



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

**Criminal Case 40 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**MOSES IKAAYA KIMUTWA.....ACCUSED**

**RULING**

The accused **MOSES IKAAYA KIMUTWA** is charged with **Murder** contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 25<sup>th</sup> day of March, 2008 at Kajiado within Kajiado District, Rift Valley Province, the accused unlawfully murdered **PAUL MUSANGO DAVID**.

The accused in this case is charged with **MURDER** contrary to section 203 as read with section 204 of the Penal Code.

The information is dated was filed, and the accused arraigned in Court on the 9<sup>th</sup> May, 2008. The plea was taken on 23<sup>rd</sup> May, 2008 and a plea of '**Not Guilty**' entered. The hearing of the case on the set dates seems to have been delayed for several reasons. One of those reasons was the fact the accused person requested repeatedly examination for the purpose of age assessments on him. The accused contested the results of the age assessment by the various doctors. The accused person's age was in all occasions assessed to be over 18 years of age.

On 4<sup>th</sup> June, 2009, when the matter came up before HON. OCHIENG J, the advocates on record for the accused notified the Court that they would raise a constitutional issue under S.72 (3) of the Constitution in the course of the trial proceeding, in order not to have the investigating officer testify twice, first in answer to the allegations of violation, and later in support of the prosecution case.

HON. OCHIENG J., in a short ruling intimated that the issue should be raised formally as a constitutional reference in order for the issue to be determined before any evidence in the case is called.

Pursuant to that ruling, the accused filed a formal application on 12<sup>th</sup> June, 2009. That is the application which was argued before me on the 18<sup>th</sup> November, 2009.

The application is filed under **Rules 6 and 23 of the Constitution of Kenya (Supervisory Jurisdiction,**

**Enforcement and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practise and Procedure Rules.** The Applicant, the accused in this case seeks three orders:

- (a) ***That the Court finds the applicant's constitutional rights (to be presented before a Court within 14 days or soon thereafter and being treated as an adult whilst he is a minor) to have been violated;***
- (b) ***That the Court does make an order for the applicant's acquittal;***
- (c) ***That the Court does make an order for damages and compensation as the Court may deem fair and just.***

The grounds cited on the face of the application are 18. However, having perused them, I find that these are not grounds but rather facts upon which the application is based and supported. I have considered each of these grounds.

There is an affidavit sworn by the accused person in support of the application. The gist of the affidavit is that the accused was arrested on 24<sup>th</sup> March, 2008 and detained at Isinya Police Station after presenting himself to the Police. The deponent states that he was taken before **Chief Inspector of Police JOHN MWAURA** on 26<sup>th</sup> March, 2008, where a statement of inquiry was taken from him; that on 31<sup>st</sup> March, 2008 he was taken before **Inspector of Police SAMSON OKANYI** where a charge and caution statement was taken from him.

The accused deposes further that he was arraigned in Court on 23<sup>rd</sup> May, 2008 and that therefore he had been confined for a period of 60 days, which is in contravention of his constitutional rights. The accused deposes further that from the investigation diary, witnesses' statements were taken between 29<sup>th</sup> March, 2008 and 3<sup>rd</sup> April, 2008 and that therefore there was no reasonable explanation or excuse for his prolonged confinement beyond 3<sup>rd</sup> April, 2008 or 8<sup>th</sup> April, 2008.

The State filed a replying affidavit which is sworn by **P.C. MARTIN MUTHENGI**, a Police officer attached at Isinya Police Station, who investigated this case.

The gist of the reply is that the delay in arraigning the accused in Court was inadvertent due to protracted investigations. **PC Muthengi** deposed that after recording statements from witnesses and having completed investigations on 3<sup>rd</sup> April 2008, the Police filed an Apprehension Report at Senior Resident Magistrate, Kajiado Court on 4<sup>th</sup> April, 2008 and at the same time forwarded the Police file to the Attorney-General Chambers for perusal and advice.

I have considered the application and the affidavits filed by both sides together with the submissions by both sides.

Order (a) sought on the application have two limbs: It seeks the Court to find that the applicant's constitutional rights were violated, that is;

**(i) The right to be prosecuted in Court within 14 days or soon thereafter and;**

**(ii) The right to be treated as a child but having been treated as an adult.**

Nothing has been presented to Court in support of the violation alleged that the accused was treated as an adult whilst a minor.

