



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Miscellaneous Criminal Case 62 of 2009

IN THE MATTER OF SECTION 84(3) OF THE CONSTITUTION (NOW REPEALED)

AND

IN THE MATTER OF KITUI PM CRIMINAL CASE NO 274 OF 2006

(REPUBLIC –VS- CAESAR NJAGI)

R U L I N G

1. **Kitui PM Criminal Case No. 274 of 2006 (Republic –vs- Caesar Njagi)** was fully heard but the court did not prepare and deliver judgment because the accused person raised a constitutional issue. That issue was that his constitutional rights under **section 72** of the old **Constitution** (now repealed) had been violated in that he was not arraigned before court within the period prescribed and instead was unlawfully held in police custody for seven (7) days.
2. The lower court therefore framed the following constitutional questions for determination by the High Court-
 - (a) **In the circumstances of this case (the criminal trial before the lower court), have the rights of the accused under section 72 of the (old) Constitution been violated?**
 - (b) **When in a case before a subordinate court an issue or question arises of violation of an accused’s rights under section 72 (aforesaid) of the Constitution, can a subordinate court dispose of the issue by following the established decisions of superior courts that have themselves already interpreted that section, or would doing so... amount to an interpretation of the Constitution and therefore unlawful?**
3. This constitutional reference was forwarded to this court on 6th July 2009. It was informed by a number of Court of Appeal and High Court decisions to the effect that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature of the charge and the strength of the evidence that may be adduced in support of that charge. See for instance-
 - (i) **Albanus Mwasia Mutua – vs – Republic Court of Appeal Criminal Appeal No. 120 of 2004 (Unreported).**
 - (ii) **Ndede – vs – Republic [1991] KLR 567.**
 - (iii) **Republic – vs – Amos Karuga Karatu Nyeri High Court Criminal Case No. 12 of 2006 (Unreported).**

(iv) Republic – vs – Geroge Muchoki Kungu Nairobi High Court Criminal Case NO. 49 of 2007 (Unreported).

4. This line of decisions received mixed reactions among some High Court and Court of Appeal judges, and the reason was obvious. Strict application of the decisions led literally to some accused persons getting away with murder and other serious felonies.

5. It was therefore not surprising that on 8th October 2010 a different bench of the Court of Appeal (Githinji, Waki and Visram, JJA) rendered a decision that departed from the position taken by the aforesaid line of decisions. This was in the case of **Julius Kamau Mbugua – vs – Republic [2010] eKLR**. The *ratio decidendi* of this case is that **breach of an accused person’s constitutional rights prior to being arraigned in court does not exonerate the accused from the crime or crimes that he stands charged off**. In any event such breach could give rise to the civil remedy of monetary compensation as stipulated in section 72(6) of the old Constitution.

6. This decision of the Court of Appeal is obviously in conflict with the previous decisions of the same court already mentioned. It will be up to a bench of five or more judges of the same court, or the **Supreme Court**, to finally settle the law in this regard. In the meantime, on my part I choose to follow the decision in the **Julius Kamau Mbugua** case. In my respectful view, the law as pronounced by it is the correct one.

7. That being my view of the matter, I hold that it is not necessary for this court to investigate and answer the questions posed to this court by the lower court. Instead, **I direct that the lower court do proceed to prepare and the deliver judgment in Kitui PM Criminal Case No. 274 of 2006 (Republic – vs – Caesar Njagi)**. Those will be the orders of the court.

8. The delay in preparation of this ruling is regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

DATED AT NAIROBI THIS 22ND DAY OF AUGUST 2012

H. P. G. WAWERU
JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

ASIKE-MAKHANDIA
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JUDGE