

suspicion of having committed a criminal offence punishable by death, should be brought before a court within 14 days, or as soon thereafter as possible. Indeed, the Constitution stipulates that if the suspect was not brought before court within the 14 days, the person who thereafter asserts that the suspect had been brought before the court as soon as is reasonably practicable, has the obligation to prove his assertion.

In this case, in which the applicant was not brought before the court for over 6 months, there is no doubt whatsoever that there was an inordinate delay.

The delay in having the police file delivered to the Provincial state counsel is definitely not a reasonable explanation, by any stretch of imagination.

Given that it already took 6 months for the state to take the applicant to court for the first time, I am satisfied that the applicant is not likely to be tried within a reasonable time.

In the event, the continued confinement of the applicant in custody would be adding insult to injury.

The learned state counsel has urged this court to weigh the rights of the applicant against the rights of the family of the deceased.

I have no doubt that that is a legitimate request, in the interest of justice. I so say because two wrongs do not make a right.

The termination of the trial against the applicant would be right, if this court had a way of ascertaining that the applicant was innocent. But that I cannot do, because the innocence or guilt of the applicant can only be established after a full trial.

Therefore, if the applicant was to be set free now, after the trial against him was terminated, it is possible that his innocence or guilt may never be determined by any court. In fact, it is not just possible, but a certainty, in the event that the applicant was acquitted.

If that were to happen, the family of the deceased would be justified in believing that a person who may be guilty was set free.

But then again, every suspect who is facing a criminal charge is presumed to be innocent until and unless he is proved guilty.

Bearing in mind all those factors, and weighing the same on the scales of justice, I find and hold that in this case, justice will be served by setting free the applicant.

Accordingly, the proceedings in criminal case No. 2481/07 is terminated, as otherwise the continuation thereof would occasion further violation of the applicant's constitutional rights.

It is ordered that the applicant be set at liberty forthwith, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Kakamega, this 23rd day of October, 2008.

FRED A. OCHIENG

J U D G E