



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

Criminal Case 101 of 2005

REPUBLICPROSECUTOR

VERSUS

REUBEN GATHARI MACHARIA.....ACCUSED

R U L I N G

[On whether or not the accused has a case to answer]

On 19/7/2005, the accused, REUBEN GATHARI MACHARIA was charged with the murder of PETER MATHIAKA MUNORU, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63 Laws of Kenya.

In the cause of the proceedings, and in support of their case, the prosecution called Seven (7) witnesses who testified between 26/11/2007 and 21/7/2008.

At the end of the prosecution evidence, the learned defence counsel, Mr. Kanyangi, submitted that the prosecution had not made a prima facie case to warrant putting the accused on his defence.

He also challenged the legality of these proceedings against the accused given that the accused was held in police custody for 210 days after his arrest before being brought to court.

I begin with the evidence adduced by the seven witnesses.

The defence counsel submitted that none of the seven witnesses witnessed the alleged fight during which injuries from which the deceased is alleged to have died were inflicted; and the evidence of the pathologist stated that such injuries could be caused by a fall given that the deceased was not only drunk, but also a habitual drunkard. In effect, there is no evidence on how the injuries were inflicted on the deceased and by whom.

In response to the above defence submissions, the prosecution, through Learned State Counsel – Bifwoli – submitted that the deceased died of the injuries inflicted on him by the accused during a fight which was witnessed by P.W. 3. That submission that P.W. 3 witnessed the fight is not supported by any evidence on record.

On the legality of the proceedings, the prosecution submitted that the issue of delay and violation of the rights of the accused as per Section 72(3) (b) was an ambush to the prosecution as it had not been raised and hence they had not been afforded the opportunity to explain the delay. The prosecution urged the court to reject the objection as it is raised too late.

I have reviewed the evidence adduced by the seven prosecution witnesses, and considered the submissions by the Learned Counsel for both sides, including the points on the legality of these proceedings, and I have reached the following findings and conclusions.

I start with the legality of the proceedings, in light of the undisputed facts that the accused was not brought to court within the 14 days stipulated by Section 72(3) (b) of the Constitution.

The prosecution's submission that the issue of delay had not been raised and hence they were ambushed is not strictly correct, and the submission is untruthful.

This court adjourned the hearing on several occasions to facilitate the appearances of Inspector Muchoki, the Investigating Officer to testify. The court even issued a witness summons on 14/5/08. But Muchoki never appeared, and it is him who would have been in a position to explain the delay, as the Investigating Officer. It is thus not true that the issue was not raised during cross-examination as the witness never appeared and no cross-examination could take place.

On that basis, I find and hold that the prosecution – the Police – failed to explain the inordinate delay of 210 days that lapsed before the accused was brought to court.

On the evidence adduced, I find and hold that there is no evidence that anybody witnessed the alleged fight between the accused and the deceased. What came out, and is on record, is that there was a quarrel and exchange of abusive language between the deceased and the accused, which was triggered by the deceased.

None of the witnesses saw or witnessed the fight or actually witnessed what happened. It is therefore not possible to say that the injuries were inflicted on the deceased by the accused. Nobody even witnessed the fight; if there was any. The fact that the deceased and accused were heard howling abusive language at each other is no evidence that they fought.

The above is buttressed by the evidence that deceased was drunk, and the pathologist's evidence that the injuries from which the deceased died could be caused by a fall.

In brief, there is no evidence that it was the accused who killed or inflicted the fatal injuries on the deceased. There is thus absence of ACTUS REUS. Besides, the second crucial element of a crime like this – namely MENS REA has not been raised, much less proved.

Taking into account all the foregoing – the lack of legality in these proceedings and lack of evidence to link the accused to the death of the deceased, I find and hold that the prosecution has not made a *prima facie* case to warrant putting the accused on his defence.

And even if there was evidence of *actus reus* and *mens rea*, that would be of no consequence since the genesis of these proceedings is an illegality and violation of the Fundamental Rights of the accused, as enshrined in Section 72(3) (b) of the Constitution.

Once it is shown that the accused was not brought to court within 14 days of his arrest, the accused must be released unless the prosecution can satisfactorily explain the delay. And that is the case irrespective of the weight of the evidence that the prosecution might adduce.

All in all therefore, I hold that the prosecution has not made any *prima facie* case to warrant putting the accused on his defence.

Accordingly I order the immediate release of the accused unless he is otherwise lawfully held.

DATED and delivered in Nairobi this 5th day of November, 2008.

O.K. MUTUNGI

JUDGE