



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

**Criminal Case 37 of 2005**

**REPUBLIC**

**-VS-**

**MARK KYALO NDUNDA**

**RULING**

The accused has been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

On the 22<sup>nd</sup> October, 2004 at Sunrise Estate

House No.82/653 in Nairobi within Nairobi

Province, murdered GRACE IRUNGU.”

From the record, it is apparent that initially, this case was being handled by Ojwang J who only managed to hear one witness. Consequently, the trial Judge declared the case a mistrial and referred the same to me for further directions. Thereafter, the defence counsel informed the court that he had been instructed to file a preliminary objection. On 17<sup>th</sup> November, 2008, the defence counsel viz, Mr. Waweru submitted that the rights of the accused under Section 72 (3) of the Constitution had been violated. According to him, the accused was arrested on 22<sup>nd</sup> October, 2004 and was first produced in court on 30<sup>th</sup> March, 2005. He estimated that period to be 5 months and 10 days. Further to the above, Mr Waweru also submitted that the police never gave any explanation for the delay. In support of his submissions, he relied on the following cases:

ALBANUS MUTUA –VS- REPUBLIC

CRIMINAL APPEAL NO.120 OF 2004

and

PAUL MWANGI MURUNGA –VS- REPUBLIC

CRIMINAL APPEAL NO.35 OF 2006

Apart from the above, he also submitted that the rights of the accused under Section 77 (1) of the Constitution have also been violated – and hence I should “acquit” him.

On the other hand, the State through Mr. Ong’ondo, State Counsel has opposed the application on the ground that the same has been filed late. Specifically, he pointed out that the same is over three years old and that the accused had all along been represented by qualified counsel. To support his submissions he relied on the following case:

DOMINIC MUTIE MWALIMU –VS- REPUBLIC

CRIMINL APPEAL NO.217 OF 2005

Mr. Ong’ondo concluded his submissions by urging the court to decide the case on its own merits.

This court has carefully considered the submissions by both learned counsels. From the record, it is apparent that though the defence counsel raised a preliminary objection after the lapse of over three and half years, the court had only heard one witness. Apart from the above, it is also obvious that the State never denied the fact that the accused had been unlawfully held for a total of 5 months and 10 days. Neither did the State give any explanation whatsoever for the inordinate and unreasonable delay. In view of the above, I hereby find that the delay was oppressive and in gross violation of the constitutional rights of the accused. In the case of

ALBANUS MWASIA MUTUA –VS- REPUBLIC

CRIMINAL APPEAL NO.120 OF 2004

The Court of Appeal stated inter alia:

*“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of the constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under Section 72 (3) (b) of the Constitution also amounted to a violation of his rights under Section 77 (1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone”.*

In this case, there was clearly an unexplained delay and violation of the constitutional rights of the accused. Apart from the above, it is obvious that the delay also denied the accused a fair hearing within a reasonable time by an independent and impartial court established by law. The upshot is that I hereby declare the proceedings null and **void ab initio**. Due to the above, I hereby “acquit” the accused in relation to the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code. The accused should be released forthwith unless held lawfully. Those are the orders of the Court.

**MUGA APONDI,**

**JUDGE.**

Ruling read, signed and delivered in open court in the presence of the accused; Waweru Defence Counsel and Ong’ondo State Counsel.

**MUGA APONDI,**

**JUDGE.**

**3<sup>RD</sup> FEBRUARY, 2009.**