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

Criminal Case 54 of 2006

REPUBLIC …….……………………………..………………PROSECUTOR

VERSUS

ANGELINA JUMA MUDHUNE …………..……………………………ACCUSED

R U L I N G

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 25th March, 2004 at Makongeni Estate, within Nairobi area, murdered BERNARD MUTIE KOKI".

From the record, it is apparent that the accused was first arraigned before me on 24th May, 2006 and thereafter I took the plea. Consequently, I allocated the case to Ojwang J who only heard one witness before he declared the case – a mistrial. In response to the above, I took over the case and selected fresh assessors before proceeding with the same. After hearing four prosecution witnesses, the defence counsel via, Ms Obara informed the court on 14th April, 2008 that she wanted to file a constitutional application. During the hearing of the same, she submitted that the application had been brought under Section 72(3) (b) and 77(1), (2), (a), (b) and (c) of the constitution of Kenya. According to **Ms Nanjala** (who held brief for **Ms Obara**), the accused was arrested on 25th March, 2004 at Makongeni Estate. Subsequently on 8th October, 2004 the accused was charged for the offence of murder. That apart, **Ms Nanjala** also submitted that the accused was later remanded up to 11th November, 2004 when she was brought to court to take a plea. Further to the above, she pointed out that the accused was brought to court more than 7 months after her arrest. She termed the actions of the police as constituting a violation of her fundamental rights. She also stated that the police had not complied with the law. In support of the above submissions, Ms Nanjala **quoted the case of Republic vs James Njuguna Nyaga Cr. Case No.40 of 2007**. Besides the above, she also submitted that the delay by the prosecution had denied the accused, a fair hearing and protection of the law. Though she was served with a replying affidavit dated 28th October, 2008, she responded by stating that the delay has not been sufficiently explained by the prosecution. Specifically, she took issue with Para (3), (4) and (5) noting that the advice given had not been attached to the replying affidavit. In conclusion she submitted that the accused's right to the law cannot be sacrificed at the altar of bureaucracy. In view of the fact that the State had breached the law, she urged the court to declare the proceedings null and void and that the court releases the accused.

On the other hand, **Mr. Ong'ondo**, State Counsel opposed the application and intimated that he was relying on the affidavit of **Cpl. Zacharia Nderitu**. He urged the court to uphold the explanation that had been given in the said affidavit. In the alternative, he urged the court to invoke Section 72(6) of the Constitution that entitles an aggrieved party to be compensated. As far as the case of **Republic vs James Nyaga Criminal Case No.40 of 2007** was concerned, **Mr. Ong'ondo** urged me not to feel bound by the same since it was decided by a court of concurrent jurisdiction.

This court has carefully considered the submissions by the two learned counsels. No doubt, the State has not denied the fact that the accused was held in custody for a period of about seven months. In fact, in the affidavit of Cpl. Zacharia Wachira Nderitu he confirmed that the accused was arrested on 25th March, 2004. Apart from the above, **Mr. Ong'ondo** never denied the fact that the accused was charged on 8th

October, 2004. With respect to the learned State Counsel, the said affidavit by Cpl. Nderitu is a mere chronicle of the events that took place. Sadly, the said affidavit does not even attempt to give any reasons for the delay in arraigning the accused before court. When the accused was arrested she was about 53 years old. By now she is about 57 years old. Assuming that the police had not completed their investigations within the requisite period, one would have expected them either to bring her to court to get the necessary orders or alternatively bond the accused and require her to report to a convenient police station regularly. To me, the accused seems to be local woman who was unlikely to abscond from the jurisdiction of the police. I hereby find that the delay in bringing the accused for 7 months without any reasonable and/or plausible explanation to be oppressive, inhuman and a gross violation of the Constitutional rights of the accused as envisaged under Section 72(3) of the Constitution of Kenya. In the case of **ALBANUS MUTUA VS REPUBLIC Criminal appeal No. 120 of 2004 (unreported)** the Court of appeal stated inter alia:

"**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 judgement 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".**

In view of the above, I hereby find that the proceedings are null and void *ab initio*. The upshot is that I hereby "acquit" the accused for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63 Laws of Kenya. She should be released forthwith unless held lawfully. Those are the orders of the court.

MUGA APONDI

JUDGE

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

Ms. Obara Defence counsel

and **Mr. Ong'ondo** State Counsel

MUGA APONDI

JUDGE

26th November, 2008