



No. 84

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 13 OF 2009

REPUBLIC.....PROSECUTOR

-VERSUS

THOMAS MORONGE SAGERO.....1<sup>ST</sup> ACCUSED  
OMBONGI SIRO.....2<sup>ND</sup> ACCUSED

RULING

**Thomas Moronge Sagero and Ombongi Siro** hereinafter “*the accused* ”were arrested on 5<sup>th</sup> February, and 28<sup>th</sup> June, 2009 respectively on suspicion of having committed the offence of murder contrary to section 203 as read with 204 of the **Penal Code**. According to the accused they were thereafter held in police custody until 24<sup>th</sup> February, 2009 and 16<sup>th</sup> July 2009 respectively when they were presented before this court to face the charge. It was alleged in the information that they on 30<sup>th</sup> December, 2008 at Otamba in Masongo sub location in Kisii Central District within Nyanza Province jointly with others not before court murdered **Tom Siro**.

They pleaded not guilty to the information. However before the court could fix the case for hearing **Mr. Nyawencha** and **Mr. Ayienda**, learned counsel for accused respectively intimated to the court that they had filed a Constitutional reference challenging the proceedings so far and wanted to prosecute the same first. They urged the court to invoke Section 72(1), 77(1) and 84 of the constitution of Kenya and declare that an account of the illegal and unlawful violation of the accused’s constitutional rights, they should be set free forthwith.

The background to the references were that the accused were arrested on 5<sup>th</sup> February, 2009 and 28<sup>th</sup> June, 2009 respectively. Whereas the 1<sup>st</sup> accused was arraigned in court on 24<sup>th</sup> February, 2009, the 2<sup>nd</sup> accused was however arraigned in court on 17<sup>th</sup> July, 2009. Thus for the 1<sup>st</sup> accused he was held in custody for four (4) days in excess of the statutory period whereas the 2<sup>nd</sup> accused suffered seven (7) days of such excess. The delays were a breach of section 72(3)(b) of the constitution of Kenya. According to the accused no explanation for the delay, reasonable or otherwise, had been given to them by the prosecution. That being the case, they were entitled to an acquittal by dint of their 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 Inspector **Wycliff Mwangia Kamau**, the investigating officer in the case. He conceded that there was a delay of seven (7) and four(4) days respectively in arraigning the accused in court. However the delay was occasioned by the file moving from the police station to the DCIO and thence to the state counsel and back through the same route. In the circumstances the delay was not inordinate. The accused were thus brought to court as soon as was reasonably practicable in the circumstances. Thus their constitutional rights were not violated.

On 27th April, 2010 the substantive hearing of the two references which had been consolidated earlier on by **Muchelule J.** commenced before me. **Mr. Nyawencha** for the 1<sup>st</sup> accused submitted that because of the delay in arraigning the 1st accused in court, a fact conceded to by the state, the proceedings so far should be held to be a nullity and quashed. He relied on the following authorities for that proposition; **Cr.Application No. 120 of 2004, Albanus Mwasia Mutua .v. Republic Cr.Case no.121 of 2005, (UR) Francis Ogega Mochama .v. Republic, Cr. Case Number 21 of 2005(UR) and Joseph Amos Owino .v. Republic (2009) eKLR ).** **Mr. Ayienda** for the 2<sup>nd</sup> accused associated himself fully with the submissions of **Mr. Nyawencha**. However, he added that though the investigating officer had explained away the delay on the basis of the file moving from the police station to the state counsel and back, there was no evidence to back up that assertion.

**Mr. Mutuku**, senior principal prosecution counsel on behalf of the state opposed the references. He pointed out that though there was delay in arraigning the accused in court, the explanation was logical taking into account the weekends in between. The delay was not inordinate. The police officers could not have taken the accused to court without the in-put of the Attorney General. In any event the accused had cause of action by way of damages in the event that a breach of their constitutional rights was proved by dint of section 72(6) of the Constitution of Kenya. Two rights are involved here. The right of the accused person as well as that of the deceased whose right were allegedly taken away by the accused. The court has to strike a balance between these two conflicting rights. 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 application ought to be dismissed therefor.

I have considered albeit carefully the reference, the replying affidavit, oral submissions by **Mr. Nyawencha, Mr. Ayienda** and **Mr. Mutuku** and the law. Essentially what the accused are saying is that they were taken to court four and seven days respectively after the time limited by our constitution for doing so. That much is conceded to by the prosecution. However to the prosecution, the delay was not inordinate and in any event it had been explained away.

The alleged breach of the constitutional rights of the accused is based on section 72(3) of the constitution of Kenya. 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 there 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 capital offence is arraigned before court after 14 days 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 recent 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 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 accuseds’ fundamental and constitutional rights and that the allegations have been raised at the earliest possible opportunity-when the accused were arraigned in this court 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 that 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 to my satisfaction that the delay was occasioned by circumstances beyond their control. The explanation given for the delay is reasonable and logical. The investigating officer’s file had to be perused by the DCIO and state counsel for appropriate advice. In that process, there was bound to be delay. I do not therefore think that a delay of four and seven days was inordinate given the circumstances. It must also be appreciated that two competing rights are involved here. The right of an accused person and the rights of the person whose rights were allegedly violated by the accused. The rights of the deceased were switched off allegedly by the acts of the accused. It is incumbent upon the court to strike a balance over these conflicting rights. In any event the accused have a cause of action in the event of a breach of their rights. By virtue of section 72(6) of the Constitution, they can sue for damages.

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. They were brought before court as soon as was reasonably practicable. The prosecution have ably discharged their burden under the constitution to wit, that the accuseds’ were brought before a ***“court as soon as is reasonably practicable.....”*** That being my view of the matter, the accuseds’ references must fail. Accordingly the references are dismissed. The case shall proceed to hearing in the normal manner.

**Ruling Dated signed and delivered** at Kisii this 31st May, 2010.

**ASIKE-MAKHANDIA**

**JUDGE**