



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Criminal Case 56 of 2006**

**REPUBLIC.....APPLICANT**

**VERSUS**

**JOHN MWANZIA MUSYOKA ..... ACCUSED**

**RULING ON A PRELIMINARY POINT**

1. The Preliminary Point raised by Mr D.R.T Konya Esq Advocate is that since the accused person herein, John Mwanzia Musyoka was arrested, detained and arraigned in court more than 14 days after arrest, his constitutional rights under Section 72 (3) (b) of the Constitution were grossly violated and the present proceedings rendered a nullity. That therefore the accused is entitled to release forthwith as was held in the case of Albanus Mutua vs R, Cr. Appeal No. 1201/2004 and Michael Nguyu & Others vs Republic, H.C.CR.C No. 51/2007 (Machakos).

2. The response by Mr Wang'ondy, learned state counsel is that the Affidavit in response to the objection, filed on 5/5/2008 and sworn on the same day by I.P Peter Kirui gives a reasonable explanation and the Republic has therefore discharged the burden of proving that the accused person was brought to court as soon as was reasonably practicable in the circumstances of this case. That affidavit reads as follows:-

**"AFFIDAVIT**

I, No. 53383 INSPECTOR PETER KIRUI of P.O Box 3 KITHIMANI YATTA do hereby make this affidavit and state as follows:-

1. THAT I am the Deputy Officer Commanding Police Station Yatta Police Station.
2. THAT I was transferred to Yatta Police Station on 7<sup>th</sup> August 2007.
3. THAT by delegation of the authority the Commissioner of Police has authorized me to swear this affidavit on his behalf to explain the circumstances that led to the delay in charging the accused with 14 days. (sic)
4. THAT the investigating officer by name BOAZ LIKAMI was transferred in and handed over the original file and all the exhibits to the then Officer Commanding the Police Station.
5. THAT I perused the original file and noted the case was comprehensively investigated by PC LIKAMI.

6. THAT a report of murder was received at Ndithini Patrol Base area on the 27<sup>th</sup> April 2005 and P.C. LIKAMI proceeded to the scene on the same date.
7. THAT the accused person disappeared immediately after the incident and was arrested on 14<sup>th</sup> February 2006, 10 (ten) months later at Thika Town where he was hiding.
8. THAT the accused when he was arrested was sick as is evident from the investigations diary. (Annexed herein and marked PK1).
9. THAT accordingly the arresting officer P.C. JOSSEPH SAINA escorted accused person to the hospital for treatment.
10. THAT the accused person was escorted to Matuu Sub District Hospital for mental check up on 16<sup>th</sup> February 2006 and the investigation officer was advised to take him on 24<sup>th</sup> April 2006 as the psychiatrist was not available at the time.
11. THAT when the investigating officer P.C. LIKAMI took the accused to the hospital on 24<sup>th</sup> April 2006, the psychiatrist was not available and was advised to take him to Mathari Mental Hospital.
12. THAT on 27<sup>th</sup> April 2006 the investigating officer took the accused to Mathari Mental Hospital where he was advised to obtain a court order.
13. THAT on advice by D.C.I.O Machakos the investigating officer was directed to Machakos General Hospital and on the same date he traveled to Machakos General Hospital and booked an appointment. He was advised the psychiatrist will be available on 13<sup>th</sup> June 2006.
14. THAT on 13<sup>th</sup> June 2006 the accused was examined by psychiatrist and returned to Yatta Police Station to await the report on his mental status.
15. THAT the report was not released to the investigating officer by the hospital until 6<sup>th</sup> November 2006 when the report became available. Annexed herein and marked PK2 is copy of the medical examination report on mental condition of the accused person.
16. THAT the investigating officer brought to court the very next day that is on the 9<sup>th</sup> November 2006.
17. THAT the psychiatrist report on mental condition of the accused was important because of the brutal way accused committed this heinous crime.
18. THAT another factor that contributed to the delay in bringing the accused to court within 14 days was the fact that he disappeared immediately after committing the crime as is evident from the investigations diary annexed herein and marked PK3.
19. THAT another cause of the delay was due to the fact that Ndithini Police Patrol Base has no vehicle and depends on vehicle from D.C.I.O Yatta which at time is not available as is evident from the investigations diary.
20. THAT owing to the vast area under Yatta CID Police Division it was not possible for the investigating officer to use the said motor vehicle exclusively and this explains why there were delays when we could not do anything.
21. THAT it is also important for the court to note that the scene of crime was very far away that is 110 (one hundred and ten) kilometers away. Annexed herein and marked PK4 is a copy of crime report.
22. THAT the delay in charging the accused person was beyond our control as is apparent from the

foregoing.

