



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

Criminal Case 70 of 2006

REPUBLICPROSECUTOR

-VERSUS-

JOSEPH KARURU MUNGAI.....ACCUSED

RULING

After the Court's hearing of ten witnesses, the prosecution closed its case. Learned counsel *Ms. Odembo* for the accused, then sought an opportunity to make the submission that the prosecution had laid out no case requiring that the accused be put to his defence.

This is a case in which *Edward Ngungu Kinuthia* was said to have been killed, during the night of 9th – 10th May, 2006, at the home in which the accused resided, and the accused was charged with causing the said death.

I have carefully reviewed the evidence tendered, to see if it shows a relevance of the accused's hand in the circumstances leading to the death of the deceased, such that it is proper he be called upon to explain his position.

It is undesirable for me to conduct a systematic analysis of the evidence at this stage, before determining the question at this preliminary stage; for if I did so, this might set sign-posts that could influence the line of defence, in the event I put the accused to his defence – and a line of defence thus pre-ordained may not be appropriate. The governing principle in decision-making at this stage is that set out in the East African Court of Appeal decision in *Ramanlal Trambaklal Bhatt v. R* [1957]E-A. 332

(at p. 335 – *Sir Newnham Worley, P.*):”.....*the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively; that final determination can only properly be made when the case for the defence has been heard.*”

From the evidence of the ten witnesses, I would hold that a *prima facie* case has indeed been shown. But I have to consider a separate point which was raised by counsel for the accused: that there had been a violation of s. 72(3) (b) of the Constitution when the accused was brought before the Court after some *two months of detention*, rather than within 14 days.

I have carefully considered the contending standpoints of counsel on this question, and I have looked at the relevant case authorities.

It is apparent that some of the authorities on the point have either not expressed themselves with singular

clarity, or have been misapprehended by counsel – so that different counsel have been in a position to select the authorities which favour their side of the argument.

I am more in agreement with the principles set out in the case cited by counsel for the prosecution, *Dominic Mutie Mwalimu v. Republic*, Crim. Appeal No.217 of 2005: the objection based on s. 72(3) (b) of the Constitution should have been raised *much earlier*; for, that failing, this Court has devoted all its time, over a period of years, to hearing the merits of the case. That judicial task, I would hold, is not in vain, and it is indeed the foundation for a just resolution of the matter, quite apart from having been performed as part of the Court's *constitutional obligation*.

I thus reject the contention made for the accused, that the *trial process* in this Court had in any way been tainted with nullity. Since, however, it is common cause that the accused was detained for *longer* than the period indicated in the Constitution, before being arraigned in Court, I hereby state that a solution would have to be sought by virtue of s. 72(6) of the Constitution, by way of a *suitable application*.

I hold that the accused in this case has a case to answer, and I hereby put him to his defence.

On that basis I have to give directions for further hearing, as follows:

- (i) The accused may elect to remain silent; and in that case he will not be asked any question; and even if he takes that option, he may call witnesses.
- (ii) The accused may elect to make an unsworn statement, and again, in that case, he will not be cross-examined; and further he may if he wishes, call witnesses.
- (iii) Lastly, the accused may elect to make a sworn statement; but if he does so, then he may be cross-examined by the prosecution; he will be at liberty, in such a case, to call witnesses.

I will give counsel for the accused an opportunity in Court to consult with her client, and then to state before the Court the line of defence elected by the accused. Thereafter I will give directions for further hearing.

DATED and DELIVERED at Nairobi this 18th day of December, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Accused: Ms. Odembo

For the Prosecution: Mr. Ong'ondo