



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

**Criminal Case 57 of 2006**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STANLEY NJOGU KUNGU.....ACCUSED**

**R U L I N G**

The accused/applicant, **STANLEY NJOGU KUNGU**, was, on 25/5/2006, charged with the murder of **LIVINGSTONE MBURU MUHIA**, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

On 7/5/08 the accused challenged the legality of these proceedings against him on the grounds that the same violate his Fundamental Rights as enshrined in Section 72(3)(b) of the Constitution in that he was arrested on 9/2/06 and detained at Kabete Police Station until 29/5/06 when he was charged with the crime of murder. This, submits the accused, was long after the 14 days period stipulated by Section 72(3) (b) of the Constitution.

Section 72 (3) (b) of the Constitution under which the 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 period are illegal, null and void, and the accused must be released unless the prosecution can satisfactorily explain the delay to the court.

It is the case by the accused that these proceedings, having been instituted long after the 14 days set by the Constitution violate his fundamental rights to liberty, are illegal, null and void, and this court should so find and declare and release him forthwith.

In support of his application, the accused cited and relied on the following authorities: Criminal Appeal No. 35 of 2006 – **PAUL MWANGI MURUNGA VS. REPUBLIC**; Criminal Appeal No. 119 of 2004 **GERALD MACHARIA GITHUKU VS. REPUBLIC**; and Criminal Case no. 75 of 2007 **HENRY OPONDO OGAM** where it was held that any delay should be supported by a court order if accused is held longer than as per the Constitution.

In opposition the prosecution, rather than explain the delay, submitted that the prayer cannot be granted because Section 72(3) (b) has no provision for acquittal. Any acquittal can only be granted where there is no evidence, or the evidence does not meet the required standard of proof, or where the prosecution has not make a **prima facie** case.

The prosecution also submitted that if there is a violation the court must set conditions to allow the proceedings to continue. The proceedings are not illegal. The Learned State Counsel, however, conceded that the accused was brought to court after the constitutionally permitted period of 14 days had expired. Further, Mr. Bifwoli, the Sate Counsel, submitted that this court has a duty to punish crime in all its manifestations, and that there is nothing in the Constitution where there is evidence for the court to declare that the accused's rights have been violated. The accused can sue under Section 72(6) of the Constitution for compensation, and that would allow the accused to stand trial. Acquittal is tantamount to denying other people their Constitutional rights, concluded the prosecution. Accused will not be prejudiced by continued hearing of this case, said the Learned State Counsel.

Having closely perused the pleadings by the accused and considered the submissions by both sides, the following are my findings and conclusions.

The prosecution has conceded that there was delay in bringing the accused before the court. Once the delay is conceded, the only way out for the prosecution is to satisfactorily explain that delay in terms of the burden placed on the prosecution by Section 72 (3) (b) of the Constitution to prove that the law has been complied with. That is to explain the delay in acceptable manner, why the accused was not brought to court within 14 days.

The highest court in the land, the Court of Appeal, and the High Court, have given that Section meaning in such cases as the **ALBANUS MWASIA MUTUA VS. REPUBLIC**, Cr. Appeal No. 120 of 2004; **ELIUD NJERU NYAGA VS. REPUBLIC** Cr. Appeal No. 182 of 2006, and **ANN NJOGU & 5 OTHERS VS. REPUBLIC and JAMES NJUGUNA NYAGA VS. REPUBLIC**, Criminal Case No. 40 of 2007.

In a nutshell, the burden of explaining any delay in bringing an accused before court within the Constitutionally permitted period rests upon the prosecution. If the delay is not explained in terms of the instances given by the Court of Appeal in the **MUTUA** case, or circumstances **para materia** thereto, the accused must be acquitted.

In the present application the prosecution has not bothered to explain the delay as required of them by Section 72(3) (b) of the Constitution. What the Learned State Counsel, Mr. Bifwoli, attempted to do is to contest the provisions of the law, and concluded that the law is against public policy.

I do not consider it prudent to get bogged down into such fruitless debate, and this for two reasons. This court does not make law. The duty of this court is to interpret the law as it is and give it meaning. The court has diligently interpreted Section 72(3) (b) of the Constitution for over two decades now.

Secondly, this court has no duty to interpret public policy, and this for the reason that public policy is not law, and public policy is an unruly horse and once one is on the back of such a horse only the devil knows the destination of such a journey.

I am however constrained to observe that the Learned State Counsel's reading of Section 72(5) of the Constitution is interesting. To submit that where there is violation of the Fundamental Rights of the accused the court must set conditions to allow the proceedings to continue is absurd and illustrates that the State Counsel has either misread or has not at all read, the said provisions properly. That sub-section of Section 72 clearly excludes capital offences as this one from which this application originated. For capital offences such as murder, there is no bail and the conditions advocated by the Learned State Counsel are a misnomer.

There is also a grave misconception about the court's duty to punish crime. The court has a duty to uphold the Constitution. The court, like the other arms of the Government – Legislature and Executive – is a creation of the Constitution and is obliged to not only uphold the Constitution but also to ensure its enforcement to the letter.

Accordingly, when an arrested person is not charged within the Constitutionally permitted period, then

there is a violation of that person's fundamental right to liberty. The redress for such constitutional rights is clearly stipulated in Section 84 of the Constitution.

Granted the High Court has original and unlimited jurisdiction to punish crime. But that can only validly and legally be the case within the constitutional provisions. The court cannot, and has no jurisdiction to go out in the streets and round up people and purportedly punish them for alleged crimes or offences which has not been properly brought before the court or whose institution has its genesis in constitutional violations. No court has the jurisdiction to preside over a matter which that court has determined, to be before it illegally or unconstitutionally.

All said and done, I find and hold that the accused was brought to court long after the 14 days of his arrest, and that violated Section 72(3) (b) of the Constitution. The prosecution did not even bother to explain the delay. Instead the prosecution embarked on contesting the law. In the result, the delay is not explained and I hold that these proceedings are illegal, null and void.

Accordingly, I order the immediate release of the accused, unless he is otherwise lawfully held.

It is so ordered.

DATED and delivered in Nairobi this 19<sup>th</sup> Day of November, 2008.

**O.K. MUTUNGI**

**JUDGE**