



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

**Criminal Case 96 of 2005**

**REPUBLIC**

**-VS-**

**PAUL NJEHIA KANUGU**

**RULING**

The accused has been charged for the offence of murder, contrary to Section 203 as read with 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence as stated on the information are as follows:

“On the 6<sup>th</sup> day of April, 2005 at Kabuku village in Kiambu District within Central Province, murdered STEPHEN MULU MUEMA.”

From the record, it is apparent that the accused was first arraigned in court on 4<sup>th</sup> October, 2005. Thereafter, the plea was taken on 13<sup>th</sup> October, 2005. Consequently, the trial started in earnest on 7<sup>th</sup> November, 2006 and eventually, the court heard eleven witnesses. After the prosecution closed its case, the court made a ruling that the prosecution had established a prima facie case against the accused. Subsequently, the court decided to hear the defence case on 4<sup>th</sup> December, 2007. On that date, the defence counsel informed the court that the accused was sick and that he had been admitted at Kenyatta National Hospital. Thereafter on 7<sup>th</sup> February, 2008, the defence counsel informed the court that the accused had personally filed an application challenging the validity of the charge before the court. On 21<sup>st</sup> May, 2008, Ms Masaka submitted that the constitutional rights of the accused under Section 72 (3) of the constitution had been violated since he was arrested on 12<sup>th</sup> April, 2005 but was arraigned in court on 4<sup>th</sup> October, 2005. That means the accused was placed in custody for a period of about six months. The defence counsel took issue with the fact that the prosecution did not explain the reason for the delay upto the hearing date. She also added that there was no evidence to show that the police had obtained the permission of the court to hold the accused in custody. In support of her submissions, Ms Masika quoted the famous case of:

*ALBANUS MUTUA –VS- REPUBLIC Criminal Appeal No.120 of 2004*

in which the Court of Appeal stated *inter alia*, that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence that may be adduced. The defence counsel concluded her submissions by urging the court to allow the application and “acquit” the accused.

On the other hand, Mr. Ndemmo, State Counsel took issue with the fact that the preliminary objection was raised late after the prosecution closed its case on 6<sup>th</sup> November, 2007. Apart from the above, he pointed out that the investigating officer was present in court on that date and that he gave evidence relating to the circumstances of the case. Therefore, the prosecution had the opportunity to cross-examine the witness to explain the delay. In support of his submissions, the learned State Counsel quoted the case of

*Njoroge Njenga -vs- Republic Criminal Case No.64 of 2006*

In that case, the court stated that the prosecution must be given an opportunity to explain the delay before they close their case. Mr. Ndemmo concluded his submissions by stating that the accused should seek compensation for any violation of his constitutional rights. The learned Counsel relied on the case of

*Republic -vs- Daniel Mbugua & George Isaac Onyango Criminal Case No.91 of 2004*

In that case, the preliminary objection was dismissed and the accused was advised to press for compensation under Section 72 (6) of the Constitution of Kenya.

This court has carefully considered the detailed submissions by both learned counsels. Apart from the above, the court has obviously noted the prosecution evidence that led it to rule that the same had established a prima facie case against the accused. No doubt, there are two competing constitutional rights – that are at stake. On one hand, the defence counsel has stated explicitly that the rights of the accused as enshrined by Section 72 (3) of the constitution have been violated. She has ably demonstrated the above by stating that the accused has been unlawfully held in custody for 6 months. The learned State Counsel has not challenged the said period. However, Section 71 of the Constitution states as follows:

“No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of crimina offence under the Law of Kenya of which he has been convicted.”

From the above, it is apparent that the constitutional rights provided by Section 72 (3) and Section 71 are at par. None of them is superior to each other. This court appreciates and holds the Court of Appeal in high esteem. It is not lost on

me that it is the highest court and also the fact that its decisions are binding on the lower courts. However, the court wishes to note that one of its leading authority has been quoted by many counsels out of context. The same is that of

***ALBANUS MWASIA MUTUA –VS- REPUBLIC***

***Criminal Appeal No.120 of 2004***

In the said case, the Court of Appeal stated ***inter alia***:

“At the end of the day, it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in custody for a whole eight months and that, apart from violating his rights under Section 72 (3) (b) of the Constitution also amounted to a violation of his rights under Section 77 (1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”

Firstly, the above decision emphasizes that courts have a duty to enforce the provisions of the constitution. No doubt both Section 71 and 72 (6) are also part of the same constitution and the court in its profound wisdom did **not** suggest or hint that the other constitutional provisions are inferior or should be ignored by lower courts. This Court is of the considered opinion that for one to fully understand the Constitution he/she must read the same in its entirety. Provisions of the Constitution should **not** be read in isolation or out of context.

Besides the above, when one is required to give an explanation that means that after a complaint has been made, then the adverse party must be accorded a reasonable opportunity to give an explanation. In this case, the prosecution availed eleven witnesses and closed its case. Then the defence counsel turned around to complain that the rights of the accused have been trampled on. That is about 2½ years after the accused had been arraigned in court and all witnesses have given their evidence. Justice, fairness and logic dictate that this case be decided on the entire evidence on record. I do believe that the circumstances of the case justifies handsome and adequate compensation for the violation of the rights of the accused under Section 72 (6) of the Constitution. By the end of the day, this court completely concurs with the basic principle of law that an accused must be considered innocent till proved otherwise. I do wish to give the accused a chance to defence himself against the allegations made by the prosecution. In view of the above, I hereby reject the preliminary objection raised. The upshot is that the trial will proceed to its logical conclusion.

**MUGA APONDI,**

**JUDGE**

**13<sup>TH</sup> JUNE, 2008**

Ruling read signed and delivered in open court in the presence of the accused: M/s Masaka Defence Counsel and

Mr. Gikonyo State Counsel.

**MUGA APONDI,**

**JUDGE.**

**13<sup>TH</sup> JUNE, 2008.**