



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Miscellaneous Criminal Application 141 of 2008

BENSON KIBETU.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

RULING

The Applicant herein **BENSON KIBETU** has come to this court by way of an Originating Notice of Motion seeking inter alia the following orders: -

- “4. A declaration that Mombasa Chief Magistrate’s Court Criminal Case No. 1844 of 2008 in respect to the applicant/petitioner herein is unconstitutional and therefore null and void ab initio.
5. An order be issued for immediate termination of Mombasa Chief Magistrate’s Court Criminal Case No. 1844 of 2008 as against the applicant/petitioner and the applicant be discharged and or acquitted of all charges against him therein.”

The application was supported by the supporting affidavit of the said **BENSON KIBETU**. Mr. Mageto Advocate argued the application on behalf of the applicant whilst Mr. Onserio state counsel appeared for the respondent.

From the annexed charge sheet CMCC No. 1844 of 2008 and which was filed in the subordinate court on 20th June 2008, is clear that the applicant together with two others had been charged with the offence of making a **False Document Contrary to Section 347 (a) Penal Code**. It is these charges which the applicant terms null and void due to their unconstitutionality. Mr. Mageto for the applicant argues that his client was arrested on 16.6.2008 by officers of the Flying squad in Nairobi but was not arraigned in court until 20.6.2008. This fact is conceded to by the respondent as per the replying affidavit sworn by **NO. 86201 REHEMA FONDO** on 22.10.2009. The applicant alleges that his detention in police cells for a period of over 24 hours before being brought to court contravened his rights as guaranteed by S.72 (3) of the constitution of Kenya. From the facts deponed before it is quite evident that the applicant was detained in police custody for a period of four (4) clear days before being brought before a court. Without a doubt this detention was contrary to S.72 (3) Constitution of Kenya which provides that

“72 (3) A person who is arrested or detained

- (a)***
- (b) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence, and who is not released, shall be brought before a court as soon as is 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 a detention”***

This provision is crystal clear. A suspect in a non-capital offence (such as the present one) is required to be brought before a court of law within twenty-four hours of his arrest. From the facts of this case and by the admission of the state itself this provision was flouted. The applicant was not brought before a court until four (4) clear days after his arrest. What then is the legal effect of such a violation. Does it entitle the applicant to an automatic acquittal. Mr. Mageto for the applicant has cited the Court of Appeal case of **PAUL MWANGI MURUNGA – VS – REPUBLIC Criminal Appeal No. 35 of 2006** in support of his contention that the applicant ought to be acquitted

forthwith. I have carefully perused that authority and I find it to be distinguishable from the present case. In the Court of Appeal case the appellant had been subjected to a delay of a full (10) days before being brought to court. That delay remained **totally unexplained** (my emphasis) and their Lordships found such delay to be inordinate and allowed the appeal.

In this present application before me the circumstances are different. Firstly the delay being discussed is only four (4) days and not ten (10) days. Secondly the delay cannot be said to be **“totally unexplained”**. By her replying affidavit dated 23.10.2009 No. 86201 Rehema Fondo of Banking Fraud Investigations Unit, the investigating officer in this case, has explained that after his arrest on 16.6.2008, the applicant was assisting police to recover two unregistered vehicles. On 19.6.2008 police had to transport the applicant from Nairobi (where he had been arrested) to Mombasa (where he was to be charged). Then on 20.6.2009 the applicant was arraigned in court. Each case of delay must be heard and determined based on its unique and individual facts. This fact was very well elucidated by the Court of Appeal in the oft-cited case of **DOMINIC MUTIE MWALIMU – VS – REPUBLIC Criminal Appeal 217 of 2005** where their Lordships held at page 7 that

“In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the constitution does not ipso facto prove a breach of the constitution. The wording of S.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 a breach of the above provision the court must act on evidence.”

The words used in S.72 (3) are that the accused must be brought before a court as soon as it is **“reasonably practicable”** to do so. This is a very subjective term and will differ from case to case. In the present case the state have by way of the replying affidavit offered an explanation for the delay in bringing the applicant before a court of law. Taking into account the fact that the police had to transport the accused from Nairobi to Mombasa a distance of over 800 km I am satisfied that the police did in fact produce the applicant before court as soon as it was reasonably practicable to do so. Unlike in the case of **PAUL MWANGI MURUNGA – VS – REPUBLIC** where the delay amounted to 10 whole day; in this case the delay was only four (4) days. It would reasonably take one full day to transport the suspect from Nairobi to Mombasa. In the case cited above the Court of Appeal held at page 9

“So long as the explanation proffered is reasonable and acceptable, no problem would arise.”

From the replying affidavit I am satisfied that the explanation offered for the delay in bringing the applicant to court was both **“reasonable”** and **“acceptable”**. In the circumstances I find that there was no violation of the applicant’s rights as guaranteed by S.72 (3) of the constitution of Kenya. Based on the foregoing I do hereby dismiss this present application in its entirety and order that the trial of the accused in **CMCC No. 120 of 2004** proceed to its logical conclusion.

Dated and Delivered at Mombasa this 12th day of March 2010.

M. ODERO
JUDGE

Read in the open court in the presence of:

Mr. Onserio for state

Applicant in person

M. ODERO
JUDGE

12.3.2010