamumbi Police Station where they were booked, finger printed; recorded statements and taken medical examination to determine their mental fitness. This was not in Kamiti Prison, but in the Police Station, after which they were returned to Kamiti Prison.

In my view, all the foregoing was in preparation for the accused before being brought to court. But that was not done until long after 14 days lapsed from the date they were taken out of Kamiti Prison to Police Station then returned to Kamiti Prison.

Even though the accused were not held in a Police Station they effectively were under Police detention, only the physical presence was in a prison, rather than in a police cell.

Put differently, even if the Prison authorities at Kamiti Prison wanted, they could not release the accused after they had been taken out by the Police to the Police Station on suspicion of having committed a capital offence – murder. That is why the examinations and procedures they underwent were necessary. Otherwise why the procedure since they were already in prison?

I accordingly reiterate that the accused were arrested the minute they were taken out of the Kamiti Prison, by the Police, and the detention thereafter, at the Kamiti prison, was both because of the

suspected capital offence as well as their other offences unrelated to the one alleged here.

Every person, including those already in custody or prison, enjoy their constitutional rights except those which have been otherwise countermanded by a court order. For example, even a person on death roll is entitled to all his/her constitutional rights, including the right to life until and unless he/she is executed as by the law provided. Thus, if any person, including a warder, were to kill a person on death roll, that is extra judicial killing, and the warder would be charged with murder.

All in all, and for the above reasons, I hold that the Fundamental Rights of the accused persons were violated by their not being brought to court within 14 days from the date they were taken out of the Kamiti Prison, on suspicion of murdering the deceased herein.

Accordingly, I declare these proceedings against the three accused illegal, null and void.

I order for their immediate release unless they are otherwise lawfully held.

DATED and delivered in Nairobi, this 21st Day of October, 2008.

O.K. MUTUNGI

JUDGE