

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Case 10 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

KYALO MUIA..... ACCUSED

THOMAS KILONZO MBITHE.....

R U L I N G

The accused, KYALO MUIA was, on 25/1/2006, charged with the murder of JUMBO MUSYOKA, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63 Laws of Kenya. The offence is alleged to have been committed on 14/11/2005 at South B Shopping Centre, Industrial Area.

On 21/1/08, the accused, through Ms. C. Adembo, Learned defence counsel, raised this Preliminary Objection, challenging the legality of these proceedings on the grounds, **inter alia** that he was arrested on 15/11/05 and taken to court on 31/1/06. This was some 77 days since the arrest, and there is no explanation for the delay.

The trial commenced but on 11/7/07, the same was declared a mistrial [**vide** Ojwang J's ruling] when the prosecution sought and obtained court approval to add a second accused onto the case, and new information was brought to court for plea-taking by now the two accused persons. The information against the two – KYALO MUIA and THOMAS KILONZO MBITHE, is dated 5/2/2007; the plea was scheduled for 19/7/07, before Apondi J. but due to the absence of the defence counsel – Mr. Kanyangi – that day and subsequent absenteeism by either the defence or state counsel, on numerous dates thereafter, the Preliminary Objection did not come up till 21/2/08 after the accused had complained of the then assigned defence counsel and a change of counsels made.

Due to the foregoing difficulties, this Preliminary Objection was not heard until 12/6/08.

The above history of this case is important in appreciating some of the submissions by counsel for both sides in this application.

As per the application and submissions by the defence, the challenge is that the accused was kept in police custody for 77 days after his arrest in 2005 before he was brought to court. Without more, that would constitute a violation of the Fundamental Rights of the accused as enshrined in Section 72 (3) (b) of the Constitution. It is the defence counsel's submission that the delay is unexplained by the prosecution and in line with the jurisprudence that has developed around the subject, the accused should be released as the proceedings are illegal, null and void.

In opposition, the prosecution, through Learned Counsel Mr. Bifwoli, submitted that the application is belated and is misconceived. To the prosecution, the objection – application – should have been raised during the proceedings before Ojwang J, not in the current proceedings instituted after the original trial was declared a mistrial. The current proceedings are fresh, and not those of the 2005, and that is why new information had to be brought and the accused – the 1st accused charged together with the 2nd accused,

but on the same facts – information.

The prosecution's case is that after the first trial was declared a mistrial, the matter began afresh and hence the question of delay in bringing the accused before court within 14 days does not arise. This, according to the prosecution, is because there was no new arrest, and the accused was already in custody, by court order.

The argument is very attractive and almost convincing. But it hides or overlooks two key legal points. First, the legality of the proceedings which were declared a mistrial is still outstanding. Criminal matters never go stale and if the proceedings were illegal, null and void, on account of violation of the accused's Fundamental Rights as per Section 72 (3) (b) of the Constitution, that cannot be cured by purported re-starting of the proceedings, based on the original arrest and delayed bringing of the accused to court within the 14 days.

The original proceedings were unconstitutional, illegal, null and void and there is no cure to that unless, which is not the case here, the prosecution could satisfactorily explain the delay.

To hold otherwise is to tamper with justice and hand a raw deal ruling to the current application by the accused.

All in all, and taking into account all the legal and factual issues in the application before me, I find, and hold, that the proceedings violated; are violating; and continue to violate, the Constitutional and Fundamental Rights of the accused as enshrined in section 72 (3) (b) of the Constitution. Consequently, I find and declare the proceedings null and void and order the immediate release of the accused, unless he is otherwise lawfully held.

It is so ordered.

DATED and delivered in Nairobi, this 29th Day of September, 2008.

O.K. MUTUNGI

JUDGE