



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Case 65 of 2009

MOHAMMED ONYANGO JOEL.....PETITIONER

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Mohammed Onyango Joel, hereinafter “*the petitioner*” was arrested on 19th September, 2009 on suspicion of having committed the offence of murder contrary to section 203 as read with section 204 of the Penal Code. According to the petitioner he was thereafter held in police custody until 19th October, 2009 when he was presented before this court on information charging him with murder as aforesaid. It was alleged in the information that he on 21st July, 2008 in lake Victoria, at Muhuru Location, Nyatike District within Nyanza Province murdered Titus Ochieng Kithende.

However before the petitioner could take the plea, his counsel, Mr. Odingo intimated to this court that he intended to raise a constitutional challenge to the information. He wanted time to file a formal petition. On 9th November, 2009 Muchelule J made an order allowing the petitioner to bring the petition and serve the same on the State within 14 days.

The petitioner duly filed the petition dated 16th November, 2009. In the said petition he claimed that he was arrested on 19th September, 2009 over a charge of murder that he is currently facing. Upon arrest he was locked up at Nyatike and Migori police stations until 19th October, 2009 when he was arraigned before this court on the information. According to the petitioner he was detained in police custody in excess of 14 days permissible by our supreme law of the land, the constitution, before he was presented before court to face the information. He was not told and or explained to why he was not arraigned in court in time as determined by the constitution. That being the case he sought a declaration that his rights as suspect were violated and he was therefore entitled to an acquittal by dint of his fundamental rights under the Constitution having been violated. He also sought compensation for wrongful confinement and incarceration.

The state on being served with the petition reacted by filing a replying affidavit through Chief Inspector of Police David Kemboi, the then OCS Macalder police station. He deponed that the accused was arrested on 21st September, 2009. He personally worked on the petitioner's file until 27th September, 2009 when he completed the investigations. He then presented the petitioner to the MOH, Migori District for mental examination. The MOH could not undertake the exercise immediately as he was on transfer. Instead he referred him to another Doctor. That other Doctor was not available until after 9 days. Indeed it took the intervention of the DCIO, Mr. Kiboro, on 8th September, 2009 to have the examination undertaken on 9th September, 2009. As far as he was concerned the delay was occasioned by his inability to have the petitioner evaluated mentally by a doctor in good time. It was not therefore his fault.

On 23rd February, 2010, the substantive hearing of the petition commenced before me. Mr. Okenye, learned counsel holding brief for Mr. Odingo orally submitted that the petitioner was held in police custody for 27 days. The law required that the petitioner be brought to court within 14 days. His constitutional rights were thus violated and he was entitled to an acquittal.

Mr. Kemo, Senior Principal Prosecution counsel on behalf of the state opposed the petition. He pointed out that the replying affidavit contained inadvertent error as to when psychiatric evaluation of the petitioner was undertaken. It ought to have read 9th October, and not 9th September, 2009 as deponed to. The reasons for the delay given by the deponent were otherwise sufficient. He had discharged the burden placed on the prosecution pursuant to section 72(3)(b) of the Constitution of Kenya.. The petition ought to be dismissed therefor.

I have considered albeit carefully the petition, the affidavit in support thereof, the replying affidavit, rival oral submissions and the law. Essentially what the petitioner is stating is that he was taken to court 17 days after the time limited by our Constitution for doing so. For he was arrested on 19th September, 2009 and arraigned in court on 19th October, 2009. However according to the prosecution the excess detention period was for about 15 days the petitioner having been arrested on 21st September, 2009 and brought to court on 19th October, 2009. Whichever way one looks at the situation there was a delay of sorts. Indeed the prosecution concedes that much.

