REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 2 of 2007

REPUBLIC……………………………..……...………………………PROSECUTOR

Versus

MOSES NDERITU NDUMIA……………………………..……………….ACCUSED

RULING

The Accused person in this case was arrested by the Police on 7th January 2006 upon suspicion of having murdered Loise Wambui Muita at Mukaro Location in Nyeri District on the night of 6th and 7th January 2006. That is an offence punishable by death where the maximum days of detention in Police custody before such an accused person is first taken to a court of law is 14 days. But although the Accused in this case was never released by Nyeri Police at Nyeri Police Station following that arrest, by the time he was first brought to court, one year had already lapsed as that was on 12th January 2007.

This court's Deputy Registrar, Mrs. E. J. Osoro, who handled the case first and felt concerned about the long delay in bringing the Accused person to this court, obtained an explanation from an Inspector of Police from Nyeri Police station and thereafter forwarded the court case file to me for plea and further action.

After seeing what had happened, I was anxious to find out what the Attorney General's Office at Nyeri was saying about the delay and whether the defence counsel had anything to add. The Principal State Counsel Mr. Charles O. Orinda from the Attorney General's Office at Nyeri appeared for the Republic to prosecute the case, while Advocate, Gathiga Mwangi appeared for the Accused who was also present as it was intended to take his plea. That was on 9th February 2007 and I had on 7th February 2007 alerted both sides that in view of the fact that the Accused had for the first time been brought to the court one year after his arrest and continuous detention in Police custody, I wanted the prosecution and the defence counsel to address me on whether the trial of the Accused in this case was lawful. I wanted that question be answered in order to take the plea or not because my concern was I should take the plea only if the trial is lawful.

During oral submissions on 9th February 2007 therefore Mr. Orinda raised a number of side issues which have, unfortunately, to take my time answering them before I go to the main and relevant issues in the submissions.

Firstly, Mr. Orinda took the position that the explanation to be given under *Section 72 (3) (b)* of the current Constitution of Kenya is an explanation to be given by the Police when the Police are giving evidence during the trial. He therefore submitted that what this court's Deputy Registrar did when she

obtained the explanation from a Police Inspector was not proper as that was not during the trial and the Deputy Registrar has no power to preside over the trial.

Mr. Orinda did not refer to relevant provisions of the law, which say the explanation must be given during the trial. In my view, it all depends on the stage, in the proceedings, at which the need for that explanation arises. If the need arises when the trial is going on before a judge especially if that need has arisen from what a witness still in the witness box has said, the explanation will be given by that witness and any additional witnesses during the trial before the trial judge. But where, as in the instant case, the need to explain the delay arises at the very initial stage when the criminal case is being registered in the High Court, it is perfectly in order for the Court's Deputy Registrar to assist the judge by gathering relevant information through explanations such as the one obtained by the Deputy Registrar of this court from the Police Inspector aforesaid. All she did was to gather information and pass it over with her comments, in the relevant case file, to a judge for information and necessary further action – and that is why I am dealing with that issue of delay now. According to me, what the Deputy Registrar did was very good and deserves to be commended instead of condemning it because, like a number of other cases with similar problems, the delay in this case may also have escaped the eye of a judge and the trial would have proceeded without any word being said about the delay so that, like similar cases that will be referred to later in this ruling, the problem would have remained for the Court of Appeal only to handle at the top there when it would be too late for the Police Inspector and Mr. Orinda to give their respective explanations – for due consideration by the court.

Perhaps it is not realised by people outside the Judiciary that a deputy registrar of the High Court or Court of Appeal assists a judge in the relevant court by doing some specific work the judge is required to do and that is done in accordance with the law – which also imposes limits to what a Deputy Registrar should do in that respect.

Further on that issue, it would seem to me that the Deputy Registrar dealt with the Police Inspector in the absence of a State Counsel because of the manner in which the Attorney General's Office at Nyeri and the Police have agreed to handle new criminal cases at the filing stage. That has nothing to do with the court which merely receives those who go before it for some action or service.

I note Mr. Orinda feels that had a State Counsel been present before the Deputy Registrar, the Inspector of Police would not have made statements blaming the Office of the Attorney General as he did. But as I have already stated, that is a matter for the Attorney General's Office to clear with the Police and does not concern the court.

