



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

**AT EMBU**

**CONSTITUTIONAL REFERENCE NO. 1 OF 2011**

**BERNARD KIBATHA KABORO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The issue regarding the alleged contravention of the Applicant's fundamental right under Article 49 (1)(f)(i) of the Constitution of Kenya, 2010 was referred to this court by an order given by the Senior Resident Magistrate at Wanguru following an application by his counsel Ms. Munene. The allegation was that he had been held in custody for two days before being produced in court and that that was longer than the 24 hours that the Article provides.

In the trial court the Deputy Officer Commanding Wanguru Police Station Inspector Mutegi Kathanya testified that the Applicant was arrested on 6<sup>th</sup> December 2010 and brought to court on 8<sup>th</sup> December 2010. This was on the charge of being rash and negligent contrary to Section 243 (d) of the Penal Code. This is a misdemeanour.

Before this court, Ms. Munene relied on the High Court decisions in *ANN NJOGU & 5 OTHERS VS REPUBLIC Misc. Criminal Application No. 551 of 2007 at Nairobi*, and *REPUBLIC VS JUSTINE NANDWA & ANOTHER High Court Criminal Case No. 114 of 2006 at Nairobi* and the Court of Appeal decision in *GERALD MACHARIA GITHUKU VS REPUBLIC Criminal Appeal No. 119 of 2004 at Nairobi* to seek that this court finds that the charging of the Applicant was null and void and that he should be acquitted given the fact of delay in bringing him to court. Her argument was that whatever evidence the prosecution has against her client was beside the point. She further asked that it be found that the explanation given by Inspector Mutegi as to why the Applicant was not charged within 24 hours was insufficient and unacceptable.

What was Inspector Mutegi's explanation? He told the trial court that after the Applicant was arrested on 6<sup>th</sup> December 2010 he was detained at the police station awaiting presentation to court. Next morning, a charge sheet was prepared to accompany him to court. At 7.30 a.m., however, the Applicant requested the Officer Commanding Police Station (OCS) not to take him to court as he wanted to discuss the matter in respect of which he was being charged with the family of the complainant. The OCS allowed the discussion but by the time it was concluded the rest of the suspects of the day had already been taken to court. The discussions were not successful. The OCS made a decision to release the Applicant on bail to the following day. He asked the Applicant to post KShs.5,000/= bail. He was unable to raise the amount. This is how he came to be detained till the following day.

It is material, and this was also pointed out by Mr. Wohoro for the State while opposing the application, that the evidence of Inspector Mutegi was not controverted. The record of the trial court shows Ms. Munene did not cross examine the officer and neither did she seek to have her client testify, that is if he had a different version of what had transpired at the police station. I find it was the Applicant who chose against being taken to court on 7<sup>th</sup> December 2010. It is apparent from the conduct of the OCS, as revealed by the evidence of his deputy, that it was appreciated that the Applicant needed to be arraigned in court within 24 hours of his arrest. When the Applicant made that impossible he was offered bail which he was unable to raise. He was presented to court the following day.

Mr. Wohoro's submission was that even if the court were to find that the Applicant's right had been contravened, his remedy lay in suing the State for compensation. I agree with that submission, and hasten to add that, unless the circumstances of the alleged contravention are grave, the court should remember its responsibility to society to punish any proved crime even as it seeks to accord the rights of the person suspected to have committed the crime.

I should also point out that Article 49(1)(f)(i) is more strict when compared to the provisions of Sections 72(3)(b) of the previous Constitution which provided for an accused being arraigned in court within 24 hours or "as soon as was reasonably practicable." The decisions referred to by Ms. Munene were interpreting this old provision and therefore their value in this new dispensation may be limited.

In conclusion, I find that the right of the Applicant under Article 49(1)(f)(i) of the Constitution of Kenya, 2010 has not been violated. He shall go back to the trial court to face the charge in respect of which he is being tried.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12<sup>TH</sup> DAY OF JULY 2011.

**A. O. MUCHELULE**  
**JUDGE**