

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT ELDORET

Criminal Case 2 of 2008

**REPUBLIC:.....PROSECUTOR
VERSUS
CORNELIUS KIPKOSGEY KOGO:.....ACCUSED**

RULING

CORNELIUS KIPKOSGEY KOGO faces the charge of having murdered **JULIUS KIPRUTOH LELEI** on the 19th August 2007 contrary to section 203 as read with section 204 of the Penal Code. He has filed an application under Sections 72(1), 72(3) 77(1) of the Constitution of Kenya as read with Rule 23 of the Constitution (Supervisory and Protection of Fundamental Rights) on the 25th August 2007 when he himself surrendered to the police but he was not arraigned in court until the 21st February 2008 for purposes of taking plea, a period of 171 days or six months which time he says was too long and unreasonable delay and thereby his rights to liberty and fair trial were breached and so any intended prosecution would be a miscarriage of justice as the trial is founded on a nullity. He contends that his continuing detention is a further violation of his constitutional rights.

The investigating officer in the case one Wilson Kipkemei Sambu a police officer stationed at Songhor Crime Section has sworn an affidavit explaining the delay. He states that the postmortem on the body of the deceased was performed on the date the accused was arrested but that the mental examination on the accused to determine whether or not he was fit to answer to the charges of murder was delayed because the only Doctor at Nandi Hills District Hospital who could undertake the said examination was away attending some training and he was not examined until 31st October 2007. The file was then sent to the D.C.I.O on 2nd November 2007 who advised that the statement of a very key witness must be recorded but the witness was not traced until 25th November 2007 when she recorded her statement. That the file was received from the state counsel for purposes of charging the Applicant herein on 29th December 2007 but by that time post election violence had erupted and there was a lot of insecurity and it was not possible to bring the accused to court until 21st February 2008.

The state concedes the delay but states that the reasons given for the delay are reasonable and so the Preliminary Objection should not be withheld.

I find that the accused was first brought to court on the 11th of February 2008 but could not take plea as an advocate had to be appointed for him as he faced a capital offence. He finally took plea on 26th February 2008. The issue for the court to determine is whether the reasons given for the delay are acceptable. It would not have served any useful purpose for the prosecution to charge the accused with murder before his mental status was established. It is not alleged that the doctor who was to perform this mental examination on the accused person decided to go for training well knowing that the accused person was to be brought to the hospital for the mental examination. There was no other doctor to examine the accused. And all relevant evidence had to be collected in a bid to sustain a charge of murder. In the circumstances leading to the delay herein and considering that the prosecution did not occasion the post election violence. I find that it is not sound to uphold the Preliminary Objection. Even if I were to find, which I do not find, that a breach of the constitutional rights of the accused herein was occasioned, his automatic acquittal does not result from

such breach. The law cuts both ways. The accused shall stand trial for the murder of the deceased herein and if there is not enough evidence to sustain a conviction then he will be acquitted at that stage. In the end this Preliminary Objection is found to be without merit and it is accordingly dismissed.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF MAY 2010

**P.M.MWILU
JUDGE**

IN THE PRESENCE OF:-

Andrew Omwenga - Court clerk

Mr. Misoi - Advocate for the Applicant

Present - Accused

Mr. Chirchir - Advocate for state.