



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

**Criminal Case 35 of 2006**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ESTHER WAMBUI KINUTHIA.....ACCUSED**

**RULING**

On 27/2/2006 the accused ESTHER WAMBUI KINUTHIA was charged with the murder of PLABANUS NJERU GATHUA contrary to Section 203 as read with Section 204 of the penal Code, Cap.63 Laws of Kenya.

When the hearing commenced on 29/4/08, Learned Counsel for the accused raised a Preliminary objection, on a point of law, challenging the legality of the proceedings. The Notice of the Preliminary Objection had been filed and served on the prosecution on 31/10/07, on the following grounds: the fundamental rights to a fair trial of the accused had been breached in that she had been held in custody for 252 days without being brought to court, and that is against the provisions of Section 72(3) of the Constitution of Kenya.

The facts behind the challenge are that the accused/applicant was arrested on 21/8/05 and was first taken to court on 24/4/06, but the plea was actually taken on 3/5/06.

The correct calculation comes to 231 days taking into account the record in the file and the 14 days under Section 72(3) (b) of the Constitution under which the police are entitled to hold a murder suspect before bringing the same to court.

Under Section 72(3) (b) of the Constitution, under which this application is brought, a person arrested or detained upon reasonable suspicion of having committed, or about to commit an offence punishable by death, shall be brought before a court as soon as is reasonably practicable and at any rate not later than 14 days after his arrest or detention. The burden of proving that those provisions of the constitution are complied with rests upon the prosecution.

In opposition to the challenge, the prosecution, through Learned State Counsel, Mr. Ndemo, produced an Affidavit deposed to by Inspector David Kiumba, and dated 28/4/08, in which they tried to explain the delay. The Affidavit states that the delay was due to unavailability of some of the eye witnesses, and that the file was sent to the Attorney General's Chambers on 14/2/06 and was not returned till 27/2/06. The Affidavit concludes by stating that **"in the circumstances the delay in bringing the accused to court for trial was reasonable"**.

The Learned State Counsel submitted that given the fact that the incidents that constitute acceptable

delay as per the Judgment of the Court of appeal in ELIUD NJERU NYAGA Cr. Appeal No. 182 of 2006, are not exhaustive, **unavailability of key witnesses, as in this case, can form a good ground for acceptable delay.**

Pausing at this juncture, it is important to stress that, granted that the incidents given by the Court of Appeal in Cr. Appeal No. 182 of 2006, for acceptable delay are not exhaustive, the reason sought to explain the delay must be **paramateria** to those given in the above Court of Appeal. That is to say either the accused/arrested person fell ill or was admitted in a hospital within the 14 days he should have been brought to court, or the court was not sitting within the period of the constitutionally permitted period.

Needless to say, unavailability of a witness or witnesses does not fall within the categories given by the court to explain the delay. This is because, any proceedings instituted after the lapse of the 14 days, unless satisfactorily explained as above, are illegal, null and void, irrespective of the weight of the evidence that the prosecution might have or adduce.

Protracted investigations by the police has never, and cannot, constitute an explanation for delay. As this court held in HENRY OPONDO OGAM Cr. Case No. 75 of 2007 “.....**if the investigators believe there is an important piece of information which cannot be completed within the stipulated period of 14 days, they nevertheless should bring the accused before court; then seek court orders under sub-Section (4) of Section 72 of the Constitution. That way the continued stay in custody is upon the orders of the court, not the prosecutor/investigator.**”

From the Affidavit produced by the prosecution, and taking into account the courts holding as to what constitutes **explained delay**, there is no explanation of the delay in the application before me. What clearly comes out from the affidavit is an elaborate effort by the units within the prosecution docket to pass the buck from section to the other: the investigator blaming the delay on the unavailability of the potential witnesses; the delay in completing the postmortem report after the Government Chemists or analyst; the time taken in the Hon. The Attorney General’s office in granting the requisite consent to prosecute.

The list of inter-unit blames in an effort to explain the delay within the prosecution docket is endless. Unfortunately, none of the reasons fits the categories mentioned or required to satisfy the delay within what is envisaged in Section 72(3) (b) of the Constitution.

The submission by the prosecution that the delay was occasioned by efforts to trace key (actually eye) witnesses to the incident is as unconvincing as it is untenable. Once it is held that upon proof that the proceedings were instituted after the expiry of the 14 days, the entire proceedings are illegal, null and void irrespective of the weight of the evidence by the prosecution, the issue of key or crucial witnesses becomes irrelevant. That is because the forum for adducing such evidence does not, and cannot, exist in the absence of satisfactory and acceptable explanation of the delay.

Finally, this court has repeatedly held that the remedies/redresses available upon violation of Section 72(3) (b) and 72(b), as per Section 84(1) of the Constitution are not mutually exclusive. The contrary position held by the Learned State Counsel is rather contradictory. To hold that the proceedings instituted after the contravention of Section 72(3) (b) are illegal, null and void, then proceed to hold that such proceedings can still be used to found a claim for compensation under Sub-Section (6) of the same Section, is difficult to follow.

Put differently, the remedy in Section 72 (6) is over and above what is given in Sub-Section (3) and cannot therefore be seen as the only remedy available to the accused/applicant.

That is the thrust of the provisions of Section 84 (1) of the Kenyan Constitution, that acquittal is no bar to a claim for compensation for illegal and unlawful detention of an arrested/detained suspect, if he/she can prove the claim in a civil case.

The upshot of all the foregoing is that I find and hold that the proceedings before me were instituted in

contravention of the provisions of Section 72(3) (b) of the Constitution. To that end, they are in violation of the Fundamental and Constitutional rights of the accused. They are therefore illegal, null and void **ab initio**.

Accordingly I declare the proceedings against the accused illegal, null and void and order for his release forthwith, unless he is otherwise lawfully held.

DATED and delivered in Nairobi, this 22<sup>nd</sup> Day of May, 2008.

**O.K. MUTUNGI**

**JUDGE**