Secondly, Mr. Orinda took the position that the explanation can only be given by the investigating officer during the trial when the investigating officer is in the witness box giving evidence. As I stated earlier, it can be so or it cannot be so. *Section 72 (3) (b)* does not specify that the person to give the explanation must be the investigating officer. That provision does not specify the time when that explanation should be given. But since that explanation is aimed at showing or proving that *Section 72 (3) (b)* has been complied with and there is therefore no violation of the Accused's fundamental rights and freedoms, the earlier the explanation is given the better. This is because if given before the trial or hearing of the main case commences, an unlawful trial would be avoided if violation of the fundamental rights and freedoms of the Accused is revealed at that stage. If on the other hand the explanation is given during the trial and it is revealed that the fundamental rights and freedoms of the Accused person have been violated, then that revelation will be coming out during an unlawful trial because where violation of the Accused's fundamental rights and freedoms has already been committed during the delay in the detention in Police custody there can be no lawful resulting trial subsequently. In terms of this case, it means that if to-date there is already violation of the Accused's fundamental rights and freedoms resulting from his having been detained in Police custody for one year, his trial will merely be driving a big hot nail into a deep fresh wound by worsening the already existing violation as violation through the court is added to the already existing violation through the Police. With all due respect, that is what Mr. Orinda is regrettably advocating for, very well knowing that once that is the scenario, the two violations will remain existing whether or not the Accused Person is acquitted at the conclusion of the illegal trial.

Thirdly, Mr. Orinda took a position which is not easy to understand. While he was busy explaining the delay in Police custody, he was at the same time submitting

"***that the right forum to challenge the prosecution of the Accused ought to be by way of Constitutional reference where a Constitutional Court would deal with the Constitutional issue."***

He sometimes talked of a judicial review.

It has already been explained in many judgments that not every violation of a constitutional right deserves the establishment of a Constitutional Court, and that questions going to constitutional courts must first be questions referred to Constitutional courts under *Section 67* or *Section 84* of the Constitution. In brief the position is simply as follows:

In constitutional matters coming to the High Court under *Section 67* and *Section 84* of the current Constitution, the quorum is provided only where the High Court is exercising its referral original jurisdiction under *Subsections (1), (2)* and *(3)* of *Section 67* to resolve a question as to the interpretation of the Constitution, involving a substantial question of law. Here the legally mandated composition of the High Court must be an uneven number of judges not being less than three.

Where the High Court is exercising its non-referral original jurisdiction in matters which would have been covered by *Subsections (1), (2)* and *(3)* of *Section 67*, or *Subsection (3)* of *Section 84*, but are not covered because proceedings were started in the High Court and the question as to the interpretation of the Constitution or the question as to the enforcement of *Sections 70* to *83* (inclusive) arose when proceedings were going on in the High Court, the legally mandated composition of the High Court is the one already seized of the proceedings in which the question as to the interpretation of the Constitution or the question as to the enforcement of *Sections 70* to *83* (inclusive), as the case may be, has arisen. In all other cases, that is to say:

Where the High Court is exercising its referral original jurisdiction under subsections (1), (2) and (3) of Section 67 but handling an interlocutory matter;

or

Where the High Court is exercising its referral original jurisdiction under Subsections (2) and (3) of Section 84;

or

Where the High Court is exercising its appellate jurisdiction, for example under Section 67 (4);

or

Where the High court is exercising its revisionary jurisdiction;

or

Where the High court is exercising its non-referral original jurisdiction in matters which would have been covered by subsections (1), (2) and (3) of Section 67 but are not covered because the parties went straight to the High Court for the interpretation of the Constitution;

or

Where the High Court is exercising its non-referral original jurisdiction under subsection (1) and (2) (a) of section 84;

the legally mandated composition of the High Court is a single judge. That constitutes a large majority

of Constitutional cases going to the High Court.

But the legally mandated position aside, there has arisen an approved and actively encouraged practice in this country whereby many of these single judge constitutional cases end up being heard by a bench of three or more High Court judges – each bench being referred to as a Constitutional Court. The result is that most of those three or five judge constitutional courts have been constitutional courts not legally mandated by provisions in the constitution of Kenya.

I am not saying those courts may have been unconstitutional. Those courts have always been constituted by successive Chief Justices on insistence of the parties. According to a former Chief Justice Apaloo, respective Chief Justices have been and are requested to empanel benches of three or more judges in their inherent jurisdiction as the foremost administrators of the Judiciary. He said:-

"***the fact that counsel have often requested the Chief Justice to constitute a three bench court and the Chief Justice's accession to these requests must be based on the conventional wisdom that many heads are better than one."***

I will end my summary about constitutional courts here hoping the learned Principal State Counsel is with me and agrees with me that the question of the legality of the trial of the Accused now before me is presently in the right and legally competent forum.

