



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 60 of 2006

REPUBLICPROSECUTOR

VERSUS

FRANCIS NGATA MBUGUAACCUSED

RULING

The accused has 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 20th May, 2006 at Nyanduma, in Kiambu district within Central Province, murdered SAMUEL MBUGUA MUCHIRI”.

According to the record, the accused was first arraigned in court on 15th June, 2006. Thereafter, on 3rd July, 2006, I took the plea and fixed the case for hearing. After selecting the assessors, the case started in earnest on 9th November, 2006. After the court had heard a total of ten witnesses, the defence counsel, via **Mr. Wamwayi** applied for an adjournment to allow him file a preliminary objection. During the hearing of the application, **Mr. Wamwayi** submitted that the rights of the accused under Section 72(3) and 77 of the Constitution were violated. According to **Mr. Wamwayi**, the accused was arrested on 21st May, 2006 and was arraigned in court on 15th June, 2006. He was of the view that the accused was held in custody for nine days in excess of the mandatory period of 14 days. Further to the above, **Mr. Wamwayi** submitted that the investigating officer had confirmed the date of arrest and that the post-mortem had been conducted on 23rd May, 2006. He also confirmed that the accused was escorted to hospital for mental examination on 29th May, 2006. In addition to the above, **Mr. Wamwayi** referred to the cross examination of Cpl. Thadayo who acknowledged that there was a delay due to protracted investigations and misadventure. Though **Mr. Wamwayi** acknowledged that the delay was about 8 to 9 days, he urged the court to uphold the human rights of the accused as guaranteed by the Constitution. To support his submissions, he relied on the case of **Gerald Githuku vs Republic Criminal Appeal No.119 of 2004**. **Mr. Wamwayi** submitted that in the above case, the appellant was held for three days in excess of the mandatory period. On that account alone, the appeal was allowed while in this case, the prosecution has not discharged its burden. Besides the above, he also quoted the following case; **Paul Mwangi Murunga vs Republic Criminal Appeal No.35 of 2006**. In the above case, the appeal was allowed where there was delay of ten days and the court found that the explanation given was not reasonable. In addition to the above, **Mr. Wamwayi** also quoted the case of **Albanus Mutua vs Republic Criminal Appeal No.120 of 2004**. In the above case, the appellant was held in custody for 8

months without being taken to court. While acquitting the appellant, the court stated that it is bound to enforce the provisions of the Constitution. Apart from the above, the defence counsel also submitted that preliminary objections on a point of law can be made at any stage of the proceedings. To support the above, he quoted the case of **Republic vs James Njuguna Nyaga Criminal Case No.40 of 2007**. He concluded his submissions by urging the court to acquit the accused.

On the other hand, **Mr. Imbali**, State Counsel, submitted that the State was relying on the affidavit sworn by PC Thadayo who was the investigating officer and his evidence which is already on record. In addition to the above, **Mr. Imbali** referred the court to Paragraph (11) of the said affidavit that explains that the delay in bringing the accused to court was due to protracted investigations. Secondly, he referred the court to Section 71 and 72 of the constitution that guarantees the right to life and freedom. He pointed out that none prevails over the other. In support of the above submissions, he relied on the case of **Republic vs Paul Njehia Criminal Case No.96 of 2005**. Thirdly, **Mr. Imbali** submitted that the application was an afterthought as the same should have been filed at the earliest opportunity. He reminded the court that the prosecution has availed eight witnesses and has already closed its case. In support of the above submissions, he quoted the case of **Republic vs Joseph Ndirangu & Stephen Irungu Criminal Case No.42 of 2006**. Further to the above, he also submitted that the delay was for only eight days and that the investigating officer tried his best to arraign the accused in court at the earliest reasonable opportunity. In addition to the above, he distinguished this case from that of **Albanus Mutua vs Republic Criminal Appeal No. 120 of 2004**. The distinction is that in this case, the delay was only for eight days while in the above case, the delay was for 8 months. Apart from the above, he has also submitted that in this case, they have explained the delay.

From the above submissions, there is no doubt that the delay in bringing the accused to court was 8 days. The prosecution has not denied that fact. Though that was a delay, the same cannot obviously be compared to a delay of 8 months that was complained of, in the case of **Albanus Mutua vs Republic Criminal Appeal No. 120 of 2004**. Secondly, the record clearly shows that the accused has been represented by a senior and experienced defence counsel from 3rd July, 2006. Unfortunately, the learned counsel waited till 8th February, 2008 to complain that the constitutional rights of the accused had been violated. Obviously, that was about 1 ½ years after the accused had been arraigned in court. By then, the prosecution had already closed its case after calling a total of ten witnesses. Significantly, paragraph (3) to (9) of the affidavit of Cpl. B. M. Thadayo clearly shows how the latter handled the matter with due dispatch. Given the explanation by the investigating officer, I hereby accept the same. The upshot is that I hereby dismiss the application since the same has no merits. The accused is at liberty to apply for adequate and sufficient compensation under Section 72(6) of the constitution of Kenya. Given the advanced stage of the case, the defence counsel is at liberty to make submissions of a no case to answer.

Those are the orders of the court.

MUGA APONDI

JUDGE

3rd December, 2008

Ruling read, signed and delivered in open court in the presence of the accused.

Mr. Masara for Wamwayi Defence counsel

and **Mr. Imbali** State Counsel

MUGA APONDI

JUDGE

3rd December, 2008

Masara: I pray for a further mention, since I do not have the diary for Mr. Wamwayi.

Imbali: No objections.

Court: Further mention on 9th December, 2009 with a view of fixing a hearing date for submissions of a no case to answer by Mr. Wamwayi:

Order: Assessors to be paid allowances. Accused remanded in custody. Two assessors to be paid transport, subsistence and accommodation allowances.

MUGA APONDI

JUDGE

3rd December, 2008