



CRIMINAL

- Should a criminal trial be terminated for reasons of prolonged detention of accused person?

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 77 OF 2003

REPUBLIC STATE

VERSUS

MUTABARI MITHIKA KOOME RESPONDENT

RULING

The accused Mutambari Mithika Koome raised a Preliminary Objection seeking termination of the charge of murder which he faces in this case. He based his Preliminary Objection on the basis that he was detained in the police station when he was arrested beyond the period stipulated in the constitution. The court on hearing the Preliminary Objection by a ruling dated 26th July 2010 requested the state counsel to clarify whether the accused had been taken before the magistrate's court for committal proceedings. That was the procedure before the law was changed. The court was prompted to ask for this clarification because it found that an order had been made on 20th August 2003 when the accused person first appeared before the High Court for plea. The proceedings indicated as follows:-

“Case to be withdrawn from magistrate’s court.”

The learned state counsel Mr. Kimathi on 26th January 2011 informed the court that indeed the accused had been taken through the committal proceedings before the magistrate's court in C.M.C.C Meru Criminal Case No. 31 of 2003. The state counsel gave to this court a copy of the charge sheet which was presented in the magistrate's court during committal proceedings. That charge sheet shows that the accused was arrested on 8th April 2003 and was presented before the magistrate court on 28th May 2003. It therefore becomes clear that the accused was detained in police custody for a total of 20 days. The period permitted for detention of a suspect in a capital offence in the former constitution was 14 days. See section 72 (3) (b) of the former Constitution. The accused therefore was detained for 6 days in excess of that period permitted under that section. Until the Court of Appeal made a decision on the issue of violation of an accused rights under that section of the constitution, in the case **Julius Kamau Mbugua Vs. Republic** Criminal Appeal No. 50 of 2008 the courts invariably were acquitting accused

persons on finding that their rights had been violated. This was the decision made in cases **Albanus Mwasia Mutua Vs. Republic** Criminal Appeal No. 120 of 2004 and **Gerald Macharia Vs. Republic** [2007] e KLR. In the case of **Gerald Macharia** (supra) the excess period of detention of the accused was 3 days. The Court of Appeal in the above two cases allowed the appellant's appeals on the ground that their trial was not undertaken within the period provided under section 72 (3) (b) of the former Constitution. In the case **Julius Kamau Mbugua** (supra) the Court of Appeal overturned the previous decision on the issue of violation of suspect's rights when the alleged prolonged detention at police station. In that case, **Julius Kamau Mbugua** (supra) the Court of Appeal cited with approval the decision of Emukule J. as follows:-

*“Anyara Emukule J. in **Republic Vs. David Geoffrey Gitonga**, Criminal Case No. 79 of 2006 (Meru) (unreported). In that case, the accused was tried for the offence of murder and after the conclusion of the trial and after the accused had made his defence, his counsel submitted that the trial was a nullity since the accused was detained for 140 days before he was charged in violation of section 72 (2) (b) of the Constitution.*

The trial Judge declined to acquit the accused saying that a breach of section 72 (3) (b) does not render a trial a nullity but entitles an accused to compensation as stipulated in section 72 (6). The trial Judge reasoned thus:-

“I am aware that contrary to opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existence, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized states that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal.

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A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy. A rapacious rapist and a serial killer will not be allowed to go scot-free because either deliberately or inadvertently, the prosecution authority has not deemed it fit to have him brought before a court within 24 hours or as a case may be within 14 days.”

Now that the Constitution of Kenya 2010 under Article 23 (3) (a) to (f) provides the granting of injunction and compensation amongst other remedies available to a person who alleges that the Bill of Rights has been violated the prayer that this court would terminate the accused person's murder trial cannot stand. The accused person has the right to seek the remedies provided under the Constitution of Kenya 2010. The Preliminary Objection raised by the accused is rejected. I dismiss it and order the trial to proceed from where it stopped.

Dated, signed and delivered at Meru this 3rd day of March 2011.

MARY KASANGO
JUDGE