



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 102 of 2006

REPUBLICPROSECUTOR

VERSUS

- 1. PETER NDUATI DEFE.....**
- 2. AMOS KINYANJUI..... ACCUSED**

RULING

The accused/applicants PETER NDUATI DEFE and AMOS KINYANJUI Alias WANYAGWA were, on 9/11/06, charged with the murder of *JOSEPH MBUGUA MUGECHA*, 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 24/8/06 at Kenyatta University Grounds within Nairobi Area.

On 2/4/08 the accused persons challenged the legality of these proceedings against them on the grounds, inter alia, that the same violates their Fundamental Rights as enshrined in Section 72(3) (b) of the Constitution.

That Section is to the effect that a person arrested/detained on 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 of the arrest. Any proceedings instituted outside the 14 days are illegal, null and void, and the accused must be released unless the prosecution can satisfactorily explain the delay.

In the present case, the accused persons were arrested on 19/9/06 and 20/9/06, and held in Police custody until 14/11/06 when they were brought to court. They did not, however, take the plea, until 20/11/06 when a defence counsel had been availed to them.

On the basis of the above dates, the 1st accused and the 2nd accused were held in police custody for 42 and 41 days respectively, over and above the Constitutionally permitted 14 days.

In opposition, the prosecution, through their learned State Counsel, submitted that the accused did appear before a Resident Magistrate within one day of their arrest, and since Section 72 (3) (b) of the

Constitution does not say which court the arrested person must be brought, the statutory provisions were complied with. Before the Resident Magistrate's Court, the accused allegedly confessed on killing, and how they killed and defaced the deceased, making it difficult to identify the deceased, which caused the delay in bringing the accused before court. It was also the prosecution's case that the accused were being held pursuant to a court order when they made the confession.

The prosecution completed their submissions by urging the court to allow the proceedings to run to its logical conclusion, as that is what would be in public interest and justice to both the accused and the deceased!

Having carefully considered the objection and the issues raised therein by both Learned Counsel, I feel the application calls for close attention to both factual and legal issues raised by the circumstances of the case.

Effectively, the prosecution's case is that there was no delay in bringing the two accused persons before the court, since they had been taken to the Resident Magistrate's Court within a day of their arrest.

Given the facts of what transpired, I find it unnecessary to spend a lot of time on the submissions by the Learned Counsel for the State. Suffice it to firmly state that the accused were taken to the Resident Magistrate's Court, not to take a plea, as no information had been prepared by then, but for the purposes of recording a confession – before a court – as required by Section 25 of the Evidence Act, Cap. 80, Laws of Kenya.

The contradiction in the prosecution's submissions is that the accused confessed, within a day of their arrest, and before a court, on how cruelly they killed the deceased. The immediate question then is: why were the accused kept in police custody for over 40 days, if they had confessed, before being brought to court for plea? That, the Learned State Counsel, failed, and, or, refused, or neglected, to explain.

The other points which I must mention which arise from the prosecution's submissions are the concept of court and the role and place of confessions or evidence where the legality of proceedings, such as these, has been challenged.

Within Kenyan law, only the High Court has original jurisdiction to hear murder cases. No subordinate court has jurisdiction to try murder cases.

Accordingly, for the learned state counsel to submit that the accused were brought before a court, when knowing very well that that court lacked jurisdiction or was not a court of competent jurisdiction to deal with murder charges, and to go further and submit that that satisfied the provisions of Section 72(3) (b) of the Constitution, is clearly chicky.

The word "court" as used in Section 72(3) (b) of the Constitution, must be and is read to mean "competent court" to deal with the issue at hand.

The prosecution seems to think that given the confession recorded at the Subordinate Court that is sufficient reason to allow these proceedings to continue and be heard on merit. To the Learned State Counsel, the confession sealed everything against the accused. That thought process is probably pregnant with misconceptions.

Confessions, just like admissions, is one of the means by which an alleged matter of fact is proved or disproved. Confessions are part of the evidence that may be called upon to prove or disprove an alleged fact that is in dispute.

The problem seems to be how release of an accused person, on the basis of his/her Fundamental Rights under the provisions of Section 72(3) (b) of the Constitution, is perceived. The court is not in any way saying that the accused did, or, did not, commit the alleged crime when it releases such a person, pursuant to a Preliminary Objection under Section 72 (3) (b) of the Constitution. All the court is saying is that

such proceedings, having been instituted in violation of the Constitutional provision, are illegal, null and void. The evidence to prove that the accused did actually commit the offence, with all the requisite ingredients of *actus reus* and *mens rea*, may be irreproachable. But the platform at which to receive and hear such evidence simply does not legally exist because of the illegality in the manner the proceedings were instituted.

That is the basis behind the Court's firm stand in JAMES NJUGUNA NYAGA VS. REPUBLIC – Cr. Case No. 40 of 2007: that where the Fundamental Rights of an accused, as enshrined in Section 7293) (b) of the Constitution, have been violated, the proceedings are illegal, null and void, and the accused must be released irrespective of the weight of the evidence that the prosecution may have in support of their case. This is because such evidence would be in support of a nullity – a vacuum, the proceedings having their genesis in an illegality.”

For all the foregoing reasons I find and hold that the Fundamental Rights of the accused persons were violated, and continue to be violated, by these proceedings which proceedings have their genesis in an illegality.

Accordingly, I order the immediate release of the accused persons unless they are otherwise lawfully held.

DATED and DELIVERED IN Nairobi, this 12th Day of November, 2008.

O.K. MUTUNGI

JUDGE