



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTRTS
CRIMINAL CASE NO. 53 OF 2007
REPUBLIC.....PROSECUTOR
VERSUS
STEPHEN ONYANGO APONDI.....ACCUSED

R U L I N G

The Accused/Applicant, STEPHEN ONYANGO APONDI, was on 16/8/2007 charged with the murder of MOREEN ANYANGO APONDO, contrary to section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

The offence is said to have been committed at Ngomongo Estate in Nairobi.

Before the hearing formally commenced, on 26/2/08, the accused filed and served a Notice of Preliminary Objection, on the prosecution, challenging the legality of these proceedings.

The grounds of the objection are, **inter alia**, that the accused was arrested on 4/4/07, but not produced in court until 20/8/07, which is more than four months later. It is also the applicant's case that no explanation as to why he could not be brought to court earlier than 20/8/07, has been given by the prosecution.

Accordingly, it is the applicant's case that his rights under Section 72(3) (b) of the Constitution of Kenya were contravened and violated.

That Section 72(3) (b) provides that any person arrested upon reasonable suspicion of having committed an offence punishable by death must be brought before court as soon as is reasonably practicable, and at any rate before the expiry of 14 days. The Section goes further to state that the burden of proving compliance with the stipulated period rests with the prosecution.

Any proceedings instituted after the expiry of the 14 days, is illegal, null and void, as it violates the Fundamental and Constitutional Rights of the accused.

In Reply, the prosecution, through Learned State Counsel, Ms. Mwanza, admitted that the accused was kept for 4 months before being produced in court. However, the prosecution submitted that despite the delay the accused should not be released. He, the applicant, can seek compensation under Section 72(6) of the Constitution. The prosecution also produced an Affidavit sworn by Cpl. Maxwell Otieno, dated

15/4/08, attempting to explain the delay.

I begin by stating that the effort by the prosecution to explain the delay falls flat. It is unsatisfactory and does nothing but expose the untenable blame- game – passing the buck – within the various units of the prosecution docket. I reject the same as lacking in merit and legal basis.

In absence of satisfactory explanation of the delay in bringing the accused before court, as held in Cr. Appeal No. 182 of 2006 ELIUD NJERU NYAGA, and the various decisions by this court on the issue, there is no known cure to the nullity of proceedings instituted in violation of the provisions of Section 72(3) (b) of the Kenyan Constitution.

For whatever it is worth, it is trite to point out that, the redress provided in Section 72(6) of the Constitution is not mutually exclusive of the redress of releasing an accused person where the proceedings are held, as in this case, to be illegal, null and void, as provided for in Section 84(1) of the Constitution.

As this court has repeatedly held, the compensation referred to in Section 72(6) is over and above the release consequent upon institution of illegal proceedings against an arrested person, brought to court after unexplained delay, in contravention Section 72(3) (b) of the Constitution.

In the result, I hold that the Fundamental Rights of the accused were, and continue to be, violated by the institution of these proceedings.

Accordingly, I declare these proceedings to be unconstitutional, illegal and null and void **ab initio**.

I therefore order the release of the accused/applicant forthwith, unless he is otherwise lawfully held.

DATED and delivered in Nairobi, this 5th Day of June, 2008.

O.K. MUTUNGI

JUDGE