



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Criminal Appeal 143 of 2009

MONANZA SASI GARIKA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(From original conviction and sentence by the Senior Resident magistrate's court at Kehancha Criminal case no. 795 of 2008 By J.R.Ndururi-(SR

This appeal was argued on only one ground, that the appellant's Constitutional rights were violated. The appellant was arrested for the offence on 1st September, 2008. However it was not until 17th September, 2008 that he was arraigned before the Senior Resident magistrate's court at Kehancha to answer to the charge of stealing stock contrary to section 78 of the Penal Code. It was alleged that the appellant and others not before the court stole one cow and a calf valued at Kshs. 29,000/= belonging to Chacha Sagunyi Machugu on 28th August, 2008 at Gekeharara location of Kuria District within Nyanza province.

As the offence preferred was non-capital, the Constitution required that the appellant be brought to court within 24 hours or as soon thereafter as it was reasonably practicable. According to Mr. Ondari, learned counsel for the appellant, the statements of witnesses were recorded on 28th August, 2008. The appellant was thereafter arrested the following day. There was however a delay of sixteen(16) days thereafter before the appellant was presented before court to answer to the charges. No explanation was given to the trial magistrate for the said delay. Accordingly, the proceedings were a nullity and counsel urged me to so hold.

Counsel placed much reliance on the following authorities.

1. Gerald Macharia Githuku .v. Republic C.A.No. 199 of 2004(UR)
2. Francis Ogega Muchoma .V. Republic Criminal Appeal No. 21 of 2005 (UR)
3. Vincent Nyambati Mecha & Others .V. Republic Criminal Appeal No. 164 of 2006(UR)
4. Dickson Nyabando Osoro .v. Republic, Constitutional reference no.20 of 2008 (UR)

On his part, Mr. Mutuku, learned senior principal state counsel whilst conceding to the delay nonetheless submitted that such complaint ought to have been raised in the trial court on the day that the plea was taken or at the earliest possible opportunity. When the issue is raised at this late stage, it can only be considered to be an afterthought.

Section 72(3) of the Constitution of Kenya provides interalia:

“a person who is arrested or detained:

- a) *For the purpose of bringing him before a court in execution of the order of a court: or*
- b) *Upon reasonable suspicion of 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 reasonable 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 reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”*

From the foregoing it is clear that a person charged with non-capital offence such as the appellant is required to be brought to court within twenty four hours upon arrest failing which it has to be as soon as is reasonably practicable. So that it is not every delay that would lead the court to hold that the accused’s rights have been violated . The constitution recognizes that there are certain circumstances which may make it impossible to bring a suspect to court within the set time lines. However, in the event of such delay, duty is cast upon the detaining authority to give the explanation. However not every explanation will suffice. In the case of Fan XI & Others .V. the Attorney General, Misc.Criminal application number 860 of 2007(UR) Ojwang J attempted to define the kind of explanation that may be acceptable to court. He stated thus:-

- i) *The explanation must carry elements of objective reasoning.*
- ii) *The explanation must make sense in the light of special circumstances of the case*
- iii) *The explanation must be made bonafide, and not merely as a technicality in aid of the prosecution.*

- iv) *The explanation should show such operational difficulty as may have prevented timeous arraignment of the suspect in court.*
- v) *The explanation should show clearly that the arresting authority did exercise genuine professional care in conducting the investigations preceding the arrest.*

I entirely agree and endorse the aforesaid sentiments. However in dealing with the question of violation of Constitutional rights and in particular on issues of delay, it must be appreciated that the court is dealing with two competing Constitutional rights: the right to ensure that crime where detected, perpetrator identified and prosecuted successfully he should be appropriately punished. For he too is assumed to have violated the rights of the complainant (s). On the other hand it is equally the duty of the court to uphold the Constitutional and fundamental rights of such accused person. That is what the court of appeal stated in the case of Albanus Mwasia Mutua .v. Republic, Criminal Appeal no. 120 of 2004(UR) when it delivered itself thus:-

“We must admit that the matter has caused us some considerable thought and anxiety. On the one hand is the duty of the courts to ensure that crime where it is proved, it is appropriately punished. This is for the protection of society; on the other hand it is equally the duty of courts to uphold the rights of persons charged with criminal offences particularly the human rights guaranteed to them under the constitution”

Besides the foregoing, it must be appreciated that a suspect who claims that his Constitutional rights have been violated has under the same Constitution a remedy, he can always sue for damages.

