



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Case 30 of 2003**

REPUBLICAPPLICANT

VERSUS

KALULUI MUTINDA 1ST ACCUSED

MASYWILI MUTINDA 2ND ACCUSED

RULING

1. Mr Konya, learned advocate for the accused persons in this case, has taken an objection to the proceedings herein being continued for reasons that the fundamental rights of the accused persons have been violated. The Objection, premised on Section 72 (3) (b) of the Constitution is raised, and it is admitted, because the accused persons were arrested on 22/1/2003 but only arraigned in court close to 19 days later. Mr Konya's argument is that no reasonable explanation for the delay has been given and the accused persons should be released forthwith.

2. Mr Wang'ondy, learned state counsel in opposing the objection relied on Affidavits sworn on 6/5/2008 and 4/6/2008 by one I.P Danson Keke. For ease of reference, the affidavits are reproduced herebelow:-

"AFFIDAVIT

I, No. 44716 INSPECTOR DANSON KEKE of Post Office Box Number 139 KITUI do make oath and state as follows:-

- 1. THAT I am Inspector of Police in charge of Crime Kitui Police Station.**
- 2. 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.**
- 3. 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.**
- 4. THAT I was transferred to Kitui Police Station on 22nd August 2006 and I took over from SGT ESTHER MWEU.**
- 5. THAT on 22nd December 2002 a report of murder was made at Kitui Police Station by Mbula Katuta brother to the deceased and mentioned the names of accused persons.**

6. THAT on the same day the scene was visited and the body removed to Kitui District Hospital Mortuary.
7. THAT immediately after murdering the deceased person both accused persons disappeared until they were apprehended on 22nd January 2003 and brought to the Police Station.
8. THAT committal proceedings were commenced on the 10th February 2003 before Kitui Law Courts (Annexed herein and marked DK1 is a copy of Charge Sheet).
9. THAT upon repeal of Section 230 of Criminal Procedure Code, the D.C.I.O Kitui on 28th July 2007 sought directions from then Senior State Counsel CHARLES ORINDA (Annexed and marked DK 2 is copy of the letter).
10. THAT on 16th September 2003 the Senior State Counsel upon perusal of the file directed that D.C.I.O Kitui to advise the prosecutor Kitui Law Courts to withdraw the charge under 87 (a) of Criminal Procedure Code and have the accused produced in Machakos High court for plea (Annexed herein and marked DK3 is copy of his letter).
11. THAT on 19th September 2003 the Senior State Counsel filed the information before the High Court Machakos. He also advised the Police to produce the accused on 29th September 2003 when the plea was to be taken.
12. THAT the charges were withdrawn before Kitui Law Court on the 7th October 2003 under Section 87 (a) of the Criminal Procedure Code.
13. THAT given the gravity of the matter namely deceased was brutally killed in broad daylight it is only fair that his case proceeds to hearing to its logical conclusion in court.
14. THAT I am advised by the learned State Counsel which advice I verily believe to be correct that the accused persons constitutional rights does not supersede the right of life of the deceased.
15. THAT what is deponed to herein is true to the best of my information, knowledge and belief save for information the sources of which have been specially stated.

SWORN by the said IP DANSON KEKE)

at Machakos thisday of2008)

BEFORE ME)

) DEPONENT

)

MAGISTRATE”)

“FURTHER AFFIDAVIT

I, No. 44716 INSPECTOR DANSON KEKE of Post Office Box Number 139 KITUI do make oath and state as follows:-

1. THAT I am Inspector of Police in charge of Crime Kitui Police Station.
2. 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.

3. 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.

4. THAT the court allowed me to file a further affidavit on this matter.

5. THAT on paragraph 12 of my replying affidavit I stated that the accused was Discharged on 7th October 2003 (enclosed herein and marked DI I is the copy of Court Proceedings).

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

SWORN by the said IP DANSON KEKE)

at Machakos thisday of2008)

)

BEFORE ME)

) DEPONENT

)

COMMISSIONER FOR OATHS

3. From the above depositions the reason given for the delay in arraigning the accused persons in court within 14 days of their arrest is;

that committal proceedings were commenced at Kitui Law Courts on 10/2/2003 and after the committal process was abolished, the accused persons were then taken to the High Court on 29/9/2003 when the plea was taken.

4. I need not belabour the point but the last day of arraignment of the accused persons in any court should have been 6/2/2008 but they were in fact taken to the Kitui Law Courts on 10/2/2008. No explanation whatsoever has been given for the delay. It is not enough to say that the committal process took long without stating why so.

5. It follows that the explanation given is wholly unreasonable and cannot be sustained.

6. Mr Konya did point me to the following decisions;

- i. Anne Njogu vs R, Misc. Cr.551/2007
- ii. Albanus Musavu vs R Cr. Appl. 120/2004
- iii. R vs James Nyaga, Cr. Case 51/2007 (Nai)
- iv. R vs Michael Nguyo, Cr.Case 51/2007 (Machakos)

7. In all these cases, the courts have upheld the principle that where fundamental rights are violated, the criminal proceedings are nullified and the accused person is entitled to an acquittal. I agree.

8. There is little more to say but to express the duty of this court as follows:-

“It is the duty of the courts to uphold the rights of accused persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution”

9. In the end alive to that duty and because the objection is merited, the same is upheld. The proceedings herein are declared a nullity and the accused persons shall be ordered to be released unless they are otherwise lawfully held.

10. Orders accordingly.

Dated and delivered at Machakos this **8th** day of **July 2008**.

ISAAC LENAOLA

JUDGE

In the presence of: **Mr Wang’ondy for Republic**

ISAAC LENAOLA

JUDGE