



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

Criminal Case 49 of 2007

REPUBLICPROSECUTOR

VERSUS

GEORGE MUCHOKI KUNGU.....ACCUSED

R U L I N G

The applicant/accused herein, GEORGE MUCHOKI KUNG’U, was, on 6/8/2007, charged with the murder of ZIPPORAH MUMBUA NYAO, 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 23/2/07 along Outer Ring Road, Embakasi, within Nairobi.

On 23/2/07, the accused filed a Preliminary Objection challenging the legality of these proceedings against him on the grounds, inter alia that he was arrested on 23/2/07 he was arrested and kept in custody until 6/8/07 when he was charged with murder. That is a period of 106 days before the accused was brought before court.

Based on the above facts, which are not challenged by the prosecution, it is the accused’s case that his Fundamental Rights, as enshrined in Section 72(3) (b) of the Constitution were violated, and these proceedings are illegal, null and void and he should be released.

Briefly, Section 72(3) (b) of the Constitution provides that a person arrested upon reasonable suspicion of having committed a capital offence shall be brought before court as soon as is reasonably practicable, and at any rate within 14 days of his/her arrest. Any proceedings instituted against such an arrested or detained person after the expiry of the 14 days is illegal, and the accused must be released unless the prosecution can satisfactorily explain the delay.

In opposition to the application, the prosecution sought to explain the delay vide an Affidavit deponed by Inspector Anthony Keter, on 28/4/08; the gist of which is briefly as under:

While conceding the delay in bringing the accused before court long after the expiry of the 14 days, the Affidavit gives a chronology of what happened from the date of arrest to the date the accused was brought to court as follows:- On 28/2/07 the postmortem was performed on the body of the deceased but the results got misplaced in the office of the pathologist on 7/3/07, and by 23/3/07, the results had not been signed as the pathologist was out of the country; the postmortem report was received at the post office on 21/4/07; the file was sent to the Director of Public Prosecution for perusal and advice and it came back from the Attorney General’s office with directions to cover some points not fully covered earlier. Finally, the Affidavit ends by stating that the delay in bringing the accused to court was due to protracted

investigations.

The foregoing is what the prosecution relied on and the basis of their submission that the delay has been explained and this court should find the explanation reasonable.

I have virtually reproduced the reasons given in the Affidavit to pave the way for my finding and conclusion that the explanations fall far short of what is envisaged in Section 72(3) (b) of the Constitution and the court's interpretation of what constitutes satisfactory explanation for delay in bringing the accused to court within 14 days. That interpretation is sufficiently and extensively dealt with in Cr. Appeal No. 120 of 2004 – *ALBANUS MWASIA MUTUA VS. REPUBLIC* where the Court of Appeal, the highest Court in the land gave a non-exhaustive list of instances which constitute reasonable explanation of delay to bring an arrested person before court within 14 days. Such instances include the following; that the accused was admitted in hospital and was detained in hospital as a result of which the police were unable to produce him in court; that the accused/appellant had been presented to the court earlier but his case was terminated for one reason or the other; was discharged and subsequently recharged afresh.....

It is also an acceptable reason for delay where on the date the accused was being taken to court the vehicle carrying him/her broke down on the way and he could not reach the court on time.

Given the above, it is my finding and conclusion that the reasons given by the prosecution for the delay are not satisfactory or acceptable. A chronology of the events since the accused was arrested is not necessarily an explanation for the delay. For such chronology to meet the test set by the court above, the reasons, must be *pari materia* to those given in the above judgment.

Here the reasons are simply a chronology of the problems that faced the prosecution office. They unfortunately fell short of the explanation envisaged in Section 72(3) (b) of the Constitution and as interpreted by the courts over the past two decades.

The Learned State Counsel tried to show that given the seriousness that is murder, the accused should not be released without being heard on merit, and such release is bad law and does not serve Kenya.

No authority was cited by the learned State Counsel in support of such a view.

Be that as it may be, if the provisions of Section 72(3) (b) of the Constitution are bad law, and do not serve the country, the right body to change such law is clearly not this court.

Of greater concern to me is the inherent misconception behind the above submission. When the court releases an accused on the ground that there was a violation of his Fundamental Rights, the court is not saying that the accused did, or did not, commit the alleged offence. What the court is saying is that the proceedings, instituted after the expiry of the 14 days, stipulated by Section 72(3) (b), are unconstitutional and therefore illegal, null and void, unless the delay is explained.

Upon discovery of the Constitutional violation, the court has no jurisdiction to continue hearing an illegality, and, or, a nullity. That is the basis for the court's firm holding that any proceedings instituted outside the 14 days stipulated in Section 72(3) (b) are illegal, null and void irrespective of the weight of the evidence that the prosecution might have. Put differently, the evidence might be there with the prosecution. But the forum at which such evidence can be adduced does not legally exist due to the illegality of the proceedings when they were first instituted in violation of the constitutional provisions under Section 72(3) (b).

For all the foregoing reasons, I find and hold that these proceedings violate the Fundamental Rights of the accused and are accordingly illegal, null and void.

I therefore order the immediate release of the accused unless he is otherwise lawfully held.

DATED and delivered in Nairobi, this 28th day of October, 2008.

O.K. MUTUNGI

JUDGE