



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

Criminal Case 31 of 2008

REPUBLICPROSECUTOR

VERSUS

SIMON KAMAU KINYANJUI.....ACCUSED

R U L I N G

The accused/Applicant, **SIMON KAMAU KINYANJUI**, was, on 9/4/2008 charged with the murder of **GEORGE GATHUNGU KAMAU**, 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 25/11/07 at Corner Mbaya area, Githurai 45 Estate Nairobi.

On 23/4/08, and just before the hearing of the case got underway, the accused filed a Notice of Preliminary Objection, challenging the legality of these proceedings on the grounds, **inter alia** that the same violate his Fundamental Rights as enshrined in Section 72(3) (b) of the Constitution. The above section, under which this application is brought, is to the effect that a person arrested/detained 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/her arrest. Any proceedings instituted outside the 14 days is illegal, null and void, and the accused must be released unless the prosecution can satisfactorily explain the delay to the court.

The basis for the challenge is that the accused was arrested on 25/11/07 and kept in police custody for 4 months and 16 days before being taken to court on 18/4/08.

In support of their application, the accused cited and relied on the following authorities: **H.C.Cr.C. No. 40 of 2007 – JAMES NJUGUNA NYAGA VS. REPUBLIC; MISC. APPLICATION NO. 198 of 2007 – JOSEPH ANYANGO ABAYO VS. REPUBLIC; AND ANN NJOGU & 5 OTHERS VS. REPUBLIC; MISC. CR. APPLICATION NO. 551 of 2007.**

In urging the release of the accused, the Learned Defence Counsel submitted that the police have not explained the delay of more than 3 months.

In opposition to the application, the prosecution filed a Replying Affidavit, deponed by Inspector David K. Mursoy on 14/7/08, the gist of which is as under: the delay was caused by failure of the Government Analyst to finalise on the various Exhibits submitted to that office; the Government Chemist lacked various re-agents to conduct the required examinations. The Affidavit concludes by stating that the accused was brought to court as soon as was reasonably practical and the deponent did his best in the

interest of justice for both the accused and the victims of the crime.

The prosecution urged the court to find the above explanation reasonable and allow the proceedings to continue on merit, to their logical conclusion. It is the prosecution's case that more harm would result from terminating the proceedings. The court should proceed with the trial in the public interest, and this application should be dismissed in the interest of justice.

The Learned State Counsel submitted that in Cr. Case No. 40 of 2007, there was no explanation given, while here the prosecution has an explanation and hence the case is distinguishable.

Having closely perused the pleadings and the submissions and authorities by both sides, I have reached the following findings and conclusions.

There is no dispute that the accused/applicant was brought to court long after the expiry of the 14 days stipulated by Section 72(3) (b) of the Constitution. Once that is conceded, the only question is whether the prosecution has explained the delay, and the test of what constitutes acceptable delay has been extensively dealt with by the courts over the last two decades. To that end, the law on the topic is well settled, and the test was set by the Court of Appeal in Criminal Appeal No. 120 of 2004 – ALBANUS MWASIA MUTUA VS. REPUBLIC, where the court gave a non-exhaustive list of instances where delay is acceptable. These include, **inter alia** that; the accused fell sick and was admitted in hospital within the period he/she was required to be brought to court; or the accused was discharged and subsequently re-arrested; or that the vehicle taking the accused to court broke down on its way to the court and hence the accused could not get to court on time.

Granted that each case is unique in its peculiar circumstances. Thus the reasons for the delay may vary from one case to another. But whatever the reasons, they must be **pari materia** to those given in the above MUTUA case.

The reasons given in the Affidavit of Inspector Mursoy are nothing but a chronology of the events between the arrest and being brought to court of the accused/applicant herein.

They fall far short of meeting the test set by the MUTUA case. In my humble view, they are mere bureaucratic bottlenecks in the prosecutorial docket where, for untenable reasons, each of the units therein blames the other for the delay, and regards each other an independent unit. That is not the case. The position is that all the units – police, the government chemist and analyst; the State Law office and the Doctors who performed postmortems are one and the same as far as ensuring that Section 72(3) (b) of the Constitution is complied with. They all go to constitute the prosecution docket.

All in all, and for the above reasons, I find and hold that the prosecution has failed to satisfactorily explain the delay in bringing the accused/applicant before court within the 14 days permitted by Section 72(3)(b) of the Constitution.

Accordingly I hold that these proceedings have their genesis in an illegality and are therefore null and void.

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

DATED and delivered in Nairobi this 26th Day of November, 2008.

O.K. MUTUNGI

JUDGE