



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

**Criminal Case 2 of 2007**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMUEL NJUGUNA MUKURU ..... ACCUSED**

**R U L I N G**

The accused/applicant, **SAMUEL NJUGUNA MUKURU ALIAS BAKER**, was, on 28/12/2006 charged with the murder of **ROSE GATHERINE NJERI GICHUHI**, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

On 27/2/08, before the hearing could commence, the accused filed a Preliminary Objection, challenging the legality of these proceedings on the grounds, as enshrined in Section 72(3) (b) and Section 77 (1) in that he was arrested on 23/9/06 and brought to court on 4/1/07. This is long after the expiry of the 14 days stipulated by Section 72 (3) (b) that an arrested/detained person, upon reasonable suspicion of having committed murder must be brought before court within 14 days of his arrest. Any prosecution instituted after the expiry of the 14 days is illegal, null and void and the accused must be released unless the delay is satisfactorily explained to the court.

That the accused was charged in court long after the 14 days had lapsed is conceded by the prosecution who sought to explain the delay, **vide** an Affidavit by Chief Inspector C. Rotich the gist of which is that due to the difficulties in contacting the witnesses and recording statements, plus getting Report from the Government Chemist, the accused could not be brought to court within the stipulated time of 14 days. The foregoing took up to 3/10/06 and the Attorney General's directions were not received until 16/11/06.

Accordingly, concludes the Affidavit, the delay was not intentional or intended to infringe on the fundamental rights of the accused.

Over and above the Affidavit by Chief Inspector Rotich, the Learned Counsel for the State stressed that under Section 72(5) of the Constitution the accused/applicant herein cannot be released either on bail or bond. Accordingly, argued the Learned State Counsel, to interpret the redress stipulated under Section 84(1) to include release would be contradiction of Section 72(5).

Upon perusal and consideration of the pleadings and submissions by Counsel for both sides, including the authorities cited and relied upon by the accused, I have reached the following findings and conclusions.

Once delay is conceded, as in this case, the only question is whether or not the prosecution has satisfactorily explained the same to the court. That revolves on the Affidavit by the Investigating Officer, in this case, Chief Inspector Rotich.

I have perused that Affidavit and the explanations therein fall far short of what is envisaged in Section 72(3) (b) of the Constitution, and the interpretation of the same by the courts over the last two or so decades as per the Court of Appeal's judgment in **ALBANUS MWASIA MUTUA VS. THE REPUBLIC**, Cr. Appeal No. 120 of 2004.

In that case, the court gave a non-exhaustive list of instances which would constitute satisfactory explanation of delay in not bringing an arrested person before court within the 14 days stipulated by S. 72 (3) (b) of the Constitution. These are **inter alia** that: **the accused fell ill during the 14 days the police were entitled to hold him in custody; that he was admitted in hospital.....as a result of which the police were unable to produce him in court; the appellant had been presented to the court earlier but his case was terminated for one reason or the other; the accused/appellant was discharged and subsequently recharged afresh.**”

Granted that each case is generally unique in its peculiar circumstances and facts. But for an explanation for delay to bring an accused person to court within 14 days to meet the test, the reasons/circumstances must be **pari materia** to those listed by the Court of Appeal in the above MUTUA case. Thus, it is an acceptable explanation for delay where the vehicle bringing an arrested person to court breaks down and there is no way the accused can reach the court before the expiry of the 14<sup>th</sup> day of his arrest. So is the case if there is no court of competent jurisdiction nearby before which the arrested person can be brought.

With the above in mind, I have found and concluded that the Affidavit produced by the prosecution to explain the delay fails the test. And this is so irrespective of the motive or lack of it, around which delay occurred.

All in all, and for the above reasons, I hold that the prosecution violated the Fundamental Rights of the accused herein, as enshrined in Section 72(3) (b) of the Constitution by instituting these proceedings outside the 14 days of his arrest.

Accordingly, I hereby declare the proceedings illegal, null and void and order the immediate release of the accused/applicant, unless otherwise lawfully held.

DATED and delivered in Nairobi, this 30<sup>th</sup> Day of October, 2008.

**O.K. MUTUNGI**

**JUDGE**