



**REPUBLIC OF KENYA**

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

**Criminal Case 36 of 2006**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JOSEPH KINYANJUI MUIKAMBA (alias CIINJU).....ACCUSED**

**RULING**

The accused has been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

“On the night of 29<sup>th</sup>/30<sup>th</sup> September, 2004 at Githunguri Location in Kiambu district within Central Province murdered JOSEPH KARIGU KARANJA”.

From the record, it is apparent that the accused was first arraigned before court on 25<sup>th</sup> April, 2006. After the plea was taken, the court selected the assessors and the trial started in earnest on 23<sup>rd</sup> October, 2007. Consequently, the court heard eight witnesses before the prosecution closed its case. On 24<sup>th</sup> April, 2008, I delivered my ruling in which I put the accused on his defence and I also set down the date for the hearing of the defence case. Instead of the accused presenting the defence case, the counsel informed the court that he had been instructed to file a preliminary objection. During the hearing of the objection, Mr. Ochako, defence counsel, submitted that the application is challenging the legality of the charge before the court. His main ground was that the constitutional rights of the accused have been violated and continue to be violated. According to Mr. Ochako, the accused was arrested on 19<sup>th</sup> May, 2005 and was arraigned in court on 25<sup>th</sup> April, 2006. That actually means that the accused was held in custody for 11 months instead of being brought to court within 14 days. As a result of the above, the defence counsel described the charges as illegal, null and void as they violate Section 72(3) (b) and 77(1) (2) (b) and (c) of the Constitution of Kenya. Mr. Ochako was also of the considered view that Section 36 of the CPC had also been violated. Further to the above, he also submitted that the accused was subjected to mental torture and that the same cannot be compensated through monetary terms and hence he is entitled to an “acquittal”. In support of his submissions, the defence counsel quoted the following authorities; Gerald Macharia Githuku vs Republic Criminal appeal No.119 of 2004 at page 4 and Albanus Mutua vs Republic Criminal Appeal No.120 of 2004. Despite the fact that Mr. Ochako was served with the replying affidavit that was deponed by Sgt. David Chelagat, he responded by stating that the same does not explain the delay of eleven months but instead shifts the blame on the investigating officer. Mr. Ochako was of the opinion that the delay was intentional and was meant to torture the accused. It is on that note that he has urged the court to declare the trial, null and void and thereafter “acquit” the accused.

On the other hand, Mr. Ndemmo, State Counsel recalled how the prosecution called eight witnesses and closed its case on 10<sup>th</sup> April, 2008. Thereafter, the application was filed on 31<sup>st</sup> May, 2008. According to Mr. Ndemmo, the defence should have filed the application earlier instead of waiting for the prosecution to close its case. To support the above submissions, he quoted the case of Republic vs. Paul Njehia Kanugu Criminal Case No.96 of 2005 where the court explained the right to life and unlawful detention. In his final submissions Mr. Ndemmo recounted the difficulties that were encountered during the investigations. He informed the court that the accused went into hiding immediately after the commission of the offence and on his arrest, the investigations were carried out while he was in custody. That apart, he also explained that there were three investigating officers in the case. Due to the above, he urged the court to dismiss the application in the interest of justice and fairness.

From the record, it is apparent that the accused was represented by a qualified defence counsel from 3<sup>rd</sup> May, 2006. For unknown reasons, the defence counsel never raised any preliminary objections till 26<sup>th</sup> May, 2008. That was after a period of over two years. Significantly by then, the prosecution had already availed a total number of eight witnesses. In addition to the above, the court had already delivered its ruling and placed the accused on his defence. Therefore, what was remaining was for the accused to give his defence before the matter could be set down for summing-up and judgement. No doubt, substantial resources have been used to avail all the said witnesses to the court. The essence of preliminary objection is that the same will be raised at the earliest opportunity. When the same is raised late, then it loses its meaning. Given the above and the nature of the evidence on record, it is my considered opinion that in the interest of justice and fair play, the case should be heard to its logical conclusion to allow the court to decide the same on merit. No doubt, the court is alive to the fact that the accused is innocent unless proved otherwise. In addition to the above, the burden of proof is beyond any reasonable doubt and lies squarely on the prosecution. In view of the foregoing, I hereby dismiss the application and direct that the case proceeds to its logical conclusion. The accused is at liberty to seek adequate and sufficient compensation under Section 72(6) of the Constitution of Kenya.

Defence hearing on 29<sup>th</sup> January, 2009. Those are the orders of the court.

**MUGA APONDI**

**JUDGE**

**4<sup>th</sup> December, 2008**

Ruling read and signed and delivered in open court in the presence of accused.

Mr. Imbali for Ndemmo    State Counsel

And Ms Nthuku for Tile    Defence Counsel.

**MUGA APONDI**

**JUDGE**

**4<sup>th</sup> December, 2008**