

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

Criminal Case 94 of 2006

REPUBLICPROSECUTOR

VERSUS

SIMON MBURU MWAI.....ACCUSED

R U L I N G

The accused/applicant herein, **SIMON MBURU MWAI**, was on 11/10/06, charged with the murder of EMMA WAGIO NJAU 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 27/9/05 at Kirwara Division, Thika District.

On 5/3/08, the accused challenged the legality of these proceedings on the ground that the same violate his Fundamental Rights as per Section 72(3) (b) of the Constitution in that whereas he was arrested on 28/9/05, he was not brought to court until 11/10/06. The constitutional provisions in Section 72(3) (b) stipulate that a person arrested upon reasonable suspicion of having committed a capital offence shall be brought to court as soon as is reasonably practicable, and at any rate within 14 days of his/her arrest. Any proceedings instituted after the lapse of the 14 days are illegal null and void and the accused must be released unless the prosecution can explain the delay to the court's satisfaction.

The case by the accused is that he was brought to court well over a year after his arrest and the prosecution has not explained the delay at all.

In opposition, the prosecution relies on a Replying Affidavit deposed by Robert Wanyama on 21/7/08 the gist of which is that the bureaucratic process in the prosecution/investigations dockets simply did not move at a pace that could comply with the 14 day's stipulated by law to bring the accused to court. Thus, for instance it took a whole year to receive back results of exhibits sent to the Government Chemist, and a whole year for the Criminal Investigators to complete their work.

Once the delay is conceded, as in this case, the only way out is for the prosecution to explain the delay, in terms of the judgment and instances or reasons **pari materia** to those in the **ALBANUS MWASIA MUTUA VS. REPUBLIC** Cr. Appeal No. 120 of 2004.

The Affidavit herein above, by the prosecution, comes nowhere near meeting the test and standard set in the above judgment. The Affidavit is a mere chronology of the events and a veiled cry for the slow pace in preparing to bring an arrested person to court within the legal provisions.

All in all, I find and hold that the proceedings were instituted long after the lapse of the 14 days prescribed by Section 72(3)(b) of the Constitution, and the delay is not explained by the prosecution.

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

DATED and delivered in Nairobi, this 16th Day of December, 2008.

O.K. MUTUNGI

JUDGE