Having said the above, I will now turn to the explanation of the delay – or proof of compliance with *Section 72(3) (b)* of the constitution on the basis of what Inspector Martha Muyega told the Deputy Registrar together with what the Principal State Counsel told me. Although he was sometimes arguing that he was not the one to give the explanation or prove compliance, I think what the two did could not have been made better by anyone else whether in a constitutional court or in an ordinary court of law. What better explanation or proof could there have been in terms of substance? I can see none whether on oath or not on oath. I will start with what Inspector Martha Muyega said.

On the 22nd day of January 2007 Police Inspector Martha Muyega properly told this court's Deputy Registrar who rightly sought an explanation on behalf of a judge in the High Court, that at first it was not clear that the Accused was involved. But the Accused was arrested and even when an inquest was commenced, the Accused remained in the Police custody under arrest. He was arrested on 7th January 2006 according to what he told the court.

Inspector Martha Muyega continued that the Police prepared a file, which they handed over to the D.C.I.O, then to the Attorney General's Office. That must have been the office at Nyeri. She went on to say that her Nyeri Police Station waited for the result. The file did not go back quickly to Nyeri Police Station. Then there was a problem of missing exhibits, she went on to say. Another file was opened. She added that the Accused was held over one year at the Police Station awaiting advice from the Attorney General. She concluded that the delay was not occasioned by the Police but was occasioned by the Attorney General's Office.

But according to Mr. Orinda, when on 7th January 2006 an inquest file was opened, the Accused ought not to have remained under arrest in Police custody – as such an inquest meant that the Police did not have sufficient evidence to charge the Accused and therefore should not have even arrested him in the first place.

The learned Principal State Counsel went on to say that the case file kept on moving from office to office including the D.C.I.O. and the P.C.I.O. until 11th September 2006 when that case file was first taken to the Attorney General's Office at Nyeri for the first time. He told the Police that there was no question of an inquest as this was an open case of murder. Mr. Orinda noticed the items which had been taken to the Government Analyst had not been included and he wanted them to be included. On 2nd October 2006 he sent instructions to include results from the Government Analyst and send the Accused to court.

On 6th October 2006 the case file was returned to him with no further statements recorded according to his instructions. But someone tried to cover the points raised through a letter stating that the specimens sent to the Government Analyst got lost and the Police still wanted an inquest which, according to Mr. Orinda, meant that the Accused was not to be in Police custody under arrest.

The learned Principal State Counsel again said no to inquest and sent the case file back to the Police. He did not see the file again until returned to him by a letter dated 6th December 2006 acknowledging that there was negligence on the part of the officers handling the case resulting in the Accused being kept in Police custody for a long time.

He told the Police to cover the points they had not covered so that plea is taken as defence counsel would want to have witness statements. He explained that while he was still waiting, a Police officer appeared before this court's Deputy Registrar and blamed the Attorney General's Office for the delay in taking the Accused to court.

That is the totality of what Inspector Martha Muyega and the Principal State Counsel said and it is now opportune to consider the legal provisions in the light of which the trial of the Accused person should be looked at.

One of the fundamental rights and freedoms of the individual spelt out in *Section 70* of this country's Constitution is the right to personal liberty. That right is protected under *Section 72* where *sub section (1)* states as follows:

"***No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:-"***

That sub section goes on to list instances when a person may lawfully be deprived of his personal liberty and in so far as it is relevant to this case, includes paragraph (e) stating

"(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya".

But *Sub section (3) (b)* comes in to stipulate that

"***A person who is arrested or detained***

(b) upon reasonable suspicion of his having committed or being about to commit, a Criminal offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention upon reasonable suspicion of his having committed or about to commit an offence punishable by death;

the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this sub section have been complied with."

That leads us to another one of the fundamental rights and freedom of the individual spelt out in *Section 70* of this country's Constitution, namely,

"***the right to security of the person and the protection of the law."***

More precisely in this case, this court is concerned with that last segment of the above right which talks about

"the protection of the law;"

and the relevant section of the said Constitution is 77 where *sub section (1)* states:

"***If a person is charged with a Criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court – established by law."***

In terms of the instant case, in relation to *Section 77(2),* it means that bringing the accused person to this court one full year after arresting him and giving an unacceptable explanation for the delay is a gross violation of the Accused's fundamental or Constitutional rights to the protection of the law as the deprivation of the Accused's fundamental or Constitutional rights to liberty earlier on had resulted in this trial of the Accused not being held within a reasonable time as required by *Section 77 (2)* because the trial is unfair *ab-initio* – and there can be no "reasonable time" in such a situation.

