



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyango v Republic (Criminal Petition E002 of 2023)  
[2023] KEHC 479 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 479 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL PETITION E002 OF 2023  
RE ABURILI, J  
JANUARY 30, 2023**

**BETWEEN**

**COLLINS OTIENO ONYANGO ALIAS OJIS ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The applicant/petitioner herein is the accused person in Siaya CM Cr Case No E448 of 2022. He was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*.
2. He was arrested on December 20, 2022 and held in police custody for 7 days without any order of the court allowing the police to detain him for investigations and brought to court on December 28, 2022 after the Christmas and boxing day extended gazetted public Holiday.
3. When he appeared before Hon Margaret Wambani, Chief Magistrate, he complained that he had been tortured by the police and injected with an unknown substance and was therefore not feeling well. He also complained that he had been held in custody without any order of the court for seven days which violated his Constitutional right as an arrested person. He wrote to court and the trial court placed the trial court file and the complaint in the form of a petition before this court for consideration
4. The court then directed the ODPP to be served with the petition and the ODPP appeared in Court through Mr. Kakoi and requested for time to enable the investigating officer and arresting officer file affidavits explaining what transpired.
5. As it turned out, the two officer, CPL Nyabura purported to swear an affidavit which was not sworn at all as it simply has a stamp of ODPP Siaya at the jurat where the stamp and signature for Commissioner for oaths is supposed to be. The officer however took oath and stated what he knew about the matter and he was cross-examined by the petitioner



6. PC Korir too purported to have sworn an affidavit which was not sworn before a commissioner for oaths as he conceded before court that he never saw the advocate who commissioned his affidavit and when the court issued summons to that advocate called Kennedy Ochieng Omolo of Siaya to appear, the Officer could not trace the said advocate. He returned the unserved summons to court. The court struck out and expunged the affidavit from the court record.
7. Nonetheless, the officer took oath and stated on oath what he did in respect of this case. The court adopts his statement on oath to be what he had to tell the court.
8. It is not in dispute that the accused person was arrested on December 20, 2022 and was never taken to court or leave of court sought and obtained to detain him for more than 24 hours. He was detained until December 28, 2022 when he was taken to court. Although 26th and December 27, 2022 were public holidays, there is no justifiable explanation for the accused to have been detained in police custody from 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 23<sup>rd</sup>/12/2022 when the courts were open and available to grant any orders that the police could have sought and obtained to hold the accused person suspect longer than 24 hours to enable them investigate further before a decision to charge him could be sought or reached.
9. Article 49 of *the Constitution* guarantees every arrested person the right to (1)(f) be brought before a court as soon as reasonably possible, but not later than :
  - i. Twenty four hours after being arrested or
  - ii. If the twenty four hours ends outside ordinary court hours or on a day that is not an ordinary court day, the end of the next court day
10. In the instance case, the accused was held beyond 24 hours for four clear days when the courts were open upon being arrested in the morning hours on December 20, 2022 and he has lodged a complaint before this court of violation of his constitutional rights under Article 49(1) of *the Constitution*.
11. This court has received evidence on Oath from the re-arresting officer Corporal Nyabura and Police Constable Korir the investigating officer of the case. However, the two officers have not explained to the satisfaction of this court why the accused was held in custody for four days from 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and December 23, 2022 before the weekend upon which the Christmas holiday fell in and extended to December 27, 2022 then they only took him to court on December 28, 2022.
12. The accused/applicant has laid various accusation against the police officers, and which can be subject to in-depth investigation by IPOA - Independent Policing Oversight Authority after he is attended to medically as he claims that he was injected with an unknown substance while at Ugunja Police Station, which has adversely affected his health.
13. When the complaint was filed, the file was placed before me for consideration. Article 21 of *the Constitution* provides that it is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of costs.
14. The accused approached this court under Article 22 of *the Constitution* which guarantees every person the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened,.
15. The Rules made pursuant to the above Article 22(3) commonly known as the *Mutunga Rules* provide that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. A person claiming that their rights are violated or threatened to be violated or threatened to be violated can file a petition which can be by way of a letter addressed to the court for redress.



16. In this case, a letter was addressed to this court and filed on 16/1/2023 upon which the court served it upon DPP who have availed Corporal Nyabura and Police Constable Alvin Korir who have been examined on Oath and failed to explain the reasons for the delay in taking the accused person to court upon arrest within 24 hours as mandated under Article 49 of the Constitution.
17. In the circumstances, I find and hold that this is a clear case where the rights of the accused person have been violated with impunity by the officers at Ugunja Police Station. The remedy for such violation is found in Article 23(3) of the Constitution being:
  - i.(a) declaration of rights;
  - (b) an injunction;
  - (c) a conservatory orders
  - (d) a declaration of invalidity of any law that denies, violates, infringes or threatens a right for fundamental freedom in the Bill of Rights and is not justified under Article 24 of the Constitution.
  - (e) compensation
  - (f) Judicial Review
18. The police have not pleaded and or proved that the rights of the accused person under Article 49 of the Constitution can be limited or were limited or justifiably limited by application of Article 24 of the Constitution.
19. For the above reasons and following my findings above, I conclude and find that the rights of the accused person Collins Otieno Onyango alias Ojis were violated and infringed by the failure on the part of the police to take him to court within 24 hours of the time of his arrest and subsequently being charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code vide Siaya CM Cr. E448/2022.
20. That being the case, I find that the appropriate order to issue is to issue a Judicial Review Order of *Certiorari* quashing and bringing into this court and I hereby bring into this court and quash the decision of the ODPP Siaya to charge the accused person/applicant/petitioner herein Collins Otieno Onyango alias Ojis with the offence of robbery with violence based on the facts subject of the charge in Siaya CM Cr. Case No. E448/2022.
21. In addition, I hereby order that the National Police Service and ODPP are hereby prohibited from arresting and charging the accused person/Applicant/Petitioner herein with the offence related to the robbery with violence or any other offence whose facts relate to the violation of the rights of the Petitioner herein Collins Otieno Onyango alias Ojis.
22. Consequently, having quashed the charges subject of the violation of rights of the accused person and prohibited his arrest and prosecution, I hereby order that the Petitioner herein Collins Otieno Onyango alias Ojis shall forthwith be released from custody.
23. Regarding the alleged injection of unknown substance, the Petitioner is at liberty to report to IPOA - Independent Policing Oversight Authority for further investigations.
24. This file and the lower court Criminal Case File No. E448/2022 are hereby closed. Petitioner/ Accused to be returned to Siaya G.K. Prison until a signal for his release is served. I so order. File closed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**



**R.E. ABURILI**  
**JUDGE**

