



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 213 of 2003

REPUBLICRESPONDENT

VERSUS

AFRICANAS NTHEKE NGUNGAACCUSED

J U D G M E N T

The Accused Africanas Ntheke Ngunga is charged with offence of murder contrary to section 203 as read with section 204 of Penal Code. The offence of murder is punishable by Death.

It is alleged that on 8th July, 2003 about 9.00 p.m. at the University of Nairobi the accused murdered one Felistus Mbithe Mutua.

The trial was protracted due to the accused changing his counsel and filing several applications and also due to the fact I was being transferred to other Divisions of the High Court.

At the close of the defence and during submissions the learned counsel for the Accused raised a Constitutional issue alleging the violation of his human and Constitutional right granted under section 72(3) of the Constitution. Mr. Wamwayi urged that the Accused person, as per the evidence on record, was arrested in Tanzania on 6th March 2004 and was arraigned before the court on 26th April, 2004. He was brought before the court about one month and 20 days after his arrest which is beyond the permitted days of 14 days as per section 72(3). He contended that as his rights were violated the whole trial is a nullity and the Accused should be acquitted.

As this issue goes to the root of the matter, I shall have to deal with this issue before I can proceed to consider the merits of the case and nature of evidence.

Section 72(3) of the Constitution stipulates:-

(3) A person who is arrested or detained —

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(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 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.

I can see from the record of the case that on 3rd November, 2003 the court, on application from the State, issued a warrant of arrest against the Accused.

As per the evidence before this court, it is true that the Accused was arrested on 6th March, 2004 in Tanzania.

Going back to the record of this case, the Accused was arraigned before the court on 26th April, 2004 on which date it directed the Deputy Registrar to allocate a counsel for the Accused.

Thus what is alleged by the Defence Counsel is supported by the record that the Accused was produced before the court after the prescribed period. It is also true that delay is not explained by the Prosecution even after the said issue was raised during submission.

Mr. Wamwaiyi relied on the decision of Court of Appeal in the case between **Albanus Mwasia Mutua and the Republic (Criminal Appeal No.120 of 04 U. R.)**.

The issue of delay of around eight months was raised in the Appeal in the said case but the Court of Appeal heard and determined the issue despite that fact.

The court relied on the case of **Ndede v. Republic (1991) KLR 567**, wherein during conviction on hearing an Appeal from a plea of guilty, the Court of Appeal observed that as there was delay of some thirty days before the Accused was brought before the court, the Trial Magistrate ought not to have accepted his plea of guilty. The court further observed that it did not matter that before conviction the facts were presented by the Prosecutor and the Accused admitted those facts which disclosed the offence charged against him. The court then allowed the appeal and quashed the conviction.

The other case relied by the Court of Appeal was **Kiyato v. R. (1982-88) KAR 418** wherein the Court of Appeal allowed the appeal where the Accused was not provided with an interpreter contrary to section 77(2) (f) of the Constitution.

In the case of **Swahibu Simbauni & Another V. R. Criminal Appeal No. 243 of 05 (1). R.**, the Court allowed the appeal where the Magistrate did not record the language used by the Appellants and which was contravention of section 77(2)(b) of the Constitution.

In these two aforesaid cases, as it was observed in the Albanus case, the nature and strength of evidence brought by the Prosecution in support of the charge did not count.

After observing “*constitutionally the burden was on the police to explain the delay*” the court held in Albanus case, viz.

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having these provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgments appears to be that an unexplained violation of a Constitutional right will normally result in acquittal irrespective of the nature and strength of evidence which may be addressed in support of the charge.”

In subsequent case between **Gerald Macharia Githuka & Republic Criminal Appeal No. 119 of 2004**. (unreported), the Court of Appeal followed the Albanus’ case (supra).

It also considered the observations made in Albanus case, on the duties of the court to uphold the Constitution and to ensure that crime, where it is proved, is appropriately punished, and then found, viz

“We have come to the conclusion, after a careful weighing of these two considerations in the light of the present case, that although the delay of three days in bringing the Appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not give rise to any substantial prejudice to the Appellant and although, on the evidence, we are satisfied that he was guilty as charged we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the Appellant had been brought before the court as soon as was reasonably practicable.”

In my considered view, the finding of the Court of Appeal, as aforesaid is, on all four, relevant and applicable to the present case.

However, Mr. Ondari the learned counsel for the State urged that holdings of the aforesaid cases are not absolute and made feeble attempt to explain that after arrest of the Accused, the identification parade was to be held before he could be brought before the court. I must state that the evidence of identification parade could not be produced before the court for reasons explained. In any event, the explanation offered to the court is not sufficient to overlook the delay for more than one month. If the State was, as it ought to be, aware of the Constitutional right of the Accused, the explanation which is adequate and justified has to be brought before the court. I thus have to regretfully find that I do not agree that the State has complied with its obligation to give explanation for the delay.

The relevant section i.e. section 72(3) does state *inter alia* that **“the burden of proving that the person arrested or detained has been brought before the court as soon as is reasonably practicable shall rest on the person alleging that the provisions of this sub-section have been complied with.”** (emphasis mine)

I have no such satisfaction that the aforesaid burden is discharged by the State.

In the case between **Eluid Njeru Nyaga & Re. Criminal Appeal No. 182 of 2006**, the Court of Appeal denied to hold that any delay to bring the Accused before the court as required in section 72(3) must of necessity amount to a Constitutional breach and must result in an automatic acquittal.

Without commenting on the obvious contradictions in the views of the Court of Appeal, I may respectfully state that in the present case, the Learned State Counsel did embark upon explanation of the delay but could not give the satisfactory explanation.

It is no doubt and is axiomatic that each case depends on its own circumstances but the basic principles of law are unchangeable. It cannot be denied that the makers of the Constitution have imposed the obligation on the State to observe the rights of the Accused persons. It is then the court who has to protect and uphold those rights when seemed to have been violated.

It was further contented that this court, having heard the case, cannot now nullify the trial or acquit the Accused person on this ground.

I may hesitate to accept this fallacious contention. The court, if unaware and thereafter having been pointed out a violation of a Constitutional right, is duty bound to protect the same. That is the Constitutional oath which the presiding Judge has taken and cannot ignore the same.

I see no reason why the court can refuse to address the issue of Constitutionality howsoever late raised in the day.

I thus reject that contention also.

The Assessors have given their opinion of guilt and I am grateful for their opinion I could have also agreed with them had this court was to consider the merits of the case.

But having found that the delay in bringing the Accused person amounted to violation of his rights under section 72(3) and the same not been explained by the State, I have no option but to acquit the Accused person irrespective of the weight of the evidence adduced against him by the prosecution.

I do find this, not being oblivious of the fact that a young life was snatched away probably by the Accused person. But the supremacy of the Constitution has to be upheld by the court.

I note in passing that the Accused has been in custody since the date of his arrest.

In the premises, the Accused is acquitted of the charge leveled against him and he be released forthwith unless held otherwise as per law.

Dated, delivered and signed at Nairobi this 2nd day of October, 2007.

K.H. RAWAL

JUDGE