



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Criminal Case 38 of 2005**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**1. PAUL OTIENO NDEJWE )**

**2. PAUL OUMA OTEINO ) ..... ACCUSED.**

**RULING**

The accused are charged with murder contrary to section 203 and 204 of the Penal Code. The particulars of the offence are that on the 5<sup>th</sup> day of April, 2004 at Rapogi area in Migori District, the accused jointly with another before court murdered Dominic Osambo Oginya.

When the case came up for hearing, Mr. Ombachi for the first accused hereinafter referred to as “*the accused*” raised a Constitutional issue based on the provisions of **Section 72(3) (b)** of the **Constitution**. He said that the accused was arrested on 2<sup>nd</sup> June 2004 but was not arraigned in court until 26<sup>th</sup> June, 2004, 24 days after the date of his arrest. He urged the court to find that the accused’s constitutional right was violated as no reason for the delay had been advanced by the prosecution. He submitted that the accused ought to be discharged of the charge that he was facing.

**Police constable Simon Simiyu** of Divisional Crime Investigation Office, Migori, swore an affidavit and explained that the offence of murder with which the accused is charged was committed on 5<sup>th</sup> April, 2004. The accused went at large and was arrested on 2<sup>nd</sup> June, 2004 at Homa Bay. He was to face charges of murder and robberies committed at Awendo, Rongo, Migori and Sori. The accused was collected by CID officers from Homa Bay on 3<sup>rd</sup> June, 2004 and between 4<sup>th</sup> and 6<sup>th</sup> June, 2004 he was being interrogated in connection with the said charges. Investigations continued and the principal witnesses were traced and recorded their statements on 20<sup>th</sup> and 21<sup>st</sup> June, 2004.

P. C. Simiyu further explained that owing to the number of cases being investigated against the accused and the distances between Migori, Sori, Awendo & Rongo, it took considerable time to complete and compile the investigation files.

**Mr. Kemo**, Principal State Counsel, urged the court to find the aforesaid explanation sufficient.

Under **section 72(3)(b)** of the **Constitution**, where an accused person is not arraigned in court within the stipulated period of time, the burden of proving that the accused was taken to court as soon as was reasonably practicable lies on the person who alleges that the provisions of that subsection were complied

with. In **ALBANUS MWASIA MUTUA V REPUBLIC** Criminal Appeal No.120 of 2004 it was held that unexplained delay in arraigning an accused person before court will usually result in acquittal of the accused.

Where the police has offered an explanation it is for the court to consider whether such an explanation is reasonable in the circumstances of the case.

In this case, I have no reasons to doubt the depositions made by P.C. Simon Simiyu. Investigations that were being conducted in respect of several offences which were committed in distant places from one another would usually take much longer period of time compared to investigations in one given place. I also take note of the fact that the police have shortage of official vehicles for use in their investigative movements and often they have to rely on public means of transport. That definitely hampers their efficiency.

Though there was 10 days' delay in arraigning the accused in court, I think the delay has sufficiently been explained. I do not find that the accused's constitutional rights were violated. The trial should proceed as scheduled.

**DATED, SIGNED and DELIVERED at KISII this 19<sup>th</sup> day of November, 2008.**

**D. K. MUSINGA**

**JUDGE.**

Delivered in the open court in the presence of:

1. Accused
2. Mr. Kemo, Principal State Counsel for the Republic

**D. K. MUSINGA.**

**JUDGE.**