



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

**AT NAIROBI**

**CRIMINAL CASE 102 OF 2003**

**REPUBLIC**

**-VS-**

**PETER MWANIKI MULI**

**RULING**

The accused has been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap.63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

**“On the 24<sup>th</sup> September, 2002 at**

**Lunga Lunga slums, Industrial Area**

**within Nairobi, murdered SABINA**

**KATUNGE PETER.”**

From the record, it is apparent that the accused was initially brought to court on 19<sup>th</sup> August, 2003 – and an order was made by the trial Judge directing the Deputy Registrar to assign a defence counsel to the accused. After several hiccups, the plea was eventually taken on 11<sup>th</sup> December, 2003: Consequently, there were several adjournments due to various reasons that are reflected in the file. Eventually, the trial started in earnest on 5<sup>th</sup> July, 2006 before Ojwang J. The trial Judge was only able to hear two witnesses. On 9<sup>th</sup> July, 2007 the Judge declared the trial a mistrial. On 30<sup>th</sup> June, 2008, the defence counsel viz, Mr. Amadi requested for a hearing date for a preliminary objection. The said objection was heard by the court on 24<sup>th</sup> September, 2008. According to the defence counsel viz, Mr. Amadi, the application is based on Section 70 (1), 72 (3) (b) and 77 (1), (2) (a), (b), (c) and (d) of the Constitution of Kenya. Besides the above, he also submitted that the accused was arrested on 24<sup>th</sup> September, 2002 and charged on 14<sup>th</sup> August, 2003. He pointed out that the same was after a period of 11 months. He reminded the court that Section 72 (3) of the Constitution stipulates that a suspect must be brought to court within 14 days. Apart from the above, he also pointed out Section 72 (4) of the constitution states that a person **cannot** be held in custody without a court order. Since the police did **not** have that order, he termed the proceedings to be illegal, null and void. He also referred the court to the list of authorities that he had filed in court. On the other hand, Ms Mwanza – State Counsel told the court that the Republic was relying on the replying affidavit by PC Martin Kamau. According to the said officer, the offence was committed at the Industrial

area and the Investigating Officer had problems in tracing two witnesses. Thereafter, it was only on 30<sup>th</sup> May, 2002 that the Investigating Officer was able to record the statements of the two witnesses. Besides the above, Ms Mwanza also submitted that the post-mortem was actually performed on 18<sup>th</sup> October, 2002. Apart from the above, she also referred the court to Section 70 of the Constitution and submitted that the rights to enjoy any freedom are subject to some limitations as other people are also supposed to enjoy their rights and freedom.

From the above submissions, it is crystal clear that both sides are agreed that the accused was arrested on 24<sup>th</sup> September, 2002 – and that he was arraigned in court on 14<sup>th</sup> August, 2003. That means the accused was held in police custody for a period of 11 months. Needless to state that period was not only too long but also unreasonable and oppressive. Significantly, the police never bothered to come to court to obtain any order to allow them keep the accused in custody. The reason given by the State that the police could not trace witnesses in Nairobi's Industrial area cannot be taken seriously given the fact that communication is more advanced in the capital city. It is high time that the Commissioner of Police takes necessary action against police officer who deliberately violate the constitutional rights of suspects deliberately. That may remind the said officers to carry out their duties diligently and efficiently.

In the case of

**ALBANUS MUTUA –VS – REPUBLIC**

**CRIMINAL APPEAL NO.120 OF 2004 (unreported)**

The Court of Appeal stated as follows:

*“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of the constitutional right will normally result*

*in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge.*

Clearly in this case, the State has not given any satisfactory explanation for the delay of eleven months to produce the accused in court. In view of the gross violation of the Constitutional rights of the accused, I hereby declare the proceedings null and void **ab initio**. In the same breadth I hereby discharge the accused. He should be released forthwith unless held lawfully. Those are the Orders of this Court.

**MUGA APONDI,**

**JUDGE.**

Ruling read signed and delivered in open court in the presence of the accused: Mrs. Kinyori for Amadi Defence Counsel and Ms Wafula State Counsel.

**MUGA APONDI,**

**JUDGE.**

**28<sup>TH</sup> OCTOBER, 2008.**