



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

**Criminal Case 48 of 2007**

**REPUBLIC**

**versus**

**JAMES MUNYITHIA KITWEMWE::::::::::::::::::1<sup>ST</sup> ACCUSED**

**JOHN MUTUNGA MWANGANGI:::::::::::::::::: 2ND ACCUSED**

**RULING ON A PRELIMINARY OBJECTION**

1. The accused persons herein, James Munyithya Kitwemwe and John Mutunga Mwangangi are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the night of 23<sup>rd</sup> August 2007 at Kyulungwa Market, Mwingi District, they jointly murdered Muisyo Muasa.

2. On 10.4.2008, Mr. Mutiso Makau, advocate, filed a notice of preliminary objection premised on section 72 (3) (b) and (5) of the Constitution alleging violation of fundamental rights because the accused persons were kept in police custody for more than fourteen (14) days from the date of arrest and that the explanation given by the police is unreasonable and that the present proceedings should be nullified and the accused persons released. In support of that position, Mr. Makau stated that the accused persons were arrested on 27.8.2007 but were only taken to court on 25.9.2007 and that the explanation given by PC Boniface Muthengi in his Affidavit sworn on 29.5.2008 did not discharge the burden to prove that the accused persons were taken to court as soon as was reasonably practicable. He relied on this court's decision in Republic vs Michael Ngunyo & Others H.C.CR. 51/2007 and the decision of Mutungi, J. in Anne Njogu & Others vs Republic Cr.Appeal No.551/2007 to urge the point that the objection is merited and should be upheld.

3. Mr. Wang'andu, learned state counsel in opposing the objection relied on the Affidavit of PC Muthengi aforesaid which I will shortly reproduce but Mr. Wang'andu's point was that the delay in taking the accused persons to court on time was occasioned by inability to type witness statements speedily; inability to perform the post-mortem because the deceased's relatives were not available and lastly because the High Court was on Summer Vacation.

4. 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 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 detention 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 his subsection have been complied with.”*

5. In a bid to discharge the obligation to show that the accused persons were brought to court as soon as was reasonably practicable, the Republic has filed the following affidavit:-

“Affidavit

*I, Boniface Muthengi of P.O. Box 2 Mwingi of the Republic of Kenya make oath and state as follows:-*

*i. That I am a Police Constable currently attached at CID Office Mwingi.*

*ii. That as a police officer I am charged with the duty and responsibility of investigating into alleged offences within my area of local jurisdiction.*

*iii. That by delegation of authority the Commissioner of Police has authorized me to swear this affidavit on his behalf and explain the circumstances that led to the delay in charging the accused persons within the 14 days.*

*iv. That the incident in this case occurred on 23<sup>rd</sup> August 2007 at Kyulungwa Market about 10 kilometers from Mwingi Police Station.*

*v. That a report on the same was made at Mwingi Police Station on 25<sup>th</sup> August 2007.*

*vi. That on 25<sup>th</sup> August 2007 at about 18.20 hours two Police Officers namely Cpl Jacob Okongo and PC John Nyamu proceeded to the scene and made initial investigations after which they collected the body and took it to Mwingi District Hospital Mortuary.*

*vii. That on 27<sup>th</sup> August 2007 both Cpl Okongo and PC Nyamu proceeded to Kyulungwa Market and arrested the suspects herein following a tip off that they were the last people seen in the company of the deceased when alive.*

*viii. That on 28<sup>th</sup> August 2007 IP Gachoka, PC Oluoch and PC Shamolla all proceeded to Kyulungwa Market and arrested Mwasya Muli Maluki and Ngui Nzoka who were also suspected to be involved in the death of the deceased.*

*ix. That on 30<sup>th</sup> August 2007 PC John Nyamau escorted the relatives of the deceased to Mwingi District Hospital and on arrival the said relatives identified the body of the deceased to the doctor who performed the post mortem.*

*x. That following a complaint to the DCIO Mwingi I was instructed by the DCIO to take over investigations in this case which I effectively did on 4<sup>th</sup> September 2007.*

*xi. That on 4<sup>th</sup> September 2007 I took all the accused persons from the Police*

**Station cells to my office and interrogated each of them.**

**xii. That on the same day I requested Inspector Wambua to record each of the accused person's statements under inquiry.**

**xiii. That I embarked on typing and compiling the statements herein between the 5<sup>th</sup> and 10<sup>th</sup> September 2007.**

**xiv. That on 11<sup>th</sup> September 2007, following the instructions of the DCIO Mwingi, IP Wambua, PC Onyiego, PC Farah and PC Ngugi all proceeded to Machakos Principal State Counsel's Office with the four accused persons Namely (1) James Munyithya (2) John Mutunga Mwangangi (3) Ngui Nzoka and (4) Mwanzia Muli all who were to be charged with the offence of murder.**

