



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

Criminal Case 6 of 2007

**REPUBLICPROSECUTOR
VERSUS**

RIZIKI LOMUNYA ALIAS JOHN.....ACCUSED

R U L I N G

[ON WHETHER OR NOT THERE IS CASE TO ANSWER]

The Accused – RIZIKI LOMUNYA Alias JOHN – was charged with the murder of MUHTONI NYAGAH.

The murder charge, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, of the Laws of Kenya

as under;

That Riziki Lumunya, Alias John, on the 7th Day of June, 2006 at Kimondo slums of Embakasi, within Nairobi Province, murdered Muthoni Nyagah.

In support of its case, the Prosecution called 8 witnesses who testified before this court.

At the close of the evidence by the Prosecution, on 17/07/2007, the Learned Defence Counsel, Mr. Ogesa, submitted that the prosecution had failed to prove its case against the accused person. His grounds are as under:

Of the eight witnesses called by the prosecution, the material ones were P.W. 1, P.W. 5, and P.W. 7. P.W. 1 is purported to have been at the scene during the commission of the offence. But she could not state whether the accused is the one who assaulted the deceased. She was confused about her own statements – allegedly made on 8/6/06, and a further statement made on 12/1/07. The Investigating Officer – P.W. 7 – in his testimony, told this court that he did not know where the statements were made – at the scene of the crime or at the Police Station.

To make matters worse, P.W. 1 denied making the alleged further statement. The same was the position taken by P.W.5, who denied making any further statement.

P.W. 5 denied seeing the accused person at the scene of the crime, thus contradicting P.W. 1 evidence and that of the Investigating Officer (I.O) that she was at the scene and is one of the persons who identified the accused to the Investigating Officer, as the suspect.

Further, continued the Defence Counsel, even after the alleged identification of the accused, the

Investigating Officer proceeded to arrest the accused and took him to the Police custody without any investigations. That submission was uncontroverted. The foregoing are what the defence termed “**contradictory.**”

And finally, and of even greater import, is that upon arrest, and despite there being no investigation by the Investigating Officer, the accused was put in police custody for over 7 months, before being formally charged in a court of law. That, submitted the Defence Counsel contravened the constitutional rights of the accused, as per the provisions of Section 72 of that Supreme Law of this country.

The Defence concluded its case by submitting that the prosecution had failed to prove malice aforethought, a key ingredient of the offence of murder.

In Reply, Mr. Ndemo, Learned Counsel for the State (prosecution), admitted that there were anomalies in the statements of P.W. 1 and P.W. 5 in this case. He further admitted that the further statements alleged to have been taken were not known by P.W. 1 and P.W. 5. He further stated that the further statements were not in the original police file, and he could not explain how that came about.

However, the Learned Counsel submitted that the prosecution had adduced evidence which he believed was credible and warranted putting the accused on his defence. The evidence of P.W. 1 continued, the State Counsel was very clear that she had heard a child telling the person who was beating the mother to stop and take the money from the mother. That, P.W. 1 had heard those words as a next door neighbour of the deceased; that P.W. 1 had gone to the house of the deceased, first with a torch and then with a lantern and found the accused beating the deceased, pleaded with the accused but to no avail. P.W. 1 had used both the torch and the lantern into the deceased house to look for the money in the house of the deceased. The Learned State Counsel submitted that it was not true as alleged by the Defence that P.W. 1 had failed to identify the accused.

On declaring P.W. 5 a hostile witness, the prosecution submitted that they did so because she denied, in court, that she had positively identified the accused as the man who beat the deceased for money given to the deceased. The Learned State Counsel concluded by saying that that evidence tallied with that of P.W. 1.

Finally, the prosecution admitted that the accused had been in police custody for 7 months before he was charged with the offence of murder. But he made the following interesting statement on that point. He said:

“This is a weighty and important matter that has nothing to do with a Ruling on a case to answer. The issue is whether the evidence adduced by the prosecution is sufficient to put the accused on his defence. The Investigating Officer stated in his evidence that the accused was held for that period for investigations, however unjustifiably it may seem at this point.”

