



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

**Criminal Case 19 of 2007**

**REPUBLIC.....APPLICANT**

**VS.**

**PETER KAMAU NG'ANG'A.....RESPONDENT**

**RULING**

The accused has been charged for the offence of murder, contrary to Sec. 203 as read with Sec. 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 26<sup>th</sup> December, 2006 at Lungalunga slums, Industrial Area, within Nairobi Area Province, murdered JOHN NDUNG’U KANGOMBE.”***

From the record, it is apparent that the accused was first arraigned in court on 12<sup>th</sup> March, 2007. After the accused was assigned a defence counsel, the case was set down for hearing. Unfortunately, the case never took off on the hearing date since the defence counsel informed the court that he had written an official letter requesting the DPP to reduce the charge to manslaughter. After several months of procrastination, the State refused to accept the offer of a plea of “guilty” for the lesser charge of manslaughter. That decision was duly communicated to the court on 30<sup>th</sup> October, 2007. Subsequently, the former defence Counsel viz, Mr. Wandugi failed to turn up in court on four occasions for difference reasons. Seeing the above, the accused requested the court to assign him a new defence counsel. Immediately the new counsel came on record, he filed the preliminary objection. During the hearing of the application Mr. Opollo submitted that the accused was arrested on 26<sup>th</sup> December, 2006 and he was detained at Industrial Area Police Station upto 15<sup>th</sup> March, 2007. The defence counsel lamented that the prosecution never gave any explanation for the delay. According to him, the accused had been detained for a period of 80 days – whereas the prosecution was only entitled to hold him for 14 days. He was of the opinion that the accused had been held in custody in excess of 66 days. Further to the above, the defence counsel also submitted that the actions of the prosecution offended Sec. 70 (a), 72 (3) (b) and 77 of the Constitution of Kenya. To support his submissions, the defence counsel quoted the following authorities:

***REPUBLIC VS. PETER OTIENO & 2 OTHERS*** Nrb. HCC Crim. Case No. 4 of 1007

***ANN NJOGU & OTHERS VS. REPUBLIC*** Nrb. HCC Misc. Crim. Application No. 551 of 2007

**PAUL MWANGI MURUNGA VS. REPUBLIC** Nakuru Crim. Appeal No. 35 of 2006

**ROSE WANJIKU VS. REPUBLIC** Nrb. HCC Crim. Case No. 48 of 2005

For each of the above cases, the defence counsel gave the ratio *decidendi* of the same.

On the other hand, the State through Mr. Imbali, State Counsel has opposed the application and stated that he was relying on the affidavit sworn by Julius Wambua dated 22<sup>nd</sup> October, 2008. Further to the above, he referred the court to paragraph (10) of the above affidavit. The same explains that the accused could not have been produced before the court within fourteen days as prescribed by the law due to protracted investigations. Besides the above, Mr. Imbali also submitted that the statements by witnesses were recorded

between 28<sup>th</sup> December 2006 and February, 2007. Apart from the above, Mr. Imbali also submitted that the Constitutional right of liberty is comparable to the right to life of the deceased. In his concluding submissions, the learned defence counsel urged the court to proceed with the case in the interest of public, justice and fairness. He also urged the accused to seek compensation under Sec. 72 (6) of the Constitution.

From the record, it is apparent that the accused was initially arraigned in court on 12<sup>th</sup> March, 2007. Immediately, the accused was assigned a defence counsel viz, Mr. Wandugi. For some strange reasons, the defence counsel never attended court regularly and that request that he be replaced. In response, a new counsel viz, Mr. Opollo came on record on 14<sup>th</sup> July, 2008. It was during the hearing date on 8<sup>th</sup> October, 2008 that the new defence counsel informed the court about the preliminary objection. Having gone through the replying affidavit of Police Constable Julius Wambua, it is obvious he only gave a chronicle of events that led to the delay in bringing the accused to court. One even wonders whether there was a conspiracy to delay availing the accused to court in order that he be released on a technicality. The court hereby wishes to direct the PPO, Nairobi Area to conduct investigations relating to how the case was handled and take necessary action. Whereas the court acknowledges that the delay was **not** explained it is of the considered opinion that the accused will be adequately compensated under the provisions of Sec. 72 (6) of the Constitution of Kenya. The total circumstances of the case do not dictate that the accused should be “acquitted”. The principles of justice and fair play dictate that the court should hear the case to its logical conclusion. That does **not** in any way take away the assumption that the accused is innocent till proved, I hereby dismiss the application since the same has **no** merits at all. Lastly, I hereby direct that the case proceeds as scheduled on 16<sup>th</sup> and 17<sup>th</sup> September, 2009. Accused remanded in custody.

Order:

I hereby direct that the PDR forwards a copy of the Ruling to the PPO, Nairobi Area and Commissioner of Police within the next 15 days for necessary action.

Ruling read, signed and delivered in open court in the presence of the accused,

**Opollo** .....Defence Counsel

**Kivihia** .....State Counsel

**MUGA APONDI**

**JUDGE**

**24<sup>TH</sup> JUNE, 2009**