**xv. That I am informed by the learned State Counsel which information I verily believe to be correct that there was no evidence to support the charges of murder against both Ngui Nzoka and Mwanzia Muli. Consequently, he directed that both the two be released forthwith.**

**xvi. That I am also informed by the learned State Counsel which information I verily believe to be correct that there was sufficient evident to warrant prosecution of both James Munyithya and John Mutunga Mwangangi with the offence of murder.**

**xvii. That on the same day 11<sup>th</sup> September 2007 at about 11.30 am the learned State Counsel went to court to file information but the High Court was on vacation and most of the staff member were not on duty and therefore it was not possible for him to file information against the accused.**

**xviii. That consequently, the learned State Counsel instructed the aforesaid officers who had taken the accused persons from Mwingi to return the accused back and wait until the 24<sup>th</sup> September 2007 when the High Court was to resume. Annexed hereto is the OB Abstract on the attempt by the Police to charge the accused persons within the 14 days marked BMI and BM2.**

**xix. That from the foregoing it is apparent that the police had investigated this case expeditiously and diligently within the shortest period.**

**xx. That the inability to charge the accused persons was beyond our control.**

**That what is deponed hereinabove is true to the best of my knowledge, information and belief.**

**Sworn by the said Boniface Muthengi at Machakos this 29<sup>th</sup> day of May 2008.**

**Before me:**

**.....signed**

**.....Signed**

**Commissioner for Oaths/Magistrate ] Deponent**

**Drawn and filed by:-**

**The Principal State Counsel**

**Attorney General's Chambers**

**P.O. Box 1041**

## **MACHAKOS**

6. The only question that confronts this court is this; is the explanation reasonable? I do not think so. The accused persons were held by the police for 32 days, and it cannot surely be that the post-mortem was the main reason for doing so. I say this because although the postmortem was conducted on 30.8.2007 the accused persons were only brought before the court 3 weeks later. Neither can it be true that typing of statements would delay arraignment of any suspect in court. It is even unclear when those statements were taken and from whom but it is said that typing was done between 5<sup>th</sup> and 10<sup>th</sup> September 2007. If that it be so, why did it take another fortnight to take them to court?

7. The other reason given is that the High Court was on vacation and that the information could not be filed because “**most of the staff members were not on duty.**” This cannot be a sound reason to breach fundamental rights. In Republic vs Michael Ngunyo(supra), a position I maintain is correct, I held as follows:-

8. The summer vacation is meant to commence on the 1<sup>st</sup> August and terminate on the 15<sup>th</sup> September of each year but if the Rule excludes the application thereof of criminal sessions such as is applicable to this case, then however strongly I am inclined to accept the explanation given by the learned State Counsel, I cannot see that what legislation has excluded, I can accept in this Ruling as nonetheless a reasonable explanation. I say this with tremendous misgiving because the term vacations are to be observed under Rule 2(1) of the Rules aforesaid “***in the Courts and offices of the High Court***” but of course where only one judges sits in a station, there cannot be a vacation if he were to sit and hear criminal matters and criminal appeals at the same time as is the import of Rule (1) 4 aforesaid. The intention of the Legislature is however clear and as Fulford, J. said in Republic -vs- Ashton, Republic -vs- Draz and Republic -vs- O Reilly [2006] EWCA Criminal 794, [2007] 1 WLR 181 in deciding whether a procedure is invalid or not, the Court must ask itself what the intention of the Legislature was and only when the intention is not clear can the court go on to consider the interests of justice generally.

9. It follows that none of the reasons given for holding the accused persons beyond 14 days can be accepted by this court and the objection must be upheld.

10. It is now patently clear to this court that the Police and the State Law Office have either refused to understand the gravity of the breach of rights under the Constitution or are hiding their heads in the sand. No court is comfortable releasing suspects who may have committed serious offences but where no evidence is placed before it to show that the suspects were taken to court as “***soon as was reasonably practicable,***” the law will have to prevail irrespective of the gravity of the offence allegedly committed.

11. The duty of this court was well captured in Albanus Mwanzia Mutua vs Republic Cr. Appeal No. 1201/2004 where it was held that the courts have a duty to enforce the fundamental rights of suspected criminal offenders, irrespective of their weight of the evidence against them.

12. It is averred by the Republic that the inability to charge the accused persons was beyond its control. That is an admission of failure and the objection must be upheld.

13. The accused person’s continued detention is unconstitutional and they shall be ordered released forthwith unless they are otherwise lawfully held.

14. Orders accordingly.

Dated and delivered at **Machakos** this **8<sup>th</sup>** day of **July 2008**.

**Isaac Lenaola**

**Judge**

In the Presence: Mr. Wang’ondy for Republic

Mr. Makau Snr h/b for Mr. Makau Jnr

**Isaac Lenaola**

**Judge**