



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CONSTITUTIONAL REFERENCE NO. 3 OF 2010

ROBERT KIPROTICH CHEPKWONYAPPLICANT

AND

REPUBLICRESPONDENT

RULING

The trial Principal Magistrate, Hon. T. Okello, has referred to this court a Reference seeking determination of the question whether the constitutional rights of the accused who was detained for six (6) days in a police station before charge were violated. Regrettably, the trial magistrate did not state the facts before posing the question as he is supposed to do. As it turns out, this court has to carry out the exercise which the trial magistrate should have carried out. That is sloppy.

The charge sheet shows that the accused, **Robert Kiprotich Chepkwony** was arrested on 30th December, 2008 and was brought to court on 6th January, 2009 for plea in Criminal Case No. 4 of 2009 at Bomet when he pleaded not guilty to the charge of Stealing contrary to **Section 275** of the **Penal Code**.

When the Reference from the lower court came up for hearing before me on 15th December, 2010, **Mr. Maengwe**, learned counsel for the accused, submitted that the accused was arrested on 30th December, 2008 and was brought to court on 6th January, 2009, six(6) days later. He contended that the accused's constitutional rights were violated and urged the court to declare the charge and the prosecution null and void.

Mr. P. Kiprop, learned counsel for the State, opposed the prayer by Mr. Maengwe and contended that the law obtaining was in the old Constitution and submitted that if there was any breach of the accused's constitutional rights the same could be redressed by damages and the accused as recourse to civil litigation. Mr. Kiprop referred the court to the case of **Julius Kamau Mbugua (Nbi C.A. Cr. Appeal No. 50 of 2008)** in which the Court of Appeal shifted its stance on the erstwhile jurisprudence on the point as laid down in a plethora of cases including **Ann Njogu & 5 others V. R (H.C. Misc. Appl. No. 551 of 2007)**; **Ndede V. Republic [1991] KLR 567**; **Paul Mwangi Murunga V. R. (Cr. Appeal No. 35 of 2006** at Nakuru – unreported); **Amos Karuga Karatu (Nyeri Cr. C. No. 12 of 2006**, unreported);

The jurisprudence in the old independence Constitution on the issue of effect of detention of suspects beyond the constitutional limit has taken a shift and jettisoned the old case-law that supported the view that violation of an accused's constitutional right to be brought to court within the time resulted in the nullification of the charge and the prosecution. Borrowing from the judgment of **Justice Anyara Emukule** in **Republic V. David Geoffrey Gitonga(Cr. Case No. 79 of 2006 (Meru)** (unreported) the

Court of Appeal in **Julius Kamau Mbugua V. Republic** (supra) held that incarceration before a person is charged in court is extra judicial and that the court does not assume criminal jurisdiction over an accused person before the charge is laid in court and that the violation is beyond the statutory duty of the criminal court. Ostensibly shifting towards international jurisprudence on the point, the court held that the breach of constitutional right is a civil right, though constitutional in nature, which was beyond the statutory duty of the criminal court and was compensatable under **section 72(6)** of the old Independence Constitution. Referring to sentiments by Hardie Boy J, the court cited with approval that “*the right is to trial without delay, it is not a right not to be trial after undue delay...*” But it was **Justice Anyara Emukule** of the High Court in **R. V. David Geoffrey Gitonga** (supra) who first went against the grain. Said he: “*I am aware that contrary 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-existent, 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 twenty four (24) hours or as the case may be within fourteen (14) days*”.

In the light of the above, the question posed in the Reference, namely, whether the accused’s constitutional right was infringed when he was held in police station for six (6) days before being brought to court is answered in the affirmative because the State did not show that although the constitutional threshold was not reached, the State brought the accused to court as soon as was reasonably practicable. But the effect of the accused’s constitutional right to be brought to court as stipulated in the old Independent Constitution did not render the charge bad in law or vitiate the prosecution. It amounted under the old Constitution to breach of his constitutional right the remedy for which was compensation by way of damages as stipulated by **Section 72(6)** of the old Independent Constitution.

In the result, the charge holds good and the trial must proceed. The matter is returned to the trial court which shall proceed to hear Cr. Case No. 4/2009 to its conclusion.

DATED at KERICHO this 6th day of April, 2011

G.B.M. KARIUKI, sc
RESIDENT JUDGE

COUNSEL APPEARING

Mr. Maengwe Advocate for the accused/applicant
Miss N.M. Idagwa State Counsel for Respondent
Mr. Koech - Court Clerk