



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**ATKISII**

**Constitutional Reference 23 of 2009**

**TONY ABIERO OWINO )**

**GEORGE OUMA OTIENO alias MBORI ) ..... APPLICANTS**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING:**

The applicants were charged with manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. The particulars of the offence were that on the 11<sup>th</sup> day of December 2007 at Kanguka market, Migori District Nyanza Province, jointly with others not before court they unlawfully killed Bernard Ochola Nyakwaka, hereinafter referred to as “the deceased”. Prior to the commencement of the aforesaid case before the Principal Magistrate’s court at Migori, the applicants filed a Constitutional reference before this court challenging the validity of the said charge. In their petition which was supported by affidavits sworn by each one of them, the applicants deposed that they were arrested on 12<sup>th</sup> of December 2007 and kept in police custody incommunicado until 8<sup>th</sup> of January 2008 when they were arraigned in court for plea. They were therefore in police custody for 28 days. They stated that their constitutional right as enshrined in Section 72 (3) (b) of the Constitution had been violated. For the alleged offence of manslaughter, which is a bailable one, the applicants ought to have been arraigned in court within 24 hours from the date of their arrest. Alternatively, if they were to be charged with murder, they ought to have been taken to court within 14 days from the date of the arrest. They urged the court to find that the charge that had been preferred against them was annulity in law.

Mr. Owade for the applicants cited several Court of Appeal decisions to buttress the above arguments. In ALBANUS MWASIA MUTUA –VS- REPUBLIC, Criminal Appeal No. 120 of 2004, the Court of Appeal held that unexplained delay in arraigning an accused person in court amounts to violation of his constitutional right under Section 72 (3) (b) of the Constitution. Such unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge, the court stated.

Dealing with a similar application in ELISHA OTIENO ODERO –VS- REPUBLIC, [2008] eKLR, the Court of Appeal emphasized the importance of adhering to important constitutional provisions. The court delivered itself thus:

“As this court as said time and again, the prosecution must learn to operate within the laws upon which our fledging democracy is based. We are all, the police, the Attorney General and the courts bound

to accept that we are governed by law and the concept of the rule of law must be given a practical reality”.

The police did not give any explanation at all as to why the applicants were not arraigned in court within the period as stipulated in the Constitution. In the absence of any explanation, I find and hereby hold that the applicants’ constitutional right as aforesaid was abrogated and the charge of manslaughter that was preferred against them cannot therefore stand. In the circumstances this application is allowed and the applicants are acquitted of the charge that had been preferred against them. They are ordered set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 26<sup>TH</sup> DAY OF MAY, 2009.

**D. MUSINGA**

**JUDGE.**

**26/5/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Owade for the applicant

Mr. Kemo for the state

**Court:** Ruling delivered in open court on 26/5/2009.

**D. MUSINGA**

**JUDGE.**