REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Case 62 of 2009

REPUBLIC.....PROSECUTOR

AND

CATHERINE CHESINGARA JIPCHO.....ACCUSED

RULING

Catherine Chesingara Jipcho hereinafter *"the accused"* was arrested on 20th February, 2009 on suspicion of having committed the offence of cheating contrary to section 315 of the Penal Code. According to the accused he was thereafter held in police custody until 24th February, 2009 when he was presented before the Senior Resident Magistrate's court at Nyamira to face the charge. It was alleged in the charge sheet that she on diverse dates between 22nd and 26th November, 2008 at Nyamira township in Nyamira District within Nyanza Province by means of fraudulent tricks induced Gideon Sereti Ongeri to pay a sum of money namely Kshs. 343,000/= pretending that she was in a position to deliver to the said Gideon Sereti Ongeri 200 bags of white maize of 90 kilograms each.

The accused was arrested in Kitale and had to be transferred to Nyamira to face the above charge. On the way however along Kitale-Eldoret road, she allegedly attempted to push P.C. Philomena Muthoni out of the motor vehicle that was transporting them to Nyamira. That action caused the accused to be charged with second count of attempted murder contrary to section 220 (a) of the Penal Code. The particulars were that on 21st February, 2009 along Kitale-Eldoret road at Milimani area, she attempted unlawfully to cause the death of No. 79552 P.C.(W) Muthoni Mburu by trying to throw her out from a moving motor vehicle registration number KBC 286 Q make Toyota Corolla which was driven by Dickson Mokaya.

When arraigned in court to face the charges, she returned a plea of not guilty and her trial was scheduled for 17th

March, 2009. However before the hearing of the case could commence, the accused counsel, Mr. oguttu intimated to the trial court that he intended to raise a constitutional challenge to the proceedings. He prayed to the court to invoke rules 25 and 26 of "the Constitution of Kenya" (*supervisory jurisdiction and Protection of Fundamental Right and Freedoms of the Individual) High court practice and procedure rules, 2006)* otherwise known as Gicheru rules and refer the constitutional issues to the High court for determination.

The constitutional issues raised by the accused were:-

"… (i) Whether or not the plea was unequivocal

(ii) Whether or not the trial and proceedings based on the arrest and detention of the accused person in excess of twenty four hours are constitutional

(iii) Whether the accused's person's Civil liberties and or rights have been violated and finally,

(iv) The legal consequences of (I), (II) and (III) above."

L. Komingoi, the learned Senior Resident Magistrate duly acceded to the request of the accused and framed the issues as aforesaid. Thereafter she referred to this court for determination the same issues. Pending the determination of the aforesaid Constitutional issues, the learned magistrate on her own motion and without any application from any of the parties involved stayed the proceedings in her court. This was an error of her part as she has no jurisdiction to make such an order. That jurisdiction is exclusively vested in the High court vide rule 29. That rule specifically provides interlia *"……the High court may on application by a party order that all further proceedings before the subordinate court shall be stayed pending the hearing and determination of the reference….."*

The background to this reference according to the accused is that she was arrested on 20th February, 2009 in Kitale and it was not until 24th February, 2009 that she was arraigned before the Senior Resident Magistrate's court at Nyamira to answer to the charges. She was thus held in police custody in excess of 24 hours which was a breach of section 72(3) (b) of the Constitution of Kenya. No explanation for the delay reasonable or otherwise was rendered to her by the prosecution. That being the case, she was entitled to an acquittal by dint of her fundamental rights under the constitution having been violated as aforesaid.

The state on being served with the reference reacted by filing a replying affidavit through Corporal Phiip Ripis, the investigating officer in the case. He deponed that the accused was arrested on 20th February, 2009 at Milimani Estate in Kitale pursuant to a criminal complaint filed at Nyamira police station by Gideon Sereti Ongeri relating to an offence of cheating contrary to section 315 of the Penal Code. Following the arrest she was taken to Kitale police station on the same day and placed in the police cells. The following day she was collected by the deponent and P.C.

