



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 53 OF 2003**

**REPUBLIC**

**VERSUS**

**RAPHAEL MUTUI WAMBUA ..... ACCUSED**

**RULING**

1. On 16/4/2008, the accused herein, Raphael Mutui Wambua filed an Application under Section 72 (1) and (3) as well as Section 77 (1) and 2 of the Constitution seeking that the charges against him “be dropped forthwith” for reasons that his fundamental rights under these sections had been violated in that he was arrested and kept in police custody for more than a month instead of the mandatory 14 days, before he was arraigned in court. Before the Application could be heard, I alerted him to the fact that his advocate, D.R.T. Konya Esq. had filed a Notice of Preliminary Objection on 18/3/2008 which was worded as follows:-

**“NOTICE OF PRELIMINARY OBJECTION**

**TAKE NOTICE that the accused person shall raise a preliminary objection on points of law to the charge preferred against him at the next mention/hearing on the following grounds:-**

**1. THAT his constitutional rights as entrenched under S 72 (3) (b) and 77 (1) (22) (a) (b) (c) of the constitution had been, are being, are likely to be violated by these proceedings which were rendered NULL and VOID by virtue of the said violations of the constitutional rights of a fair trial and protection of the law, of the accused person.**

**2. THAT these proceedings be declared NULL and VOID for the reasons advanced above.**

**DATED at MACHAKOS this 12<sup>th</sup> day of March 2008.**

**DIXON R.T. KONYA**

**ADVOCATE FOR ACCUSED PERSON”**

2. It was agreed that since the Notice of Preliminary Objection and the Application by the accused in person raise the same issues, the Notice would be argued by Mr Konya and his position was as follows:-

That the accused person was arrested on 18/2/2003 on suspicion that on 17/8/2001 at Katuma village, Kiteta Location in Makueni District within Eastern Province, jointly with others he murdered Shadrack Muvuu Wambua. That he was only arraigned in court on 27/1/2004 and therefore he was in custody for more than 14 days contrary to the mandatory provisions of Section 72 (3) (b) of the Constitution. That

being the case, he argued that the proceedings against him were a nullity and the accused person was entitled to immediate release as was held in Albanus Mutua vs R Cr. Appeal 1201/2004.

3.The Republic represented by Mr Wang'ondu, learned state counsel while conceding the point raised, nonetheless said that the explanation for the delay was reasonable and the proceedings should continue. The explanation aforesaid was contained in an affidavit sworn by one C.I.P David Luganji on 6/5/2008 and for clarity of issues, I deem it prudent to reproduce it as follows:-

**"AFFIDAVIT**

**1, No. 219126 CHIEF INSPECTOR DAVID LUGANJI of Post Office Box Number 2 KIKIMA do make oath and state as follows:-**

**1.THAT I am CHIEF Inspector of Police currently attached at Mbooni Police Station.**

**2.THAT I was transferred to Mbooni Police Station on 26<sup>th</sup> October 2005 and many files among them this file were handed over to me by my predecessor.**

**3.THAT by delegation of authority, the Commissioner of Police has authorized me to swear this affidavit on his behalf and explain the circumstances leading to the delay in charging the accused persons within 14 days as provided for in the Constitution.**

**4.THAT as the officer in charge I am charged with the duty and responsibility of investigating alleged offences, taking charge of all criminal files and exhibits and supervising junior officers.**

**5.THAT I took over the file from investigating officer then CPL OSMAN MOHAMMED and PC CHERUIYOT.**

**6.THAT on 17<sup>th</sup> August 2001 a report of assault on deceased person was made at Tawa Police Patrol Base at around 5.00 p.m and the accused together with another person still at large were mentioned.**

**7.THAT on the same day PC ISAAH GORO and SHADRACK MAVULI WAMBUA visited the scene and established that the deceased had been taken to Machakos General Hospital and the accused person had gone into hiding.**

**8.THAT further on the same day a report that the deceased had passed away while undergoing treatment was made to the Police Station. The investigating officer started searching for the accused and his accomplices.**

**9. THAT on 26<sup>th</sup> February 2003 the accused person who had fled was arrested at Tawa market.**

**10. THAT on 27<sup>th</sup> February 2003 the accused person was escorted to Mbooni Police Station by PC MUTHINA.**

**11.THAT on 10<sup>th</sup> March 2003 the accused person was escorted to Machakos General Hospital for both age and mental assessment but the Hospital Administration advised the Police to obtain a court order (Annexed herein and marked DLI is a copy of OB/NO.7/1033/03).**

