



CRIMINAL

- Issues to consider when there is an allegation of violation of Constitutional rights of an accused person.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL PETITION NO. 8 OF 2009

CHARLES MURIMI MBAKA.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The petitioner was charged before Chuka Principal Magistrate Court on 21st April 2009 with the offence of manslaughter contrary to section 202 of the Penal Code. The charge sheet indicates that he was arrested on 16th March 2008 on the very day that it is alleged the offence occurred. The petitioner by this petition seeks this court's declarations that his constitutional rights as enshrined in section 72 (3) (b) of the old constitution were violated. He also sought a declaration that his pending criminal case before Chuka Principal Court No. 351 of 2008 is null and void *ab initio*. Following those declarations, the petitioner has sought that this court will make an order to terminate the proceedings of that case before Chuka Magistrate's Court. The petitioner relied on two cases. The first one **Robert Mwaniki Makanga Vs. Republic** Criminal Appeal Case No. 6 of 2005 where the High Court at Nyeri when considering an appeal from R.M. Gichugu Court had this to say about the prolonged detention of the accused person.

“He was therefore in custody for a period of 6 days. The offence the appellant faced was not a capital offence. Accordingly, section 72 (3) (b) of the Constitution provides that he ought to have either been produced before court or released within 24 hours of his arrest. No explanation was given to the delay in producing the appellant before court. There being no reasonable explanation the court finds that

the appellant's constitution rights were violated."

The petitioner also relied on the case **Joseph Amos Owino Vs. Republic** Criminal Appeal No. 450 of 2007 where the Court of Appeal on the issue of prolonged detention by the police of the appellant stated:-

"As we have stated, he was taken to court about seventeen days outside the time he should have been taken to court. No explanation was given in the trial court, or in the first appellate court nor in this court. His rights were clearly violated and no explanation exists for such violation. We need to make it clear that all the law requires the prosecution to do is to demonstrate to the court in cases where a person is taken to court outside the period allowed by section 72 (3) that there were reasons for the delay such that when such reasons are considered then it would appear to court that the accused has been taken to court as soon as was reasonably practicable notwithstanding the apparent delay."

Since August 2010 this country is now under a new constitution. The Constitution of Kenya 2010 Article 23 (3) (a) to (f) provides amongst remedies available to a person who alleges that the Bill of Rights has been violated. The court can order for an injunction or compensation amongst other remedies. It is clear from those provisions of that Article that there is no basis for declaring a trial to be a nullity on the basis of violation of the accused rights. The Court of Appeal in the case **Julius Kamau Mbugua Vs. Republic** Criminal Appeal No. 50 of 2008 cited with approval the decision of Emukule J. as follows:-

"Anyara Emukule J. in Republic Vs. David Geoffrey Gitonga, Criminal Case No. 79 of 2006 (Meru) (unreported). In that case, the accused was tried for the offence of murder and after the conclusion of the trial and after the accused had made his defence, his counsel submitted that the trial was a nullity since the accused was detained for 140 days before he was charged in violation of section 72 (2) (b) of the Constitution.

The trial Judge declined to acquit the accused saying that a breach of section 72 (3) (b) does not render a trial a nullity but entitles an accused to compensation as stipulated in section 72 (6). The trial Judge reasoned thus:-

"I am aware that contrary to opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existence, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized states that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal.

.....
A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy. A rapacious rapist and a serial killer will not be allowed to go scot-free because either deliberately or inadvertently, the prosecution authority has not deemed it fit to have him brought before a court within 24 hours or as a case may be within 14 days."

The Court of Appeal having cited that case by Emukule J. stated in that case:-

“Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum. The prosecution having closed its case, and the trial court having found that the appellant had a case to answer, it is in the public interest that the trial should be conducted to its logical conclusion.”

In my view, the petitioner, having been arrested on the day the offence was committed, could not have been brought before court because understandably, investigations could not have been concluded within that day. When this issue was first raised before the Chuka Principal Magistrate, the prosecution responded by saying that when investigations were concluded, the petitioner was taken to High Court at Meru to face a charge of murder. However, the state counsel advised the police that the proper charge against the petitioner was manslaughter. It was then that the petitioner was presented before the Principal Magistrate Chuka and charged with the offence of manslaughter on 21st April 2008. According to my calculations, the petitioner was held in police custody 21 days in excess of the period provided for capital offences. Bearing in mind that he was arrested on the same day the offence was allegedly committed, I do not find that the period was unreasonable. This is because there would obviously be delay which is inherent in getting advice from the state counsel amongst others. I therefore find that the petitioner’s rights under the constitution were not violated. If I had found that those rights were violated, I would have considered the same remedies in Article 23 of the Constitution of Kenya 2010. It is for that reason that I dismiss this petition with costs being awarded to the respondent. I order the petitioner do appear before the Principal Magistrate Court Chuka in Criminal Case No. 351 of 2008 on 22nd February 2011 before P.M. Ngare at Chuka for further orders on the pending trial before him in Criminal Case No. 351 of 2008 Chuka. This ruling shall be forwarded by the Deputy Registrar of this court to Principal Magistrate Court Chuka for compliance.

Dated, signed and delivered at Meru this 17th day of February 2011.

**MARY KASANGO
JUDGE**