Those are mandatory provisions of the Constitution of this country which every one of us, whether or not concerned with criminal justice, must always keep to the fore front of his mind as a pre-condition to his actions. That way, even the Police will be saved from contravention of those provisions, because it must be realised that if there is a statute or any other law outside the said Constitution authorizing the Police or anyone to detain an arrested or detained person in custody for a year as was done in this case, or for any other period longer than 24 hours or 14 days, as the case may be, before taking that person to a court, that law is unconstitutional and even if a trial subsequently takes place, that unconstitutionality, far from being obliterated by the nature or seriousness of the offence and the strength of the evidence thereon against the person then charged or accused, will, will instead, be worsened by the fact that in such circumstances the trial can never be said to have been "fair" in terms of *Section 77 (1)* aforesaid, as read with *Section 3* of the same Constitution which states as follows:

"***if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall, to the extent of the inconsistencies, be void."***

Although decided cases, to my knowledge, are those where a superior court dealt with the issue of the legality of the trial only after the trial in question had taken place, nevertheless those cases provide useful authority, and contrary to what Mr. Orinda has said that they are not relevant, I find them very much relevant. I have time to refer to only a few and propose to do so briefly.

Firstly, I refer to the case of **Swahibu Simbauni Simiyu - Vs – Republic (2006) e KLR** where the Court of Appeal said that since the record of the trial court did not show the language used by the appellants during the trial, there had been a possible violation of the appellant's constitutionally guaranteed right to be informed of the charge against them in a language they understood. The Constitutional provision contravened here was *Section 77 (2) (b).* In that court's view, it did not matter, in the circumstances, whether there was evidence proving that appellants had committed the offences they were charged with.

In another Case **Kiyato - Vs – Republic (1982-88) KAR, 418** the appellant had been convicted of robbery with violence and sentenced to death. The Court of Appeal found that the trial court had failed to provide the appellant with an interpreter – in contravention of his right to a free interpreter under *Section 77 (2) (f)* of the Constitution. The nature and strength of the evidence against the Appellant did not matter.

In the case of **Ndede -Vs – Republic (1991) KLR 567**, the Court of Appeal became concerned about the 30 days the appellant had been kept in Police custody before he was taken to court but that court, the Court of Appeal, did not talk about the 30 days in terms of contravention of a constitutional right. That Court was only concerned that the period of 30 days in Police custody before the Appellant was taken to

court had not been mentioned before the trial magistrate by the Prosecution when giving facts of the case before conviction and though the prosecution mentioned it before the sentence, the trial magistrate did not consider it. From the judgment it would appear that the Court of Appeal wanted an explanation for that 30 days stay in Police custody to have been given and the trial magistrate to have considered that explanation together with the facts which had been stated to enable the magistrate decide whether or not to enter a plea of guilty. It was on that basis that the Court of Appeal said the trial magistrate should not have accepted the plea of guilty since the delay in police custody for 30 days had not been explained and considered.

I am sure the Court of Appeal would have had stronger views against that trial had they also looked at the trial in terms of *Sections 70, 72* and *77* of the Constitution of Kenya. I am unable to say how stronger their view may have been but one possibility is they may as well have said there ought not have been that unlawful trial. That is, the Court may not have wanted that unlawful trial to have taken place.

In **Albanus Mwasia Mutua - Vs – Republic (2006) eKLR** the Court of Appeal was faced with a situation where the Appellant had been kept in Police custody for eight months before he was first taken to court. In the trial the Appellant was convicted and sentenced to death on one count and in addition was convicted and sentenced to a term of imprisonment on each of the two other counts. The death sentence was on the count alleging attempted robbery with violence contrary to *Section 297 (2)* of the Penal Code.

There was no dispute that the delay of eight months had not been satisfactorily explained, but while Counsel for the Appellant argued that as a result of that delay there was violation of the Appellant's constitutional rights, the Principal State Counsel responded that what mattered was the nature and quality of the prosecution's evidence pointing out that convictions of the Appellant were based on reliable evidence.

With those arguments in mind, the learned judges of Appeal were faced with the need to balance two considerations. One was the duty of the court to ensure that crime, where it is proved, is appropriately punished for protection of society. The other consideration was the equal duty of the court to uphold the rights of people charged with criminal offences, particularly the fundamental rights and freedoms of the individual and other constitutional rights guaranteed to individuals by the Constitution of this country. Simply put, the question was whether on account of the strength of evidence against the Appellant, the entire trial should not be nullified even if there was violation of the appellant's fundamental rights guaranteed to him by the Constitution.

The learned Judges said that in a situation which obtained in that case, the prosecution carried the burden of proving that the Appellant had been brought before court as soon as was reasonably practicable.