Having carefully reviewed the evidence adduced by the prosecution and taken into account the submissions by the Learned Counsel for both sides, I have reached the following findings and conclusions.

It is both prudent and proper to deal with the Constitutional issue raised in this case, first. That point has the potential to dispose of the entire case before this court. The rest of the issues such as whether or not the prosecution had adduced sufficient evidence to warrant putting the accused on his defence; whether there are anomalies or contradictions in the evidence, become mere footnotes **vis-à-vis** the constitutional issue raised by the accused.

It is common ground that the accused was held in custody for 7 months after his arrest and before he appeared in any court and charged with the offence of murder. That being so, it is trite to hold and conclude that the Constitutional and human rights of the accused, as stipulated in Section 72(3), of the Constitution were grossly violated. That sub-section provides as under:

“A person who is arrested or detained 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 where he is arrested or detained 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 subsection have been complied with.”

The prosecution has not tried, much less explained what investigations were going on for the seven months before the accused was brought to, and charged, in court. The only plausible inference is that the accused was arrested and detained upon no reasonable suspicion. And even if there was, any reasonable suspicion, the supreme law of this country permits only 14 days during which the accused can continue being detained without his being charged in a court of law. At the click of the 24th hour of the fourteenth day if the accused has not been brought before court and formally charged with an offence punishable by death, any proceedings thereafter are illegal, null and void. This is because such proceedings are premised and have their genesis on an illegality, and must be terminated forthwith to avoid further and continued violation of the constitutional and human rights of the accused person, as herein above expounded.

It is unfortunate that the prosecution does not seem to apprehend the gravity of the legal issues involved herein. To submit that the weighty and important matter raised by the accused has nothing to do with a Ruling on a case to answer is both incredible and trivialization of the Supreme Law of this Republic.

In the case of **NDEDE VS. REPUBLIC [1991] KLR 567**, where the accused had been convicted on his own plea of “guilty”, the conviction could not stand in light of the violations of the rights of the accused, as stipulated in Section 72(3) (b) of the Constitution. The Court of Appeal had this to say, in part:

“...The trial magistrate ought not to have accepted Ndede’s [accused] plea of guilty. It id not matter that before convicting Ndede the Deputy Public Prosecutor had stated the facts in support of their charges, that Ndede had admitted those facts and the facts themselves had disclosed the offences charged against him. Ndede’s constitutional right given to him by section 72(3) (b) of the Constitution had been violated and he was entitled to an acquittal.”

That is the bottom line which seems to be missed by the prosecution in the case before me. And as this court held in **JAMES NJUGUNA NYAGA VS. REPUBLIC** Cr. Case No. 40 of 2007, **once the violation of the right of the accused under Section 72 (3) (b) has been established, [as is the case here], the proceedings are illegal, null and void, and remain so irrespective of the weight of the evidence that the prosecution may adduce in support of their case.**

In light of the foregoing, I find and hold that there is no case to answer, as far as the accused in this case is concerned.

I need not get into the contradictions of whether or not the prosecution has adduced sufficient evidence to warrant putting the accused on his defence. Such evidence, if any, is of no legal consequence as it is evidence in support of an illegality; in support of a nullity.

In the result, and pursuant to the provisions of Section 84(2) of the constitution, which gives this court original jurisdiction to **make such orders.....and directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of Sections 70 through 83 of the constitution**, I hereby declare the proceedings in this case – Cr. Case No. 6 of 2007 – illegal and null and void.

I accordingly order the immediate termination of the proceedings in this case and release of the accused person, unless he is otherwise lawfully held.

It is so ordered.

DATED and delivered in Nairobi, this 30th day of October, 2007.

O.K. MUTUNGI

JUDGE