The alleged breach of the Constitutional rights of the accused is therefore based on section 72(3) of the Constitution although the petitioner does not specifically state so in his petition. The said section of the constitution provides inter lia:-

“A person who is arrested or detained-

- a)
- b) *Upon reasonable suspicion of him having committed, or being about to commit a criminal offence*

And who Is not released, shall be brought before a court as soon as reasonably practicable and where he is not brought before a court within twenty –four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with”.(emphasis mine)

My understanding of the above provision of the law is that a person arrested upon a reasonable suspicion of having committed or about to commit an offence has to be brought before court within 24 hours for non-capital offence or 14 days for capital offence, failing which then the person who caused the arrest and detention has a duty to explain the delay and persuade the court that in any event the person

has been brought before court as soon as reasonably practicable. The burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the constitution has been complied with. In this case it would be the detaining authority. In other words the requirement that an accused person should be brought to court within 24 hours for non-capital offence and 14 days for a capital offence is not cast in stone. The Constitution appreciates that there may be occasions when delay in arraigning the accused in court may very well be justified. Thus, where an accused person charged with a non-capital offence is arraigned before court after 24 hours or after 14 days for a capital offence complains about breach of the aforesaid provisions of the law, the detaining authority can still prove that he was brought to court as soon as was reasonably practicable, the delay notwithstanding. In my view, the mere fact that an accused person is brought to court either after 24 hours or 14 days, as the case may be, does not *ipso facto* prove a breach of the Constitution. My understanding and interpretation of the above provision of the constitution is buttressed by the decision of the court of appeal in the case of Dominic Mutie Mwalimu .v. Republic Cr.APP.No. 217 of 2005 (UR). Indeed in this case, the court of appeal emphatically stated that “.....*The wording of section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been breach of the above the provision the court must act on evidence. Additionally, a careful reading of section 84(1) of the constitution clearly suggests that there has to be an allegation of breach before the court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity....*” In this case there is no doubt at all that there has been an allegation of breach of the accused’s fundamental and constitutional rights and that the allegation has been raised at the earliest possible opportunity-when the accused was arraigned in court to take a plea.

Has the prosecution however been able to demonstrate that the delay in arraigning the petitioner in court was justified and they eventually did so “*as soon as is reasonably practicable*”. In my view the prosecution much as they have conceded the delay, they have nonetheless been able to demonstrate that the delay was occasioned by circumstances beyond their control and that they were able to arraign the petitioner in court as soon as was reasonable practicable. They were through with the investigations in time. According to the replying affidavit, the investigating officer was through with his investigations by 27th September, 2009, the accused having been arrested on 21st September, 2009. That means that within 7 days the investigating officer had concluded his investigations. However he could not present the accused to court without a certificate from a medical doctor that the accused was indeed fit to plead. It is common knowledge that before a plea is taken, the court must be satisfied that the accused is fit mentally to take the plea and indeed participate in the proceedings. In the absence of such certificate, the court may proceed to take the plea which plea may turn out to be a nullity in the event that it is proved later that the accused was not at the time indeed mentally fit and sound to take a plea leave alone participate in the proceedings. It is also necessary for the court to know the mental status of the accused at that time so as to make appropriate orders for his detention and treatment in a mental facility in the event that the Doctor is of the view that the accused is not mentally in a position not to take the plea. The prosecution does not enjoy such powers.

The Investigating Officer (I.O) has stated that between 28th September and 9th October, 2009 a period of about 12 days or so, he was unable to get a doctor to assess the mental condition of the petitioner because the then M.O.H at Migori District Hospital was on transfer. He referred them to another Doctor who was not available until 9th September, 2009. I note from the replying affidavit that the Investigation Officer talks of the petitioner having been examined on 9th September, 2009. This is clearly inadvertent and or typographical error. After all by then the accused had not even been arrested. The Investigating Officer explanation for the delay has neither been challenged nor controverted. It must therefore be held to be true. In the absence of the medical report by the Doctor, there is nothing the Investigations Officer’s could have done. He could not have presented the petitioner to court without the same. The delay was for about 15 days. It is not

inordinate and it has been explained away perfectly and convincingly.

In the result I would hold that much as there was a delay in arraigning the petitioner in court, the delay was not inordinate and has been explained perfectly. In my view therefore, the petitioner was brought before court as soon as was reasonably practicable. The prosecution have discharged their burden under the constitution that the accused was brought before a “*court as soon as is reasonably practicable.....*” That being my view of the matter, the accused’s petition must fail. Accordingly the petition is dismissed.

Dated, signed and delivered at Kisii this 24th March, 2010.

ASIKE MAKHANDIA

JUDGE