



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

Criminal Case 72 of 2005

REPUBLICPROSECUTOR

VERSUS

PENINAH AKINYI ONYANGO.....ACCUSED

RULING

On 14/7/2005, the accused/applicant herein, PENINAH AKINYI ONYANGO, was charged with the murder of JOE OSODO AYOT, 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 21/2/05 at Umoja II Estate Plot No. 503, in Nairobi.

On 16/4/08, the accused filed a Preliminary objection, challenging the legality of these proceedings on the grounds: inter alia that, that same violate her constitutional rights as enshrined in Sections 72 (3) (b) and Section 77 (1), (2) (a) (b) (c) and (d) in that she was arrested and kept in police cells for five (5) months before being brought to court, as stipulated in Section 72(3) (b) of the Constitution.

That she submits, makes the proceedings illegal, null and void in that she should have been brought to court within 14 days of her arrest, and she should be released forthwith unless the prosecution can satisfactorily explain the delay.

In support of her application, the accused cited and relied inter alia, on Criminal Case No. 40 of 2007 – JAMES NJUGUNA NYAGA VS. REPUBLIC ; and PAUL MURUNGA VS. REPUBLIC, Criminal Appeal No. 35 of 2006.

In opposition, the prosecution submitted that the application comes towards the end of the prosecution case when witnesses have given evidence and the application should have come at the beginning. The application is only meant for the accused to avoid criminal liability. The case should be allowed to proceed to its logical conclusion.

Murder cases are serious, submitted the prosecution, and that is why no bail or bond is allowed under Section 72(5) of the Constitution. Despite the violation, if proved, the accused can claim compensation for the unlawful detention under Section 72(6) of the Constitution. The Constitution does provide for acquittal, and the primary duty of the court is to punish all crimes in the interest of the society.

The prosecution relied on an Affidavit by Inspector Francis Seme, which in a nutshell, is to the effect

that the prosecution had to get a court order for the accused to undergo a mental examination, which is critical before the accused could be charged; that the accused initially refused to be examined and that contributed to the delay, and she does not come to this court with clean hands.

The prosecution mention the various options that the accused had, including Habeas Corpus and compensation, but the victim of the crime of the accused has none except this case to vindicate his claim for justice.

I have considered the pleadings and submissions by both sides and have reached the following findings and conclusions.

The law on the point and Section 72(3) (b) is now well settled that a person arrested upon reasonable suspicion of having committed murder 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 are illegal, null and void and the accused must be released unless the prosecution can satisfactorily explain the delay to the court.

What constitutes satisfactory explanation of the delay was expensively, dealt with by the Court of Appeal in ALBANUS MWASIA MUTUA VS. REPUBLIC, Cr. Appeal No. 120 of 2004.

There, the court gave a list of instances even though not exhaustive, when the delay can be said to be satisfactorily explained.

Subsequent judgments and Rulings by the Court of Appeal and the High Court have followed the same reasoning, and for an explanation to succeed, the reasons causing the delay must be *pari materia* to those given in the above MUTUA case.

Applying the above test, I have concluded that the prosecution has failed to explain the delay in bringing the accused herein to the court within the Constitutionally stipulated period of 14 days.

Accordingly, I hold that these proceedings violated, and continue to violate, the Fundamental Rights of the accused. I thus declare the same to be illegal, null and void and order the immediate release of the accused unless she is otherwise lawfully held.

DATED and delivered in Nairobi this 3rd Day of November, 2008.

O.K. MUTUNGI

JUDGE