

REPUBLIC.....PROSECUTOR

VERSUS

NELSON KAGUTHI WAWERU.....1ST ACCUSED

CHRISTOPHER KIPLANGAT CHOGE....2ND
ACCUSED

RULING

NELSON KAGUTHI WAWERU and CHRISTOPHER KIPLANGAT CHOGE are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 15th January 2007 at Emarraigushu Farm Solai in Nakuru District within Rift Valley Province they jointly murdered Richard Kipkorir Cheruiyot. After taking the evidence of one witness, they separately applied under **Rules 21** and **23** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules** for a declaration that their constitutional rights under **Sections 70** and **72(3)** of the **Constitution** have been grossly abused and violated and therefore the charge herein is unconstitutional and illegal. The same should therefore be dismissed and they be set free.

The application is based on the ground that the accused persons were arrested on 15th January 2007 but they were not taken to court until 12th February 2007. The reason given for that delay by the Investigating Officer, Mr. Julius Langat, is that the deceased's relatives refused to go and identify the body for post mortem examination until the police traced the deceased's penis which had been chopped off. Besides finding that allegation unbelievable, I agree with counsel for the accused persons that that is no good reason for delay in bringing the accused to court. I therefore find that that delay violated their rights under **Section 72(3)(b)** of the **Constitution**.

This finding notwithstanding, I am unable to grant this application. I have anxiously considered this application in light of the Court of Appeal and this Court's decisions including my own on the issue and I have come to the conclusion that we are not doing the right thing.

The past Court of Appeal and this Court's decisions on the issue have not squarely addressed violation of the fundamental rights of the victims of crime giving raise to the charges against the accused persons whose rights are also violated in the course of their prosecution. In the circumstances I think it is right to address this issue in this ruling.

Fundamental rights are not enjoyed in isolation. When one complains that one's fundamental rights have been violated, the court has to consider all the circumstances of the case before granting one's plea. The court cannot ignore the violation of other people's rights in the course of violation of one's constitutional rights. As I have stated the accused persons are charged with murdering one Richard Kipkorir Arap Cheruiyot. Though as of now that is a mere allegation, if true, the deceased has lost his constitutional right to life. Justice demands that his killers be punished. Justice also demands that the violation of the accused person's constitutional right under **Section 72(3)(b)** be also punished. The deceased in this case had nothing to do with the delay in bringing the accused persons to court. The accused persons constitutional rights were violated by the police who, as I have said, have not offered any reasonable excuse for the delay. In my respective view they should have sought damages from the state for the violation of their constitutional rights. Dismissing the charge against them before hearing the case and finding them not guilty will in my view in total disregard of the deceased constitutional right to life.

For these reasons I dismiss this application.

DATED and delivered this 27th day of October, 2009.

D. K. MARAGA

JUDGE.