23. THAT the court should not lose sight of the fact that the victim was brutally killed and that his fundamental right to life was also violated.

24. THAT I have been advised by the State Counsel which advice I verily believe to be correct that the accused's constitutional rights does not supersede the right to life of the deceased.

25. THAT what is deponed to herein above is true to the best of my information, knowledge and belief saves for information the sources of which have been specifically stated.

SWORN by the said PETER KIRUI at MACHAKOS this 5<sup>th</sup> day of May 2008)

BEFORE ME:                    )

SIGNED

SIGNED)

DEPONENT)

COMMISSIONER OF OATHS/MAGISTRATE”

3. Section 72 (3) (b) of the Constitution provides as follows:-

“A person who is arrested or detained –

a) .....

b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

4. Clearly, the Republic through the Attorney General, having admitted that the accused person was taken to court close to 9 months after arrest, has the constitutional duty to prove that the accused was indeed taken to court as soon as was reasonably practicable. The only explanation given in this case is that it took the police between 14/2/2006 and 9/11/2006 to do one thing; have the accused examined as to mental fitness and then arraign him in court. That whereas in fact, he was examined only on 13/6/2006, four (4) months after his arrest, the report was only availed on 6/11/2006 and then he was taken to court on 9/11/2006.

5. My mind is very clear that the explanation is wholly unreasonable and it is not difficult to see why; the accused could have been taken to court in time and the court would be obligated, before taking plea, to enquire into his mental status and the police had no business keeping the accused in their custody for 9 months and then claim that the explanation given is reasonable, because it is not.

6. Other excuses given in the above affidavit are also ridiculous and unreasonable; it does not matter that the accused person disappeared after the offence was allegedly committed because the important dates are those of arrest and arraignment in court only and the explanation for delay, if any. Further, the

lame excuse about lack of a motor vehicle and distance of the scene of the alleged crime would only be pertinent issues if they are raised within the context of the explanation. In this case, the two excuses are misplaced as compared with the main reason why the accused could not be taken to court in time.

7. Granted, as argued by Mr Wang'ondy, a life was lost and the accused person may have had a hand in it but as was said in Anne Njogu & Others vs R, Misc. Application No. 551/2007, the weight of evidence or the gravity of offence are irrelevant once proceedings are a nullity by fact of breach and/or violation of fundamental rights as is the case here.

8. In the case of Michael Nguyu vs R (supra) and words which I think also apply in this case, this court stated as follows:-

“Before I uphold the objection, I should add this; the High Court is now inundated by applications from suspects invoking the Albanus Mutua case to their circumstances and seeking release from custody. I am aware that release from custody is not the only remedy for breach of fundamental rights under Chapter 5 of the Constitution, Section 72 included. The Constitutional Court in Arony-vs-Republic H.C.MISC. 494/2003 said as much and went on to award damages for breach of certain fundamental rights. The Court of Appeal in declining to order the release one of the Appellants in Samuel Ndungu Kamau and Another (2007) e KLR said that any constitutional remedy under Section 84 of the Constitution was still an option available in circumstances similar to those obtaining in this case. The Police and Office of the Attorney General must wake up to the reality of this situation and suspects must also not assume that in all instances they must be released for breach envisaged by Section 72 (b) of the Constitution. Invariably some may succeed and others may not.”

9. Those words aptly apply to this situation and I reiterate that this court is now receiving in every instance of this nature almost copy-cat explanations from the Police and the Attorney-General which are neither reasonable nor acceptable. I reiterate that the words “reasonably practicable” mean that the reasons given by the Attorney-General as to delay must apart from being acceptable must also show that there was a good and practicable action taken to ensure that the accused was taken to court in the earliest after expiry of 14 days from his arrest. That test has not been met in this case.

10. In the event, I shall without further ado declare that the continued detention of the accused in this case is unconstitutional and the proceedings herein being a nullity as a result thereof, then the accused is ordered to be released unless he is otherwise lawfully held.

11. Orders accordingly.

Dated and delivered at Machakos this 4<sup>th</sup> day of June 2008.

**ISAAC LENAOLA**

**JUDGE**

In the presence of: **Mr Konya for Accused**

**Mr Wang'ondy for Republic**

**ISAAC LENAOLA**

**JUDGE**