



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

Criminal Case 82 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL MWAURA NJENGA ACCUSED

R U L I N G

The accused, **SAMUEL MWAURA NJENGA**, was, on 17/8/2006, charged with the offence of murder, of **JOHN NGORONGO NJENGA**, contrary to Section 203 as read with Section 204 of the Penal Code, Cap. 63, Laws of Kenya.

offence is alleged to have been committed on 7/5/06 at Ngorongo Village, Thika District, Central Province.

On 9/5/08, just before the hearing got underway, the accused filed a Notice of Preliminary Objection challenging the legality of these proceedings, on the following grounds: the accused was arrested on 9/5/06 and taken to Kanjeria Police Post where he was detained till 10/5/06 when he was moved to Gatundu Police Station where he was detained until 12/9/06.

That is 125 days excluding the 14 days during which the police were entitled to hold him.

On the basis of the above facts, which are not disputed by the prosecution, the accused **avers** that he was held in custody by the police contrary to Section 72 (3) (b) of the Constitution. Accordingly, he urges this court to declare these proceedings illegal, null and void and that he be released forthwith.

Section 72(3) (b) of the Constitution under which the application is brought is to the effect that a person arrested upon reasonable suspicion of having committed a capital offence must be brought before court as soon as is reasonably practicable, and at any rate within 14 days of his/her arrest. Proceedings instituted after the 14 days, are illegal, null and void, and the accused must be released unless the prosecution can satisfactorily explain the delay to the court.

In support of their case, the accused cited and relied on the following authorities: **Githuku Vs. Republic; Cr. Appeal No. 119 of 2004 and H.C.CR.C. No. 40 of 2007 –ANN NJOGU & 5 OTHERS Vs. Republic.**

In opposition to the application, the prosecution filed an Affidavit, deponed by P.C. Mara, and dated on 15/9/08. The Affidavit is an attempt to explain why the delay occurred – why the accused was not brought to court within the Constitutionally permitted period of 14 days. Further, the Learned State Counsel submitted that whereas the Fundamental Rights to liberty of the accused should not be infringed,

the right to life of the deceased should not be infringed either.

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

Once the delay is conceded, as is the case in the present application, the only question is whether the prosecution has satisfactorily explained the delay. In the present application the attempts to explain the delay by the prosecution are all in the Affidavit of P.C. Manda, dated 15/9/08.

The gist of the reasons for not bringing the accused before court within 14 days is nothing more than a chronology of what happened within the prosecutorial beaurocratic docket: how the exhibits were taken to the Government Chemist; how the post mortem was conducted and the file forwarded to the State Law Office for perusal and advice; how difficult it was to look for, and trace, the eye witnesses and record their statements etc, etc.

The foregoing chronology of the events preceding the charging of the accused with murder does not meet the test of acceptable explanation of the delay envisaged in Section 72(3) (b) of the Constitution. What constitutes acceptable explanation for delay was extensively dealt with in Criminal Appeal No. 120 of 2004 – **ALBANUS MWASIA MUTUA VS. REPUBLIC** and **Misc. Criminal Application No. 551 of 2007 – ANN NJOGU & 5 OTHERS VS. REPUBLIC**.

In the **MUTUA** case, the Court of Appeal gave a non-exhaustive list of instances which would be acceptable explanation of delay. These include, **inter alia**, that the accused fell sick or was hospitalized within the 14 days stipulated by the Constitution, hence he/she could not be brought to court for plea within the required period; that the accused was for one reason or another released but re-arrested; or the vehicle taking the accused to court broke down on the way and hence accused could not be brought to court on time.

Granted that circumstances do vary from one case to another. But for a reason to meet the criteria set in the **MUTUA** case above, the reasons must be **pari materia** to those given in the **MUTUA** case.

On the above basis, I find and hold that the Affidavit relied upon by the prosecution miserably fails the test, and is accordingly not acceptable.

On the prosecution's submission that the right to life of the deceased should be treated equally with that of liberty of the accused/applicant, I find the submission misplaced. The deceased is not a party to either this application nor the substantive case of murder herein, and it is the law that no court can give valid orders against or in favour of a person who is not a party to the proceedings before the given court.

All in all, and for the above reasons, I find and hold that these proceedings – **Criminal Case No. 82 of 2006** violate the Fundamental Rights of the accused/applicant, as enshrined in Section 72(3) (b) of the Constitution.

Accordingly, I declare these proceedings illegal, null and void and order the immediate release of the accused unless he is otherwise lawfully held.

DATED and delivered in Nairobi this 18th Day of November, 2008.

O.K. MUTUNGI

JUDGE