



No. 105

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL REFERENCE NO. 134 OF 2006

FRANCIS SIRWERI TURUNGI & 3 OTHERS.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Sirweri Francis Turungi , Alphaxad Okero Onsomu, Francis Ongeri Mokura, Yobes Ombasa and Jones Bosire Ongeri hereinafter “**the accused**” were arrested on 1st August,2005 respectively on suspicion of having committed the offence of malicious damage to property contrary to section 339(1) of the **Penal Code**.

It was alleged in the charge sheet presented before the Senior Resident magistrate’s court at Nyamira that they on 1st December, 2005 at Nyagongo sub-location in Nyamira District within Nyanza province jointly with others not before court willfully and unlawfully destroyed three houses valued at Kshs. 120,000/= the property of **Thomas Angwenyi Makori**.

They pleaded not guilty to the charge and their trial ensued initially before **S.K. Gacheru**, R.M. and later **J. Machora**, RM. After the prosecution closed its case and counsel for the accused had made submissions on no case to answer, the trial court ruled that the accused had a case to answer. The court then fixed the defence hearing for 11th March, 2009. Come that day and the defence surprisingly raised a Constitutional issue that the accuseds’ Constitutional rights had been violated since they were not brought to court within 24 hours of their arrest as required by the Constitution. That the accused were arrested on 1st October, 2005 and it was not until 4th August, 2005 that they were arraigned in court.

In response, the prosecutor took the view that though there was a delay in arraigning the accused in court, the issue was being raised too late in the day after they had closed their case. As far as the prosecutor was concerned, the accused ought to have raised the issue at the earliest possible opportunity more so considering that all along they had been represented by counsel.

The learned magistrate duly considered the issue, the rival oral submissions and the law and held thus:-

“.....This court is also of the view that the constitutional issues are being brought later after prosecution closed its case and accused put on their defence. But nonetheless as the issues raised are Constitutional issues, I am inclined to have the matter referred to High Court for Constitutional interpretation.....” Consequent upon this order, the learned magistrate pursuant to rules 24 and 26 of the Constitution of Kenya (**Supervisory Jurisdiction and Protection of Fundamental rights and Freedoms of Individual**) **“High court practice and procedure rules”** framed questions to be determined by the High court thus in a reference dated 28th July, 2009:-

- “a) whether the accused persons fundamental rights and Freedoms were abrogated.**
- b) Whether the arrest and detention of the accused persons, without charge for a period in excess of 3 days was unconstitutional.**
- c) Whether the criminal trial in the light of the arrest and detention without charge would be unconstitutional.**
- d) The legality and or constitutionality of breach of section 72(3) and (5) of the Constitution.....”**

When the reference came before me for hearing interpartes on 26th May, 2010, **Mr. Mongare**, learned counsel for the accused submitted that the accused had been detained in custody in excess of four days upon their arrest. That was in contravention of section 72(3) and (5) of the Constitution. They ought to have been arraigned in court within 24 hours. Thus the proceedings were a nullity.

Mr. Gitonga, senior state counsel on behalf of the state opposed the reference. He pointed out that though there was delay in arraigning the accused in court they were nonetheless brought to court as soon as was reasonably practicable. The delay was not inordinate. Further the defence raised the constitutional issue belatedly. The same should have been raised during the plea, or during the prosecution of the case and in particular in cross-examination of the investigating officer. **Mr. Gitonga** further submitted that the defence was seeking to re-introduce the evidence of the investigating officer who could have explained the delay by a different route. Finally counsel submitted that this court has constitutional obligation in criminal trials to balance the interest of the complainant as well as those of the accused.

I have considered albeit carefully the reference, rival oral submissions by **Mr. Mongare** and **Mr. Gitonga** and the law. Essentially what the accused are saying is that they were taken to court four days respectively after the time limited by our constitution for doing so. That much has been conceded to by the prosecution. However to the prosecution, the delay was not inordinate and in any event the issue had been raised belatedly.

The alleged breach of the constitutional rights of the accused is based on section 72(3) of the constitution of Kenya. The said section 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 the police. 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. Thus, where an accused person charged with a non capital offence is arraigned before court after 24 hours 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. Further it is my view that such constitutional issue should be raised at the earliest possible opportunity, more so, where the accused has the benefit of legal representation. My understanding and interpretation of the above provisions 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)**. 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. However those allegations were not raised at the earliest possible opportunity. It is instructive that all through the accused had the benefit of legal representation. Their counsel did not raise it when the plea was taken. They did not take up the issue at the commencement of the formal testimonies of the witnesses and in particular in the cross-examination of the investigating officer. The accused waited until the prosecution closed its case before they raised the issue. In my view the timing was such that it found the prosecution between the hard rock and deep-sea. The accused knew that the prosecution having closed their case they had lost the right to recall any of the witnesses to shade light on the alleged delay. In that regard I do not think that the accused acted bonafides in raising the issue at that late hour. They were clearly acting in bad faith. This alone should disentitle the accuseds’ to the prayers they have sought in this reference. Even if I am wrong in this conclusion, I would still hold that accused constitutional rights were not violated nor abrogated since they were arraigned in court as soon as it was reasonably practicable. The accused having been arrested on 1st August, 2005, the earliest that they could have been arraigned in court having discounted the day of arrest depending on the time of arrest would have been 3rd of August, 2005. Instead the accused were brought before court on 4th of August, 2005. The delay was one day or at most two days. This delay cannot be said to be inordinate. Indeed the court of appeal in the case of **Paul Mwangi Murunga .v.Republic, Criminal appeal nu.35 of 2006(UR)** observed:

“.....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 case, the delay was of about 1 or 2 days. I do not therefore think that such delay 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. It is incumbent upon the court to strike a balance over these conflicting rights. In any event the accused have cause of action in the event of a breach of their rights by virtue of section 72(6) of the Constitution is to sue for damages.

In the result I would hold that much as there was a delay in arraigning the accused in court, the delay was not inordinate. The accused were all along represented by counsel and never raised the issue at the earliest possible opportunity. They waited until after the prosecution had closed its case and a ruling putting them

on their defence having been made. They knew that the prosecution had lost opportunity to recall the investigating officer in the case to shade light on the alleged delay. Accordingly the issue was not raised in good faith. The accused in my view and despite the delay were brought before a court as soon as is reasonably practicable.

That being my view of the matter the reference must fail. Accordingly, I would answer the issues framed in the reference as follows:-

- a) The arrest and detention of the accused without charge for a period in excess of 3 days was not unconstitutional.***
- b) The fundamental rights and freedoms of the accused were not thereby abrogated***
- c) The trial of the accused in the light of their arrest and detention as aforesaid is not unconstitutional***
- d) There was no breach of section 72(3) and (5) of the constitution.***

The reference is in the result dismissed. The original record of the trial court shall be returned to the said court for the trial of the accused to continue in earnest.

Ruling Dated signed and delivered at Kisii this 30th June, 2010.

ASIKE-MAKHANDIA

JUDGE