



REPUBLIC OF KENYA

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

Criminal Case 81 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MUTURI MACHARIA..... ACCUSED

RULING

The accused, **JOHN MUTURI MACHARIA** was, on 24/10/2007, charged with the murder of **NANCY NJERI NJOGU**, 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 the night of 18th August, 2007 at Githurai Kimbo Estate, Nairobi.

On 6/2/06, and just before the hearing of case could commence, the accused filed this Preliminary Objection challenging the legality of these proceedings, on the following grounds.

That his Fundamental Rights as enshrined in section 72(3) (b) of the Constitution had been violated in that he had been arrested on 30/8/07 but was not brought to court until 12/11/07. That is 75 days in custody, whereas Section 72(3) (b) requires that he should have been brought to court within 14 days of his arrest.

As a consequence of the foregoing his right to a fair trial, as provided for under Section 77 (1); (2) (a) (d) were also violated.

On the basis of the foregoing the accused urges this court to declare these proceedings illegal, null and void and release him.

The substance of the provisions of Section 72(3) (b) is that any person arrested on reasonable suspicion of a capital offence, must be brought to court as soon as is reasonably practicable, and at any rate within 14 days. Any prosecution instituted outside that period is illegal and the accused should be released, unless the prosecution can explain to the satisfaction of the court, the delay. This is as per the provisions of Section 72(3) (b) which further stipulates that the burden of proving compliance with the provision therein lies with the prosecution.

In support of his application the accused cited, and relied, on the following three authorities;

- a. ALBANUS MWASIA MUTUA VS. REPUBLIC CR. APPEAL NO. 120 OF 2004

b. ANN NJOGU & 5 OTHERS VS. REPUBLIC MISC.CR. APPL. NO. 551 OF 2007.

c. REPUBLIC –VS- AFRICANAS NTHEKE NGUNGA H.C. CR.CASE NO. 213 OF 2003.

In Reply, Learned State Counsel, Ms. Wafula, stated that the state concedes that there was a delay and there is no explanation for the delay. She then left the matter to the court.

Under the circumstances where the challenge to the legality of the proceedings is conceded by the prosecution, I find and hold that by holding the accused in detention beyond the 14 days – the Constitutionally permitted period, and without any explanation for the delay, - the state violated the Fundamental Rights of the accused to liberty and fair trial within reasonable time as provided for in Section 72(3) (b) and Section 77 (1) (2) of the Constitution.

As held in ARAFAT DAUDI VS. REPUBLIC, CR. Case No. 91 of 2005, at Page 11:

“It is not the delay per se that is fatal, rather it is the failure to satisfactorily explain the delay that is fatal.”

In the case before me, despite the Notice of Preliminary Objection, the prosecution has not even sought to explain why the accused was held in custody beyond the 14 days before being brought to court.

Given the admission of the delay and lack of explanation for the same, I find and hold that these proceedings, in Criminal Case No. 81 of 2007, have their genesis in illegality and are accordingly null and void.

Accordingly, I order the release of the accused/applicant,forthwith, unless he is otherwise lawfully held.

DATED and delivered in Nairobi this 6th Day of October, 2008.

O.K. MUTUNGI

JUDGE