



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

Criminal Case 69 of 2008

REPUBLIC.....PLAINTIFF

-VS-

STEPHEN MBURU WAMBUI.....DEFENDANT

DAVID MACHARIA NJOKI.....DEFENDANT

TERESIA MUMBI WANJIKU.....DEFENDANT

RULING

The accused were first arraigned in court on 3rd September, 2008. After being assigned advocates, the plea was taken on 22nd of September, 2008. Consequently, the case was set down for hearing. However, on 24th of March, 2009, the defence counsel for accused 2 namely Ms. Celine Odembo made a preliminary objection to the proceedings. She submitted that accused 2 was arrested on 18th of August 2008 and was taken to Theta Police Post before being taken to Ruiru Police Station. The accused 2 was later arraigned in court on 3rd of September 2008. According to Ms. Odembo, accused no. 2 spent about three extra days in custody. She was of the opinion that his rights under Sec. 72 (3) (b) of the Constitution of Kenya were violated. Further to the above, she also submitted that the proceedings are a nullity and the police know their work and hence ought to have produced the accused 2 within the mandatory period of fourteen days. She further urged the court to declare the proceedings null and void. On that basis she also urged the court to set the accused 2 a liberty. In support of her submissions, she relied on the case **Gerald Macharia Githuku –vs- Republic** Criminal Appeal No. 119 of 2004. In the above case the appellant was set free after his fundamental rights were violated. Besides the above, she also submitted that the delay by the police for three days have also made it impossible for the accused to get a fair hearing within a reasonable period. Apart from the above, she also urged the court not to allow the affidavit filed by the prosecution after the delay of five months. She further pointed out that if the proceedings are continued, then the fundamental and Constitutional rights of the accused 2 will continue to be infringed. To support her submissions further, she also quoted the case of **Albanus Mutua –vs- Republic** Criminal Appeal No. 120 of 2004. She concluded her submissions by stating that even if the delay was for a day or two, then the same cannot be justified.

On the other hand, the State through Ms. Macharia State Counsel opposed the application on the ground that accused 2 was arrested on 25th of August 2008 and was arraigned in court on 3rd of September 2008. According to Ms. Macharia the accused 2 was held in custody for only nine days. Further to the above, she also submitted that she has opposed the application because the same is wrongfully before the court and is a waste of time and was brought in bad faith. She further urged the court to dismiss the application as it is misleading and is intended to block the cause of justice. She concluded her submissions by urging

me to allow the matter to proceed to its logical conclusion.

From the record it is apparent that the A2 was arrested on 21st August, 2008. The charge sheet that was drawn by Thika Police Station confirms that information. The said charge sheet was directed to the Chief Magistrate Court, Makadara. This information seems to contradict what had been passed on to the learned State Counsel. That also confirms that there was a delay of three days in bringing the accused to the court. This court has carefully considered the above facts and appreciates that though there was a delay for only three days, the same cannot be used as a basis for acquitting an accused who has been charged for the offence of murder. It is also incumbent on this court to take cognizance of Sec. 70 (a) of the Constitution of Kenya that states as follows:

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual that is to say, the right whatever his race, tribe, place of origin or residence or other local connexion, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

(a)Life, liberty, security of the person and the protection of the law.”

Further to the above, Sec. 71 (1) of the Constitution of Kenya states as follows:

“No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.”

The death of the deceased herein does not fall under any of the above provisions. In the event that the A2 feels strongly against his unlawful arrest and/or detention, then he may seek adequate and appropriate compensation under Sec. 72 (6) of the Constitution of Kenya. The upshot is that I hereby dismiss the application since the same has **no** merits at all. Further to the above, I hereby direct that the case be heard to its logical conclusion to allow the court to determine how the deceased met their deaths. Those are the orders of the court.

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

OJIENDA for **MS. ODEMBO** Defence Counsel

Ms. MACHARIA State Counsel

MUGA APONDI

JUDGE

3RD JUNE, 2006

Ojiendo:

I pray for a certified copy of the ruling.

Court:

The PDR is hereby directed to supply the defence counsel with a certified copy of the Ruling within the next 7 days. Hearing on 27th & 28th July, 2009. Accused Remanded in Custody.

MUGA APONDI

JUDGE

3RD JUNE, 2006