



**REPUBLIC OF KENYA**

**HIGH COURT AT KISII**

**CRIMINAL REVISION 2 OF 2009**

ERICK SHEBA OTIENO ..... APPLICANT

**VERSUS**

REPUBLIC ..... RESPONDENT

**RULING**

The applicant was 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 14<sup>th</sup> August, 2007 at Yokia Beach of Mfangano location within Suba District, the applicant unlawfully killed **Gordon Otieno Oyega**.

The applicant was arrested on 15<sup>th</sup> August, 2007 but was not arraigned in court until 8<sup>th</sup> October, 2007.

When the hearing of the case commenced, the applicant raised a constitutional issue relating to breach of his Fundamental Right as provided for under **section 72 (3) (b)** of the **Constitution**.

The learned trial magistrate forwarded the matter to this court for determination.

On 11<sup>th</sup> May, 2009, Mr. Kemo, Senior Principal State Counsel, sought an adjournment to enable him obtain instructions from the police. The application was granted and the hearing of the application was adjournment to 7<sup>th</sup> July, 2009. On that day the appellant was not produced in court.

When the application came up for hearing on 9<sup>th</sup> July 2009, Mr. Kemo informed the court that he had been waiting for instructions since May 2009 but the same were not forthcoming. The Court granted the Attorney-General 10 days within which to file his affidavit and the matter was set for ruling on 30<sup>th</sup> July 2009. To date no affidavit has been filed.

It is not in dispute that the police violated the applicant's constitutional right in failing to arraign him in court within the stipulated period of time in terms of the provisions of **section 72 (3) (b)** of the **Constitution**. This court and the Court of Appeal have repeatedly held that unexplained violation of an accused's constitutional right will normally lead to his acquittal irrespective of the nature and strength of the evidence that may be adduced against him.

In the circumstances, the court holds that the charge against the applicant cannot stand and proceeds to acquit him of the same. The applicant is set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT KISII THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**17/9/2009**

Before D. Musinga, J.

Nyangaga/Mobisa – cc

Mr. Kemo for the state

Accused – present

**Court:** Ruling delivered in open court.

**D. MUSINGA**

**JUDGE.**