

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

Criminal Case 114 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

JUSTINE NANDWA..... ACCUSED

SAMSON OKETCH OTUMA.....

R U L I N G

The accused, **JUSTINE NANDWA** and **SAMSON OKETCH OTUMA**, were, on 27/11/2006, charged with the murder of **PETER MANDU OKWIRI** 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 1/4/2006 at Dandora Estate Phase 4 – Gitari Marigu Slums in Nairobi.

On 3/3/08, the accused challenged the legality of these proceedings against them on the ground that the proceedings violate their Constitutional Rights as provided for in Sections 72(3) (b) and Section 77 (1) & (2) of the Constitution in that whereas they were arrested on 1/4/06 and taken to Buruburu Police Station, they were not brought to court until 13/12/06. They took the plea on 19/12/06. That, according to the accused persons was after 9 months of their initial arrest, and is contrary to the Constitutional provisions.

In support of their case, the Learned Counsel for the accused cited and relied *on H.C.CR. C. No. 40 of 2007 ANN NJOGU & 5 OTHERS VS. REPUBLIC and H.C.CR.C. No. 70 of 2007 – DANIEL OKETCH OWILLA*.

In opposition, the prosecution produced an Affidavit, deponed by Samuel Oloo, and submitted that they relied entirely on that Affidavit. They then left the outcome to the court.

The gist of the Affidavit filed in Court on 11/9/08, may be summarized as under:- that there was delay in obtaining the typed and signed post mortem form as the pathologist not signed the same, for reasons not within the deponent's knowledge, and lastly that the deponent forwarded the file to the Attorney General for directions on 11/8/06 and received no response until 27/1/06?

Having perused through the pleadings and considered the submissions by both sides, I have reached the following findings and decisions.

There is no dispute about the delay in bringing the accused before the court well after the Constitutionally permitted period of 14 days. That is conceded by the prosecution who seek refuge in the Affidavit of Inspector Samuel Oloo, Force No. 55523 in an effort to explain the delay.

With due respect the above Affidavit is nothing but beaurocratic delays that do not, and cannot, satisfactorily explain the delay.

The Law surrounding this type of Preliminary Objection is well settled and is as follows:

Section 72 (3) (b) of the Kenyan Constitution under which the application is brought, stipulates that any person arrested on reasonable suspicion of having committed a capital offence must be brought before the court as soon as is reasonably practicable, and at any rate within 14 days of his arrest. Any proceedings instituted against such an arrested person after 14 days, is illegal null and void and the accused must be released, unless the prosecution can, and does, satisfactorily explain the delay. That is because in absence of an explanation that is satisfactory to the court, the contravention of the Constitutional provisions, violate the Fundamental Rights of the accused.

In light of the fact that the prosecution has conceded the delay and the purported explanation to comply with the provisions of the Constitution, are unsatisfactory, I find and hold that these proceedings against the accused persons, in H.C.CR.C. No. 114 of 2006, have their genesis in an illegality.

Accordingly, I declare the same null and void and order the immediate release of the accused persons, unless they are otherwise lawfully held.

It is so ordered.

DATED and delivered in Nairobi, this 14th Day of October, 2008.

O.K. MUTUNGI

JUDGE