The state has submitted that by raising the issue of violation of Constitutional rights now, it is too late in the day and infact it is an afterthought. I do not agree. This is a matter of law and it can be raised at any stage, whether on the day of plea, during the trial or even at the appellate stage. If a Constitutional right has been violated and not remedied or vindicated the violation continues unabated. In other words, the appellant having been convicted in a flawed criminal process due to the alleged violation of his Constitutional rights, that violation continues. After all isn't he serving four(4) years imprisonment as a result of the conviction and sentence for the offence charged in proceedings which may after all be a nullity. In any event, the appellant raised the issue in his petition of appeal. The state had ample time to marshal evidence to counter the assertion. The Criminal Procedure Code allows the respondent to call additional evidence even at the appellate stage.

Under section 72(3) of the Constitution the police were entitled to hold the appellant in custody for 24 hours as he had been arrested for non-capital offence failing which bring him to court as soon as reasonably practicable. The police, prima facie, in detaining the appellant for sixteen (16) days before arraigning him court did so for a period beyond that permitted by the Constitution nor can it be said that he was thereafter brought to court as soon as it was reasonably practicable. The burden to explain the delay was on the prosecution. I reject the proposition by Mr. Mutuku

that the burden can only be discharged by the prosecution if the person accused raises the complaint. I am of the firm view that in case the prosecution does not offer any explanation, then the court as the ultimate enforcer of the provisions of the Constitution must raise the issue on its own motion.. That is what the court of appeal said in the case of Ndede .V. Republic (1991) KLR 567. In the recent case of Paul Mwangi Murunga (ibid) the court of appeal observed:-

“This appellant was held in unlawful custody for some ten days and no explanation for that delay is forthcoming either from the record or from the prosecuting counsel. In the case of ALBANUS MWASIA MUTUA .V. REPUBLIC Criminal Appeal no. 120 of 2004, (unreported) the court suggested some examples of what might amount to an acceptable explanation for the delay. It may be that upon arrest and on being taken to the police station the accused person fell ill, was taken to hospital and was admitted and kept there in excess of the period allowed. Or it may be that the accused person was arrested on a Friday evening and as our courts do not work on weekends and it being not possible to release the accused on bail, he is brought to court on the next working day. Or it may be that the court-house is far from the police station and the station vehicle broke down or had no fuel. These are no more than examples which would and can provide the prosecuting authorities with an explanation to enable them discharge the burden placed on them by section 72(3) of the Constitution. So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the court in MUTUA’s case.”

What are the circumstances in this appeal? According to the appellant and from the evidence of PW2, he reported the theft on 28th August, 2008 and recorded his statement then. According to PW1, immediately after recording the statements, the appellant was arrested the following day. Indeed all the statements were recorded on the same day. The above facts are conceded to by the prosecution. Yet it took the police sixteen days thereafter to arraign the appellant in court. No explanation whatsoever was proffered by the prosecution before the trial court nor did the trial court itself ask for the explanation. On this issue I wish to remind the trial courts of the sentiments expressed by the court of appeal in the case of Daniel Kioko Mbuva.v. Republic, C.A. No. 65 of 2008 (UR): *“.....the magistrate’s before whom most accused persons first appear do not normally have jurisdiction to deal with matters touching on the constitution but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. If what we are suggesting is adopted by the trial courts this would certainly help the High court or this court in determining whether the explanation offered by the prosecution was reasonable in all the circumstances of the case.....”* So that it is no longer mandatory that the prosecution must be called upon to explain in the event of any delay. If they are unwilling to do so then duty is cast upon the trial court to seek for such an explanation.

In the circumstances of this case no explanation reasonable or otherwise was given by the prosecution for the delay. The trial court too failed in its duty by not asking the prosecution for an explanation for the delay.

In view of the foregoing, I am satisfied that there was not or no acceptable explanation why the appellant was not taken to court within 24 hours of his arrest or so soon thereafter. Accordingly I find merit in this ground of appeal as, in my view, the appellant was convicted on the basis of illegal proceedings and or proceedings which were a nullity for want of compliance with the fair trial provisions of the Constitution. I therefore allow the appeal, quash the conviction and set aside the sentence imposed . Unless the appellant is otherwise lawfully held, he should be set at liberty forthwith.

Judgment dated, signed and delivered at Kisii this 31st May, 2010.

ASIKE-MAKHANDIA

JUDGE