Order (c) of the application which sought compensation for the alleged constitutional violations was not supported by any evidence or in the submissions by counsel. In any event under **S.72 (6) of the Constitution** provides thus:

**“S.72 (6) a person who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that other person.”**

In regard to the alleged violation under **S.72 (3) of the Constitution** and the prayer for an order of acquittal, **S.72(3) of the Constitution** provides;

**“S.72 (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 have observed that the accused pleaded that his right to be produced in Court was pegged on “14 days or so soon thereafter.” That is, the accused contends he should have been produced in Court within 14 days or soon thereafter. The Constitution is very clear that the State’s duty is to have the arrested person produced in Court within 14 days (in case the arrested person is suspected to have committed a capital offence) or so soon as is reasonably practicable. The section provides that the burden lies with the party alleging that there has not been a violation of that section to prove that the suspect/accused was taken to Court as soon as was reasonably practicable.

I have considered the authorities by both counsels. The State cited **DOMINIC MUTIE MWALIMU –V- REP. CRIMINAL APPEAL NO. 217 OF 2005.** The Court of appeal in the above case observed:

**“Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not *ipso facto* prove a breach of the Constitution. The wording of section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84(1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity.”**

I am well guided by this authority. The burden lies on the prosecution to prove the accused was brought to Court as soon as was reasonably practicable. The State has shown that the accused was arrested on 24<sup>th</sup> March, 2008; that investigations were concluded on 3<sup>rd</sup> April, 2008; that the Police file was forwarded to the Attorney-General’s chambers on 4<sup>th</sup> April, 2008 for perusal and advice. All these were within the stipulated time of 14 days considering that the 14 days were lapsing on 8<sup>th</sup> April, 2008. I note that the information which was filed in Court on 4<sup>th</sup> April, 2008 was signed by **T.K. Bifwoli**, State Counsel on behalf of Attorney-General. The Court record shows that the accused was arraigned in Court on the 9<sup>th</sup> of May, 2008. That was a period of thirty (30) days above the period he should have been produced in Court.

The State needed to explain why the accused person was not arraigned in Court by the 8<sup>th</sup> of April, 2008 and why it took them thirty days more to do so. **PC Muthengi** was the investigating officer in this case. He needed to explain what happened when the matter was referred to the Attorney-General for perusal and advice. He does not explain that in his affidavit. That does not mean he has no explanation to offer. That is a matter of evidence and the same can be enquired into

during the trial of the case.

I wish to quote from the case of **ELIUD NJERU NGANGA, Criminal Appeal No. 182 of 2006**, where the Court of Appeal said:

**“While we would reiterate the position that under the fair trial provisions of the Constitution, an accused person must be brought to Court within twenty-four hours for non-capital offences, and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal.”**

I am guided by this authority and I note that the Court of Appeal in the above case, in arriving at the above decision took into account their earlier decision of **ALBANUS MUASYA MUTUA VS. REP. Criminal Appeal No. 120 of 2004**, a case which **Mr. Sigei** for the accused has cited. In the **ALBANUS case**, supra, the Court of Appeal allowed the Appellant’s appeal on the grounds that his constitutional rights under section 72(3)(b) of the Constitution had been violated on account of the Police having deprived him of his right to liberty for 8 months before bringing him to Court. The decision in **ELIUD NGANGA’s case**, supra, must be deemed, by necessary implication, to have qualified the **ALBANUS MUTUA** decision which is an earlier decision of the same Court. The position therefore is that the fact that there has been delay in bringing an accused person to Court within the period stipulated under the Constitution, does not mean that the delay must amount to a constitutional breach and must result in an a automatic acquittal. Again considering the Court of Appeal decision in **DOMINIC MUTIE** case, supra, it would appear that the Court ruled that each case should be considered on the basis of its peculiar facts and circumstances.

Having considered the facts before me, and the decisions of the Court of Appeal, it is my view that the issue of whether the delay constitutes a violation of constitutional rights and whether the State will offer a reasonable explanation, should be determined during the trial of the case.

Those are the orders of the Court.

**Dated** at Nairobi this 11<sup>th</sup> day of February, 2010.

**LESIIT, J.**  
**JUDGE**

**Read signed and delivered in the presence of:**

**Elisha.....Court clerk**

**Accused.....present**

**Mrs Tuta.....For the State**

**Mr. Sigei.....For the accused**

**LESIT, J.**

**JUDGE**