



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CRIMINAL CASE 3 OF 2007**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JOHN SAIKALA KISIONGONI..... ACCUSED**

**R U L I N G**

On 15/12/2006, the accused/applicant herein, **JOHN SAIKALA KISIONGONI**, was charged with the murder of **KEVIN MORRIS MUKABWA**, 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 16/9/06 at Kongo Village, Kawangware, Nairobi.

On 28/3/2008, the accused challenged the legality of these proceedings against him on the grounds that the same violate his Fundamental Rights as enshrined in Section 72(3) (b) and Section 77 (1) & (2) of the Constitution in that he was arrested on 16/9/06 brought before court until 16/1/07, a total of 101 days after his initial arrest.

The provisions of Section 72(3) (b) of the Constitution are to the effect that a person arrested/detained upon reasonable suspicion of having committed a capital offence 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 explain the delay, to the satisfaction of the court.

It is on the foregoing facts, which are not disputed by the prosecution, that the accused urges this court to abide by the Constitutional provisions and declare the proceedings null and void and release him forthwith.

In opposition to the application, and while conceding the delay, the prosecution, **vide** an affidavit by P.C. Michael Olunya, dated 7/10/08 **aver** that the delay was inadvertent and due to protracted investigations.

The prosecution, through Learned State Counsel, Ms. Wafula, relied on the above affidavit, totally, and had nothing more to add.

In support of their application the accused cited and relied on the authorities of **ANN NJOGU & 5 OTHERS VS. THE REPUBLIC**, Misc. Cr. Application No. 551 of 2007 and Cr. Appeal No. 35 of 2006 – **PAUL MWANGI MURUNGA VS. REPUBLIC**.

As stated herein above, the prosecution did not cite any authority in the course of their submissions.

I have perused the pleadings and the authorities cited by the applicant and I have reached the following findings and conclusions.

Where the delay is conceded, as is the case in the present application, the only issue is whether the prosecution have satisfactorily explained the delay.

Looking at the explanation, as given in the Affidavit of P.C. Michael Olunga, and in light of the decided cases on the topic, I have no doubt that the prosecution's purported explanation of the delay falls far short of what is envisaged by Section 72(3) (b) of the Constitution and the interpretation given to the said provisions, by the courts over the last two decades.

What constitutes acceptable explanation for delay in bringing an arrested person before the court was extensively dealt with by the Court of Appeal in Cr. Appeal No. 120 of 2004 – **ALBANUS MWASIA MUTUA VS. THE REPUBLIC** and in Misc. Criminal Application No. 551 of 2007. In a nutshell, the arrested person either fell sick or was hospitalized and hence he/she could not be brought to court within the stipulated 14 days, or he/she was charged and for one reason or another discharged then, re-arrested; or the vehicle taking the accused to court broke down while taking the accused to court and hence could not reach the court on time. These are some of the instances which will constitute acceptable explanation for the delay.

Looking at the Affidavit deponed by the prosecution, the reason given – protracted investigations- fall far short of the test given by the courts over the years. This court has consistently and persistently held that protracted investigations or chronology of what happened from arrest to being brought before court, is not acceptable. The reasons must be **para materia** with those set down in the MUTUA case.

Here, I hold that the delay is not explained. Accordingly, the proceedings violate the Fundamental Rights of the accused/applicant and I declare the same to be illegal, null and void.

I order the immediate release of the accused/applicant, unless he is otherwise lawfully held.

It is so ordered.

DATED and delivered in Nairobi, this 17<sup>th</sup> day of November, 2008.

**O.K. MUTUNGI**

**JUDGE**



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