Philomena Muthoni; the complainant in the second count, and his driver in motor vehicle registration number KBC 283G and driven to Nyamira police station. On the way however, the accused attempted to push P.C. Philomena Muthoni out of the motor vehicle whilst it was in motion thereby committing another offence. On reaching Nyamira the accused was placed in custody and investigations commenced pursuant to a fresh complaint by P.C. Philomena Muthoni in connection with the offence of attempted murder . A day later, the accused was arraigned in court.

As far as the state was concerned therefore the delay was occasioned by the accused's own actions upon arrest and as she was being transported to Nyamira for purposes of being arraigned in court, Perhaps in good time. He verily believed that the applicant was brought to court as soon as was reasonably practicable in the circumstances. Thus his constitutional rights were not violated. Indeed the delay of one day in arraigning her in court was solely because of her conduct. It was her fault and she cannot therefore condemn the prosecution for the said delay.

On 11th February, 2010, the substantive hearing of the reference commenced before me. Mr. Oguttu, however informed the court that since the court had drawn his attention to the latest court of appeal authorities on the question of delay, he was opting to leave the fate of the reference to court. After all the reference had been made by the Senior Resident magistrate's court at Nyamira.

Mr. Kemo, Senior Principal Prosecution counsel on behalf of the state opposed the reference. He pointed out that the accused was arrested on a Saturday in Kitale. She had to be transferred to Nyamira thereafter. While on the way she committed yet another offence which necessitated investigations to be carried out. Those investigations were concluded on Monday and on Tuesday, the accused was arraigned in court. That was the earliest possible day that the accused could have been charged in court for the offences. In the circumstances, counsel urged me to find that the explanation given was reasonable and sufficient. The prosecution had thus discharged the burden placed on it pursuant to section 72(3) (b) of the constitution of Kenya. The reference ought to be dismissed therefor.

I have considered albeit carefully the reference, the replying affidavit, oral submissions by Mr. Kemo and the law. Essentially what the accused is saying is that she was taken to court 1 day or so after the time limited by our constitution for doing so. For she was arrested on 21st February, 2009 and arraigned in court on 24th February, 2009. In between there was a weekend. However according to the prosecution the delay was for about 2 days as the accused was arrested on 20th February, 2009 and brought to court on 24th February, 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 anchored on section 72(3) of the Constitution of Kenya although the reference itself does not specifically state so. 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 provisions of the constitution aforesaid have not been violated. 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 their may well be occasions or situations when delay in arraigning the accused in court may very well be justified and or inevitable as in this case. 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 as the case may be 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 and informed 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." Yet again in the case of Eliud Njeru Nganga .V. Republic-Criminal Appeal No. 182 of 2006(UR*)* the court of appealexpressed these sentiments…" *while we would reiterate the position that under the fair trial provisions of the constitution, an accused person must be brought to court within twenty four hours for non-capital offences, and within fourteen days for capital offences yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal.…."* 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 the Senior resident Magistrate's court Nyamira and before the formal hearing could commence.

Has the prosecution however been able to demonstrate that the delay in arraigning the accused 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 which circumstances were in one way or another engineered and or orchestrated by the accused. Had the accused not acted the way she did on her way to Nyamira, she may very well have been arraigned in court in good time. She was behind the reason for the delay and she cannot be allowed to benefit from her own mischief. The investigating officer's explanation for the delay has neither been challenged, controverted nor discounted. It must therefore be held to be true. The delay was about 1 or 2 days. It is not inordinate and it has been explained away perfectly and convincingly. In any case the court of appeal has in the past specifically held that *"…….Again the court might well counternance a delay of say one or two days as not being inordinate and leave the matter at that…."* See Paul Mwangi Murunga .V. Republic Criminal appeal No. 35 of 2006 (UR)

In the result I would hold that much as there has been a delay in arraigning the accused in court, the delay was not inordinate and has been explained away. In my view therefore, the accused was the author of her misfortune. Nonetheless she was brought before court as soon as was reasonably practicable. The prosecution has ably discharged it's burden under the constitution to wit, that the accused was brought before a *"court as soon as is reasonably practicable….."* the delay notwithstanding. That being my view of the matter, the accused's reference must fail. Accordingly the reference is dismissed and subordinate courts record returned for the trial of the accused on the two counts to proceed in earnest.

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

ASIKE-MAKHANDIA

JUDGE