**12.THAT the accused was brought to Machakos High Court on 13<sup>th</sup> March 2003 (Annexed here and marked DL2 is copy of OB NO. 11 OF 213/03/03).**

**13.THAT on 29<sup>th</sup> April 2003 the committal proceedings commenced and OCS Mbooni forwarded the file to OCPD Makueni for his further action (Annexed herein and marked DL3 is copy of his letter).**

14. THAT by 3<sup>rd</sup> June 2003 the committal bundle was not ready as there were areas the D.C.I.O Makueni had requested to be covered that had not been covered (Annexed herein and marked DL4 is his letter directing OCS Mbooni on points he need to cover.)

15. THAT sometime in July 2003 when Section 230 Criminal Procedure Code was repealed the investigating officer sought to withdraw the proceedings in the lower court to enable him forward the file to State Counsel for fresh charge of murder to be filed.

16. THAT due to lack of vehicle the process of withdrawing the lower court charge took a long time. The accused was discharge on 12<sup>th</sup> September 2003.

17. THAT by then the only court where committal bundle file were forwarded was Machakos Chief Magistrate's Court.

18. THAT owing to the vast area under D.C.I.O Makueni it was not possible for the investigating officer Mbooni to use the said motor vehicle exclusively and this explain why there were days when they could do nothing at all.

19. THAT the delay in charging the accused person was beyond our control as is apparent from the foregoing.

20. THAT the court should not lose sight to the fact (sic) that the victim was brutally killed and his fundamental right to life was also violated.

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

22. 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 CHIEF IP DAVID LUGANJI)

at MACHAKOS this 6<sup>th</sup> day of May 2008)

BEFORE ME: )

) SIGNED

SIGNED ) DEPONENT )

)

MAGISTRATE"

4. From the above, the explanation for delay in arraigning the accused in court on time after his arrest on 23/2/2003 was that the now defunct "**committal bundle**" process took a long time and that "**due to lack of a vehicle the process of withdrawing the lower court charge took a long time.**"

5. I need not belabour the point; the explanation prima facie is unreasonable and it cannot discharge the burden that is imposed on the Republic to show that the accused person was taken to court as soon as was "**reasonably practicable.**" The accused person was in custody for close to one year and to say that preparation of committal bundles and lack of a motor vehicle are the reasons there was delay why is to trivialise a matter so serious in constitutional jurisprudence.

6. I should say that whether the accused disappeared from the scene of the incident or that the evidence

against him is overwhelming is wholly irrelevant in looking at the import of the provisions of Section 72 (3) (b) which is 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.”**

7. I say this with respect because the Republic in this situation has only one obligation; show, with proof, that the accused was arrested and detained for more than 14 days but that he was later arraigned in court as soon as was **“reasonably practicable.”** All other matters raised in the affidavit of C.I.P David Luganji are irrelevant (see Anne Njogu & Others vs R, Misc.Cr. Application No. 551/2007 per Mutungi J.

8. The words **“reasonably practicable”** have the following meanings:-

In their ordinary meaning **“reasonably”** means,

**“Arguably, believably, credibly, logically, sensibly, acceptably”** see the Concise Thesaurus 2002 ed.

**“Practicable”** on the other hand means:

**“Achievable, attainable, doable, feasible, performable, possible, viable, within the realm possibility”**  
– Concise Thesaurus (supra)

9. I cannot in all fairness in the circumstances of this case hold that with the explanation given, the accused person was brought to court as soon as was **“reasonably practicable”** after his arrest and I must uphold the objection as raised.

10. Having so done, in Albanus Mutua (supra) the Court of Appeal explained the twin duties imposed by the Constitution on this court. The learned judges stated as follows:-

**“On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution.”**

11. Sadly in this case and notwithstanding the weight of evidence, nor the death of the deceased, the constitutional rights of the accused should prevail for reasons given.

12. I shall now declare the proceedings a nullity and order the release of the accused unless he is otherwise lawfully held.

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

**ISAAC LENAOLA**

**JUDGE**

In the presence of:

**Mr Konya for Accuse**

**Mr Wang' Ondu for Republic**

**ISAAC LENAOLA**

**JUDGE**