



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

**Criminal Case 15 of 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**OROBI ONGONDO OBARE.....ACCUSED**

**R U L I N G**

The accused, **OROBI ONGONDO OBARE**, was, on 12/2/08, charged with the murder of **WINFRED MARIAH OROBI**, 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 21/10/07 at Kenya Nurseries Farm Limited in Kiambu, Central Province.

On 17/3/08, the accused challenged the legality of these proceedings through a Preliminary Objection on the following grounds: The accused was arrested on 21/10/07 and kept in the police cells until 26/2/08 when he was brought before court. That was over 4 months since the initial arrest of the accused and it is the accused's case that Section 72(3) (B) of the Constitution permits only 14 days.

Accordingly, the accused urges this court to declare the proceedings illegal, null and void on account of the fact that the prosecution has not explained the delay, despite having been served with the application more than three months from the date of the filing of the objection to the hearing of this application.

In support of his application, the accused cited and relied on Cr. Appeal No. 120 of 2004 – **ALBANUS MWASIA MUTUA; H.C.C.CR. NO. 40 OF 2007 – JAMES NJUGUNA NYAGA VS. REPUBLIC; Cr. Appeal No. 119 of 2004 GERALD MACHARIA GITHUKU VS. REPUBLIC; MISC. Cr. Application No. 551 of 2007 – ANN NJOGU & 5 OTHERS VS. REPUBLIC** among other authorities.

Not having filed any affidavit to explain the delay, the prosecution's case, is **inter alia**, Cr. Appeal No. 182 of 2006, and that the other authorities were not binding on this court. Finally the State Counsel submitted that violation of the rights of the accused did not entitle him to a release as that is against public policy and his rights should be pursued parallel to the charge facing him – the accused. The State Counsel submitted, in his conclusion that the victim of the murder should also be protected by the court.

I have carefully considered the pleadings and the submissions by Learned Counsel for both sides and have reached the following findings and conclusions.

The law in this area is now very well settled and may be summarized in the following manner. The Supreme Law of this Land, the Constitution of Kenya, **vide** Section 72(3) (b) provides that every person arrested upon reasonable suspicion of having committed a capital offence must be brought to court as soon as is reasonably practicable, and at any rate within 14 days of his arrest. Any proceedings instituted after the expiry of the 14 days is illegal, null and void, and the accused must be released, unless the prosecution can satisfactorily explain the delay.

In the present application, it is a common ground that the accused was brought to court long after the 14 days had expired.

The prosecution has not only failed to explain the delay but simply never even tried to explain the delay.

On the Learned State Counsel's submission that Cr. Appeal No. 120 of 2004 was overruled by Cr. Appeal No. 182 of 2006, the State Counsel failed to quote the paragraph or page where his claim comes from. For avoidance of doubt, the MUTUA case was never overruled by Cr. Appeal No. 182 of 2006, or any other subsequent decision of the Court of Appeal. Further reading of the two authorities by the Learned State Counsel is called for. In any case, the defence counsel, never even cited Cr. Appeal No. 182 of 2006.

All in all, and in light of the foregoing, especially the fact that the unexplained delay is conceded by the State, I find and hold that these proceedings, in HCCR.C. No. 15 of 2008 are founded on an illegality and I accordingly declare the same to be null and void.

I further order that the accused be released forthwith, unless he is otherwise lawfully held.

DATED and delivered in Nairobi, this 13<sup>th</sup> Day of October, 2008.

**O.K. MUTUNGI**

**JUDGE**