



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**CRIMINAL CASE 42 OF 2008**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**PATRICK MZUNGU ATETUA.....ACCUSED**

**RULING**

The accused has raised a preliminary objection to the proceedings which have been instituted against him. The said proceedings are founded on an information which asserts that the accused committed the offence of murder contrary to section 203 as read with section 204 of the Penal Code.

It is common ground that the incident giving rise to the charge took place on 29<sup>th</sup> April 2008. It is also common ground that the accused was arrested on the day after the incident

However, it was not until 15<sup>th</sup> May 2008 that the accused was first taken before a court of law.

By his calculations, the accused asserts that there was a delay of one day in taking him to court. His said calculations are founded on the provisions of **section 72 (3) of the Constitution**, pursuant to which a person charged with a capital offence ought to be taken to court within 14 days, from the date he is arrested or detained.

In this instance, the accused submitted that the prosecution had failed to offer any reasonable explanation for the delay. As far as the accused was concerned, it was not sufficient for the prosecution to argue that the delay was for only one day.

In answer to that submission, the prosecution submitted that there had been no delay at all. In other words, the state believes that the accused was taken before the court, within the prescribed period of 14 days.

The issue for determination is one of computation of time. On the one hand, the prosecution submits that by virtue of the provisions of **Section 57 (a) of the Interpretation and General Provisions Act**, the day on which the thing is done is to be excluded when computing time. Therefore, as far as the prosecution is concerned, the date of arrest (being 30<sup>th</sup> April 2008) is to be excluded when computing the 14 days.

Secondly, the prosecution submitted that by virtue of section 57 (c ) of the Interpretation and General Provisions Act, the last day herein was to be excluded, as it was not a working day.

To my mind, the issue at hand can best be determined with the assistance of the provisions of **section 57 of the Interpretation and General Provisions Act**. I do therefore set out herein the said provisions in *extenso*. It states;

***“In computing time for the purposes of a written law, unless the contrary intention appears –***

***(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***

***(b) if the last day of the period is Sunday or a public holiday or all official non-working or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***

***(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day***

***(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time.”***

First, it is clear that that section is only applicable if no contrary intention appears in the statutory provision which is to be interpreted. And in any event, as the Constitution is the supreme law, if the Interpretation and General Provisions Act were in any manner inconsistent with it, the Act would be void to the extent of any such inconsistency.

In this case, none of the parties suggested that there was any inconsistency, nor did the court find any such inconsistency between the Constitution and the Interpretation and General Provisions Act.

In the event, and pursuant to Section 57 (a) of the Act, the date of arrest is to be excluded from the computation of the 14 days during which the accused should have been taken to court.

By my calculations, the accused should therefore have been taken to court on or before 14<sup>th</sup> May 2008.

If that date fell on a Sunday or a public holiday or on any official non-working day, it would be excluded. However, the 14<sup>th</sup> of May 2008 fell on a Wednesday. It was therefore not an excluded day.

The fact that the Investigating Officer could not seek the advice of the Attorney General on 10<sup>th</sup> and 11<sup>th</sup> May 2008, because those two days fell on a week-end, cannot, in law, permit the prosecution to add those two days to the 14 days allowed by section 72 (3) (b) of the Constitution.

In effect, this court finds that there was delay of one day, in taking the accused to court.

The accused urged the court to declare that because he had been taken to court later than was permissible under the Constitution, the proceedings against him are null and void. Therefore, he asks that the said proceedings be terminated, and that he should be set free forthwith. In that regard, the accused places reliance on **ALBANUS MWASIA MUTUA V REPUBLIC, CRIMINAL APPEAL NO. 120 of 2004**.

In that authority, the Court of Appeal held that an un-explained violation of a constitutional right will normally result in an acquittal. The court also held that as the appellant had been held in custody for eight months before he was brought to court, his trial could not have been held within a reasonable time, as envisaged by Section 77 (1) of the Constitution.

In my considered opinion, the delay of a short period of time cannot be said to deprive an accused person of his right to be tried within a reasonable time. I therefore find that there has been no violation of the rights vested in the accused by virtue of section 77 (1) of the Constitution. As he was brought to court after the expiry of no more than one day later than that prescribed, he could still have been tried within a reasonable time.

The next question is whether or not the accused ought to be acquitted because he was brought to court one day late.

In **ELIUD NJERU NGANGA V REPUBLIC, CRIMINAL APPEAL NO. 182 of 2006**, the Court of Appeal said;

***“While we would reiterate the position that under the fair trial provisions of the Constitution, an accused person must be brought to court within twenty-four hours for non-capital offences, and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal.”***

I am not only bound by that decision, but I believe that it is founded upon a sound legal reasoning.

Secondly, when arriving at the said decision, the Court of Appeal did take into account their earlier decision in **ALBANUS MWASIA MUTUA VS REPUBLIC, CRIMINAL APPEAL NO. 120 of 2004**. By necessary implication, the court must be deemed to have qualified their earlier decision.

Meanwhile, in the case of **DOMINIC MUTIE MWALIMU VS REPUBLIC, CRIMINAL APPEAL NO. 217/05**, the Court of Appeal said;

***“In our view, the mere fact that an accused person is brought to court either after twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. “***

In this case, the Investigating Officer was labouring under the mistaken belief that just because he could not seek the advice of the Attorney General immediately after he received the report from the Government Chemist, because it was a weekend, the two days would be excluded from the computation of the 14 days. He therefore believed that the accused was taken to court within the prescribed period.

In the circumstances, the Investigating Officer has not explained the delay of one day. And to that extent, I find that the constitutional rights of the accused, under section 72(3) (b), have been violated.

In **PAUL MWANGI MURUNGA Vs REPUBLIC, CRIMINAL APPEAL NO. 35 of 2006**, the Court of Appeal said;

***“So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again, the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that.”***

I stand guided by that decision. In the event, I decline the invitation by the accused to declare the proceedings illegal or null and void. The trial will therefore proceed to its logical conclusion.

**Dated, Signed and Delivered at Nairobi, this 28<sup>th</sup> day of September, 2009.**

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**FRED A. OCHIENG**

**JUDGE**