



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

**Criminal Case 46 of 2007**

**REPUBLIC.....APPLICANT**

**VERSUS**

**FRANCIS MWANGI IRUNGU.....DEFENDANT**

**EPHANTUS KURIA WAMBUI.....DEFENDANT**

**RULING**

Both accused have 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 22<sup>nd</sup> March, 2007 at Ongata Rongai township, Kajiado District within the Rift Valley Province jointly with another not before court murdered MARSHAL MUNGAI.”*

From the record, it is apparent that the accused were first arraigned in court on 23<sup>rd</sup> July, 2007. Consequently, the undersigned took the plea and set down the case for hearing. However, before the trial could take off, the defence Counsel filed a preliminary objection that was set down for hearing on 17<sup>th</sup> September, 2008. During the hearing of the application, Mrs Ngare – the defence Counsel, submitted that the two accused persons were held in custody for too long and that their constitutional rights were breached. According to the defence Counsel, Accused 1 was arrested on 25<sup>th</sup> May, 2007 while accused 2 was arrested on 1<sup>st</sup> June, 2007. She also submitted that both of them were arraigned in court on 30<sup>th</sup> July, 2007 (the correct date is actually 23<sup>rd</sup> July, 2007). In her calculation, accused 1 was held in police custody for 65 days while accused 2 was held in custody for 60 days. She pointed out that the above detention contravened Section 72(3) (b) of the Constitution. To support her submissions, she quoted the case of:-

***ALBANUS MUTUA VERSUS REPUBLIC***

***CRIMINAL APPEAL NO. 120 OF 2004***

Apart from the above, the defence Counsel also referred the court to Section 77(1) of the Constitution that provides that, a suspect should be accorded a fair trial expeditiously. While acknowledging that she had been served with the replying affidavit, Mrs Ngare took issue with the fact that the date of the arrest of 1<sup>st</sup> accused has not been shown. Apart from the above, she also submitted that the affidavit does not indicate the delay in bringing the accused persons to court.

On the other hand, Ms Wafula – a State Counsel, conceded that the accused was held in custody for more than 14 days. Besides the above, she referred the court to paragraphs (7) and (8) of the affidavit of PC Kinyua that gives an explanation why there was a delay in bringing the accused to court. She further explained that accused 1 was kept in police custody to help trace the accused 2. That apart, she also explained that the key witness had expressed fear for his life and thereafter, the investigating officer has not been able to trace him upto now. In support of her submissions, she quoted the case of

***DOMINIC MUTIE MWALIMU VERSUS REPUBLIC***

***CRIMINAL APPEAL NO. 217 OF 2005***

In the above case, the court stated inter alia, that as long as the prosecution can prove that the accused was brought to court as soon as possible, then that cannot be a breach of the Constitution. She further submitted that there is no definition of a reasonable number of days since each case must be decided on its own merits.

This court has carefully considered the above submissions by the learned Counsels. At the outset, it is crystal-clear that both of them are in agreement that there was a delay in arraigning the accused to court. From the dates mentioned, the accused 1 was held in police custody for 58 days while accused 2 was held for 53 days. It is rather unfortunate that the learned State Counsel stated that accused 1 was held in custody in order to held the police track the accused 2. It is unreasonable and untenable for the police to use such warped logic to justify an illegality. Both the law and case law succinctly state that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. Naturally, the court expects that the explanation would be logical, plausible and cogent. However in this case, the prosecution has merely given an excuse. From the record, it is apparent that the accused 2 was arrested on 1<sup>st</sup> June, 2007. Assuming that the police were using the accused 1 as a bait, why did they have to wait upon 23<sup>rd</sup> July, 2007 to arraign both accused in court? Besides the above, the court has noted that the defence Counsel brought the application early and diligently – before the main trial commenced.

In view of the gross violation of the constitutional rights of both accused persons, I hereby declare the proceedings to be null and void ab initio. In the same breadth, I hereby discharge the accused persons. Both of them should be released forthwith unless held lawfully.

Those are the orders of the court.

**MUGA APONDI,**

**JUDGE.**

**7<sup>TH</sup> OCTOBER, 2008**

Ruling read signed and delivered in open court in the presence of the accused;

Mrs Ngare .....Defence Counsel

Ms Mwaniki .....State Counsel

**MUGA APONDI,**

**JUDGE.**

**7<sup>TH</sup> OCTOBER, 2008**