



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Constitutional Petition 152 of 2009

FELIX OCHIENG OOKO PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

RULING

On 22nd May 2009 the petitioner was arrested by Police Officers from Homa Bay Police Station on allegations that he was connected with the death of one **Festus Omwanda**. The petitioner was held at Homa Bay police station until 7th July 2009 when he was brought to court and charged with murder.

On 25th of May 2009 the police had taken the petitioner before a court and preferred what was alleged to be **“a holding charge”** of assault which was withdrawn on 8th June 2009. After the said charge was withdrawn the police held him for a further period of 30 days. He contended that the police held him unlawfully for a total of 45 days in contravention of his constitutional right. He therefore urged this court to declare that his constitutional right as enshrined in **section 72 (3)(b)** of the **Constitution of Kenya** had been violated and as a result the charge of murder that had been instituted against him vide Kisii **HCCR No. 39 of 2009** was illegal and unconstitutional and proceed to set him free.

The petition was served upon the Attorney-General’s office sometimes in December 2009. When the same came up for hearing on 18th February 2010, Mr. Mutai, Senior State Counsel, sought an adjournment saying that on 8th January 2010 his office wrote to the D.C.I.O. Homa Bay seeking instructions as regards the delay in arraigning the petitioner in court but he had not received any feedback. A reminder was sent to the said D.C.I.O. on 7th February 2010 but there was still no response.

The court granted the application for adjournment and the petition was re-scheduled to be heard on 8th March 2010. On that day Mr. Kemo, Senior Principal prosecution counsel, told the court that a further reminder was sent to the DCIO Homa Bay on 25th February 2010. The police however failed to give him any instructions.

It is now trite law that unexplained delay in arraigning an accused person before court beyond the time

limit as stipulated in the constitution amounts to violation of his constitutional right as provided under **section 72(3) (b)** of the **Constitution**. See **ALBANUS MWASIA MUTUA -VS- REPUBLIC**, Criminal Appeal No. 120 of 2004. Where such violation has been established, the charges that were preferred by the police against the accused are illegal and cannot be maintained.

In view of the position that was taken by the Court of Appeal in the aforesaid decision, which is binding upon this court, there being no explanation from the police as regards the delay in arraigning the petitioner before court, I grant the prayers sought by the petitioner. Consequently, the charge of murder that was preferred against the petitioner is declared unconstitutional and he is set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.
23/3/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Mutai for the state

Mr. Otieno for the petitioner

Court: Ruling delivered in open court on 23rd March, 2010.

D. MUSINGA

JUDGE.