



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Criminal Case 44 of 2006

REPUBLIC PROSECUTOR

VERSUS

KENNEDY OTIENO OYANGA alias ANYONA ACCUSED

RULING

The applicant was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the 7th day of July 2006 in South Kabuoch Location of Homa Bay District within Nyanza Province jointly with others not before court, he murdered **Oure Obondo Rakiro**.

The trial commenced and the prosecution closed its case on 3rd December 2009. The court, upon perusal of the evidence tendered by prosecution witnesses, was satisfied that a *prima facie* case had been established against him. He was therefore placed on his defence. Before he tendered his defence, the applicant filed a constitutional application alleging that his constitutional rights had been violated because he was arrested on 6th September 2006 and kept in police custody until 25th November 2006 when he was taken to court.

In his affidavit in support of the application, the applicant deposed that all the statements recorded by the police in the course of the investigations as well as the post mortem report of the deceased were ready as at the 18th day of September 2006 and therefore the police deliberately kept him in unlawful custody unnecessarily.

In response to the said application, Police Constable Peter Gachie of Ndhiwa police station filed a replying affidavit and stated as follows

- The petitioner was arrested on 6th September 2006 following a complaint made to the station on 8th July 2006.
- The investigating officer visited the scene of the crime, recorded witness statements but the applicant was not arrested at the time because he was at large.
- The OCS Ndhiwa collected the applicant from Awendo police station which is 50 kilometres away from Ndhiwa on 10th September 2006.
- The file was forwarded to the DCIO Homa Bay for onward transmission to the Attorney-General's chambers on 21st September 2006.
- That the DCIO was not satisfied with the investigations carried out and directed that witness statements be properly marked and that the P3 form be included in the file before it was forwarded to the Attorney-General's office.
- That the applicant was escorted to Homa Bay District Hospital on 3rd October 2006 whereupon the file was re-submitted to the DCIO Homa Bay for transmission to the Attorney-General.
- That the file was forwarded to the Attorney-General's office on 11th October 2006 and was returned to the DCIO Homa Bay on 20th November 2006 with instructions to charge the applicant with murder.
- That the applicant was arraigned in court on 26th November 2006.
- That there was delay in typing witness statements because there is no secretary at Ndhiwa police station and all the typing is done by police officers who are not trained in typing, as a result they take a long time to type documents.

· That Ndhiwa police station is far from Homa Bay where the applicant had to be taken for mental assessment and there is only one vehicle available for Ndhiwa which covers a wide area.

It is not in dispute that the applicant was not arraigned in court within 14 days of his arrest. Under the provisions of **section 72 (3) (b)** of the **Constitution**, the applicant was supposed to be produced before court within 14 days of his arrest or soon as practicable.

The police have given an explanation regarding the delay in arraigning the applicant before court. In my view, the explanation given is reasonable. It must be appreciated that there are many factors that may force the police to be unable to beat the constitutional deadline in arraigning suspects in court. Whereas the courts cannot condone unexplained delay on the part of the police, where it is demonstrated that the police did their best in the circumstances, a court should be slow in granting an application as the present one. Murder cases require very elaborate investigative procedures before a file can be submitted to the Attorney-General for advice and thereafter to court. In this case, the police did their best within the prevailing circumstances.

Consequently, I hold that there was no violation of the applicant's constitutional right as claimed in his application which I hereby dismiss. The applicant should proceed to tender his defence to the charge of murder.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.

11/3/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the state

Mr. Otieno for the accused

Court: Ruling delivered in open court on 11th March, 2010.

D. MUSINGA
JUDGE.