



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Criminal Case 25 of 2007

REPUBLIC PROSECUTOR

VERSUS

CHARLES AOKO OGAL alias APUKO 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 22nd day of January 2006 at Kakelo Kamroti sub location in Rachuonyo District within Nyanza Province, the applicant jointly with others not before court murdered **Fredrick Onyango Bandu**, hereinafter referred to as “**the deceased.**”

In the course of the trial, the applicant filed an application dated 2nd November 2009. The same was brought under the provisions of **sections 65, 72 (3) and 77 (1) & (2)** of the **Constitution of Kenya**. He urged the court to make a finding that his constitutional rights had been violated because he was arrested and kept in police custody for a period of 41 days before he was arraigned in court.

In support of his application, the applicant deposed in his affidavit that he was arrested on 12th May 2007 and taken to Oyugis Police station where he was held until 22nd June 2007 when he was taken to court. He appeared before a Deputy Registrar who fixed the date of plea as 4th July 2007.

The Attorney-General was served with the said application on 3rd November 2009. On that day Mr. Kemo, Senior Principal Prosecution Counsel, requested for a period of two weeks to enable the police respond to the said application. The court adjourned the hearing of the application to 1st December 2009. Come that day Mr. Kemo sought a further adjournment for two more weeks since he had not yet received any instructions. The court allowed the application and gave the police more than the two weeks that were sought and ordered that the application be heard on 9th of February 2010. On that day Mr. Mutai, Senior State Counsel, told the court that a certain police officer from Kosele police station was coming to court to give an oral explanation as to why the applicant had not been taken to court within the 14 days of his arrest. He urged the court to put aside the application until 10.30 a.m. to enable the said police officer reach the court.

When the application was eventually called out for hearing at 11.40 a.m., Mr. Mutai told the court that the police officer had failed to turn up. He therefore had no explanation to offer.

It is now trite law that unexplained delay in arraigning an accused person in court amounts to violation of his constitutional rights.

See **ALBANUS MWASIA MUTUA –VS- REPUBLIC**, Criminal Appeal No. 120 of 2004.

In this matter there is no dispute that the applicant was held at Oyugis police station for a period of 41 days before he was taken to court. The police were given several opportunities to explain the cause of the delay but they were unable to proffer any explanation.

In the circumstances, the applicant's application must succeed. Consequently the charge of murder that had been preferred against the applicant cannot stand. The applicant is acquitted of the said charge and is hereby set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF MARCH, 2010.

**D. MUSINGA
JUDGE.**

8/3/2010

Before D. Musinga, J.

Mobisa – cc

Kennedy – Interpreter – English/Dholuo

Mr. Gitonga for the state

Mr. Kaburi for the accused

Accused present

Court: Ruling delivered in open court on 8th March, 2010.

**D. MUSINGA
JUDGE.**