



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

Criminal Case 109 of 200

REPUBLIC

-VS-

PETER MBUGUA MBOGO

EVANSON NG'ANG'A MBUGUA

JOHN NDERITU KAMIRU

RULING

The accused have 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 the 11th September, 2006 at Waguthi in Kiambu District within Central Province,
jointly with others not before the court murdered GEOFFREY NGOIYA MBOGO”.

From the record, it is apparent that the accused were first arraigned in court on 4th December, 2006. After the plea was taken, a hearing date was set down. Though there were several adjournments, the court eventually heard two witnesses. On 21st February, 2008, the defence counsel for A1 and A2 informed the court that he had been instructed to file a preliminary objection. During the hearing of the same, Mr. Mbiyu submitted that the application had been made under Section 84 (1) and (2) of the Constitution of Kenya. Apart from the above, he also submitted that the rights of the A1 and A2 under Section 72 (3) (b) and 77(1), (2) (a) and (b) of the Constitution are being violated by these proceedings. According to Mr. Mbiyu, the A1 and A2 were arrested on 12th September, 2006 and later arraigned in court on 16th November, 2006 (the correct date is 4th December, 2006). In his calculation, the two accused were kept in custody for a period of about 64 days. Further to the above, he also submitted that the prosecution has a duty to explain any delay in producing a suspect before the court. In support of his submissions, he quoted the following cases:

NDEDE –VS- REPUBLIC (1991) KLR

REPUBLIC -VS- DANIEL MBUGUA

GEORGE ONYANGO

CRIMINAL CASE NO.91 OF 2004

REPUBLIC –VS- JAMES NJUGUNA NYAGA

CRIMINAL CASE NO.40 OF 2007

PAUL MWANGI MURUNGA –VS- REPUBLIC

CRIMINAL APPEAL NO.35 OF 2006

REPUBLIC –VS- HENRY OPONDO OGAM

CRIMINAL CASE NO.75 OF 2007

In concluding his submissions, Mr. Mbiyu urged the court to terminate the proceedings and “acquit” the accused persons. On his part, Mr. Ojienda, the defence counsel for A3, adopted the above submissions in their entirety. Besides the above, he also submitted that the A3 had been held unlawfully for 21 days. He explained that the A3 was arrested on 30th September, 2006 and was later released on 2nd October, 2006. He was re-arrested on 14th November, 2006 until 4th December, 2006 when he was arraigned before court. Mr. Ojienda urged the court to “acquit” the A3 since the prosecution failed in giving any explanation when he was brought to court for plea.

On her part, Ms Wafula, State Counsel referred the court to Legal Notice No.4 of 1988 which she stated – amended Section 72 (5) of the Constitution of Kenya. She was of the opinion that all offences punishable by death have been put out of the ambit of Section 72 (3) of the Constitution. That apart, she was also of the view that the authorities quoted by the defence counsels are inconsistent with the constitution and are *ultra vires*. In addition to the above, Ms Wafula also submitted that compensation has to be given where the prosecution has failed to give an explanation for the delay.

From the above it is apparent that the three accused persons were first arraigned in court on 4th December, 2006. Consequently, the Principal Deputy Registrar assigned two qualified defence counsels to the accused persons. Both counsels waited till 23rd January, 2008 before they indicated that they had instructions to file a preliminary objection. By then, the court had already heard two prosecution witnesses. Their evidence is already on record. This court concurs with the defence counsels that the constitutional rights of the accused were grossly violated by the police who delayed in bringing the accused to court without any reasons. That means that they are entitled to sufficient and adequate compensation. However, this court has to take into account the fact that the deceased lost his life under circumstances that need to be determined by the court. Prior to this death, the deceased had a right to life, liberty, security of the person and protection to the law as envisaged under Sec.70 of the Constitution of Kenya. Given the above, it is incumbent on the court to balance the rights of the accused and that of the deceased. Given the total circumstances of the case, I am of the considered view that in the interest of justice and fair play, the court should determine the case after conducting a full trial. In the meantime, the court will presume, as required by law, that the accused are innocent unless proved otherwise. The upshot is that I hereby dismiss the application and direct that the trial proceeds. Further hearing on 1st and 2nd December, 2008.

MUGA APONDI,

JUDGE.

Ruling read signed and delivered in open court in the presence of the accused, Mbiyu Defence Counsel and Mr. Ong’ondo State Counsel.

Order: Two assessors to be paid allowances.

MUGA APONDI,

JUDGE.

13TH OCTOBER, 2008.