Following careful consideration, "the learned judges noted that the jurisprudence which emerged was that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and the strength of the evidence adduced in support of the charge".

I am not sure whether the report as stated in the paragraph immediately above was correctly made. It suggests that any explanation will be sufficient and on the basis of that, Mr. Orinda has strongly submitted that since he has given his explanation before me, although he changes sometimes to say that such explanation should be given in the evidence during the trial, he has discharged the burden of proving that the Appellant had been brought before court as soon as was reasonably practicable. Thus in the eye of the learned Principal State Counsel, there is no question of the court rejecting that explanation or proof on the ground, for example, that the explanation or proof is inadequate or unsatisfactory or otherwise not acceptable.

To my mind, such an explanation, or call it a proof, is subject to acceptance or rejection by the court and therefore an explanation or a proof *perse* does not guarantee success to the person alleging that the provisions of *Section 72 (3) (b)* of the Constitution have been complied with. Where the court does not accept the explanation or proof given, it means that what has been done by the person who has unsuccessfully alleged compliance with *Section 72 (3) (b)* is unlawful and the resulting trial, if any, will

also be unlawful. It will be an illegal trial furthering violation or contravention of *Sections 70*, *72* and *77* of the Constitution of this country in relation to fundamental rights and freedoms of the Accused in this matter. The relevant law has already been expounded above.

Looking at the explanation given in this case, the Police blame the Office of the Attorney General for the delay while the Office of the Attorney General blames the Police for the same.

Taking what Inspector Martha Muyega and the Principal State Counsel, Mr. Orinda, said, that is the relevant explanation in this case. That is the Prosecution's proof that the Accused "has been brought before" this court as soon as is reasonably practicable in compliance with *Section 72(3) (b)* of the Constitution. The inconsistency is clear. Mud-slinging between the Police and the Attorney General 's Office Nyeri is clear. It does not show the arrest and detention of the Accused in Police custody was reasonable especially when that detention went beyond the stipulated 14 days and subsequently became a year before the Accused was brought to this court. On the contrary it reveals the arrest and detention was unreasonable. The bringing of the Accused to this court on 12th January 2007 for the first time cannot, by any imagination, be said to have been done "as soon as is reasonably practicable" as stated in the Constitution. Who cannot see the negligence the Prosecution themselves do concede is there? Nowhere is evidence shown to the effect that anyone, on the side of the prosecution was concerned about the Accused's fundamental rights and freedoms enshrined in the Constitution. Instead there is a picture of a prosecution which goes on doing its business as if this country has no constitution containing provisions spelling out fundamental rights and freedoms of the individual. Apparently, to them such a constitution does not exist and if it exists, what it says does not concern them for observation when carrying out their law enforcement duties.

To my mind the explanation or proof given is an explanation or proof which is not acceptable and I do not accept it. The constitution of this country is not only the law but is the supreme law of this country to be respected and observed by everybody in the country, especially law enforcement agencies. They are regrettably ignoring the Constitution, especially the provisions relating to fundamental rights and freedoms of the individual. That is why this is not the only case with this problem in this court. I have in mind a finalized case H.C.Cr. No. 19 of 2006 where the Accused, Silas Bundi Kabiro, was first brought to this court about ten months from the date of his arrest, a pending H.C. Cr. Case No. 21 of 2006 where the Accused, Kenneth Mwangi Njogu, was first brought to this court about ten months from the date of his arrest. There are a number of other such cases registered in this court and I am aware that despite the war waged, with my approval, by my learned sister and able colleague at this station, Lady Justice H. M Okwengu, against that practice among the Police or Prosecution, the situation remains as if she had done nothing as the Police or the Prosecution remain immovable, unshakable and impervious exhibiting no human compassion as if they are not serving human beings. If this is happening at Nyeri High Court Station, similar things could also be happening at some other High Court Stations and Magistrate Court Stations in this country. It is a situation courts should not condone for courts of law have to work in accordance with the law. Otherwise, where are human and constitutional rights activists on this? Are they not aware?

The above being the position and this case having been brought before me, this court does not wish to be a party in this unlawful, or unconstitutional proceedings against the Accused person and therefore do hereby declare criminal proceedings, including the information, herein against the Accused person a nullity and acquit him.

He be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 23rd day of February 2007.

J. M. KHAMONI

JUDGE

Present: Mr. Orinda }

M/S Ngalyuka} for the Republic/Prosecutor

Mr. Kiarago for Mr. Gathiga Mwangi for the Accused

The Accused in the Dock

Martin Mwangi Court Clerk