



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**Criminal Case 7 of 2006**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**MOHAMED RAMADHANI.....ACCUSED**

**RULING ON A PRELIMINARY OBJECTION**

Mohamed Ramadhani Mwangasambi, the accused, was arraigned before the court on a charge of murder. Plea was taken before Njagi J, on 15<sup>th</sup> May 2006. For one reason or another, trial has failed to kick off. On 29<sup>th</sup> October 2008, the accused, through his counsel Mr. Kamoti, gave notice of Preliminary Objection in which it is contended that the accused's fundamental rights to a fair trial have been breached. The notice is appurtenant to an Originating Notice of Motion filed on the same date in which the accused seeks that he be discharged and set at liberty on the basis that the charges facing him and the proceedings preferred against him are invalid, incompetent and unlawful as the same are a violation of Section 72 (3) and Section 77 (1) of the Constitution which requires that the accused be charged and or be arraigned in court within fourteen (14) days of his arrest so as to guarantee him a fair hearing within a reasonable time.

In the supporting affidavit sworn by the accused, it is deponed, *inter alia*, that the accused was arrested on 9<sup>th</sup> February 2006 while admitted in hospital and on his discharge, on 7<sup>th</sup> March 2006, he was taken to Kwale Police Station where he was kept in police cells till 12<sup>th</sup> April 2006 when he was taken to court for plea. It is further deponed that the accused was held in custody for a total of 37 days i.e. 23 days beyond the period he could have been lawfully held. In consequence thereof, the accused contends that his constitutional right to a fair trial within a reasonable time was violated and the charge leveled against him should be declared invalid, incompetent and unlawful resulting in his discharge and freedom.

By the time the Originating Notice of Motion came up for hearing on 23<sup>rd</sup> March 2009, the Republic had not filed any response to the same. Mr. Onserio, the Learned State Counsel who appeared for the Republic stated that the Investigating Officer who could have sworn a replying affidavit was deceased and his assistant had retired from the police force. Learned counsel was therefore not in a position to contest the Originating Notice of Motion.

Counsel for the accused restated the averments in the supporting affidavit and invoked three decisions of the High Court to buttress the accused's contention.

I have considered the Originating Notice of Motion, the supporting affidavit and the submissions of Learned counsel. Having done so, I take the following view of this matter. The Leading cases on the accused's trial rights under the Constitution are **Albanus Mwasia Mutua – v – Republic [Criminal Appeal No. 120 of 2004]** and **Eliud Njeru Nyaga – v – Republic [Criminal Appeal No. 182 of 2006]**. In the former the Court of Appeal observed as follows:-

**“On the one hand it is the duty of the courts to ensure that crime where it is proved is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution.”**

The court further stated as follows:-

**“The jurisprudence which emerges from the cases, ..... appears to be that an unexplained violation of a constitutional right will normally result in an acquittal.....”**

In **Eliud Njeru Nyaga – v – Republic (supra)** the same court stated as follows:-

**“Mutua’s case the prosecution had had an opportunity to explain the cause of delay but failed to offer an explanation. In the appeal before us the ground raising the violation of Constitutional right was raised only on the morning of the hearing.....”**

The accused's Notice of Objection and Originating Notice of Motion have been filed before hearing of this case has commenced. The Republic has been accorded adequate opportunity to explain the cause of delay in arraigning the accused before the court. As in the Albanus Mwasia Mutua's case, the Republic has not explained the cause of delay and in the language of the same case **“an unexplained violation of a constitutional right will normally result in an acquittal.”**

I am bound by the decision in the Albanus Mwasia Mutua's case. The accused's allegations of violation of his trial rights under the Constitution having been uncontroverted. I must hold and do hold that his constitutional rights have been violated as he claims. Accordingly, I declare the charge and prosecution of the accused null and void and these proceedings should not continue as the same are founded on an illegality. The accused is hereby acquitted and I order his immediate release unless he is otherwise lawfully held.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF APRIL 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Kamoti for the applicant and Monda for the Republic.

**F. AZANGALALA**

**JUDGE**

**29<sup>TH</sup> APRIL 2009**