REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 252 OF 2006

GEOFREY ONGERI LUKA…….....APPELLANT
-VERSUS-

REPUBLIC…….....RESPONDENT

JUDGMENT

(From the original conviction and sentence in the Senior Resident Magistrate's court at Keroka Criminal case no. 104 of 2006 by Wahome-Resident magistrate)

The appellant, **Geoffrey Ongeri Luka** was charged before the Senior Resident Magistrate's court at Keroka with rape contrary to section 140 of the **Penal code.** The particulars given were that on the 27th day of January, 2005 at Keroka township in Nyamira District, the appellant unlawfully had carnal knowledge of **E.A** without her consent. The appellant pleaded not guilty to the charge and he was tried in earnest. To prove their case the prosecution lined up a total of four witnesses.

Briefly, the case for the prosecution was that, on 27th January, 2006 PW1 **E.K.A** had come from Nairobi after getting information that her mother was sick. She got to Keroka at about 8.14 p.m and went to the lower stage to get means of transport to her home via Gesusu. As she walked to the stage a person who turned out to be the appellant according to her suddenly appeared and started trailing her from Keroka police station. He struck a conversation with her and told her that he was also headed for Gesusu. PW1 was able to see the appellant well because of the street light and in particular the security lights at the police station. As they walked on, the appellant started touching her blouse. She tried to run but fell down. The appellant then held her by the neck, squeezed her and she fainted and he thereafter raped her. After the ordeal the appellant warned PW1 not to scream and took her hand bag that had a mobile phone, identity card, medicine and books plus cash Kshs. 600/=. After he left, PW1 screamed and people came and advised her to report the incident at the police station. She did so and described the rapist to the police who later through her assistance arrested the appellant from a video shop the following day. He was arrested by **Agrrey Keya.** (PW4)

PW1 was subsequently issued with a P3 form which was filled at Kisii District hospital by PW3 **Jackson Murauni**, a clinical officer. He examined PW1 on 2nd February, 2006 and noted that she had a tender neck, a wound on the back of the head and a tender chest. The age of the injuries was 6 days and the degree of injury was harm. In her genitalia, there was nothing significant but a vagina swab which had been done on 28.1.2006 showed pus cells and there was spermatozoa. She had been infected with gonorrhea. He formed an opinion that there was penetration and ejaculation had taken place.

In his defence, the appellant testified on oath that on 27th January, 2006 he left his house at 7.00

a.m and bought milk. On his way back he found 3 police officers who arrested him. They took him to Keroka police station with another woman who claimed that he had raped her. He went on to testify that the place where PW1 alleged that he had raped her, he had never lived there and it was only his parents who previously stayed there before moving to Manga.

The learned magistrate having keenly gone though the evidence adduced by the prosecution and the defence offered by the appellant was persuaded that the complainant was infact raped on 27th January, 2006 at about 8.30 p.m by the appellant. He thus convicted him and sentenced him to 15 years imprisonment. That conviction and sentence triggered this appeal. The appeal was mainly on the grounds that the prosecution case was not proved beyond reasonable doubt. That the learned magistrate shifted the burden of proof to the appellant and that the appellant's constitutional rights were violated.

In support of the appeal, the appellant tendered written submissions limited to the issue of violation of his constitutional rights which I have carefully read and considered.

On his part **Mr. Gitonga** learned senior state counsel whilst giving the issue of a violation of the appellant's constitutional rights a wide berth, nonetheless submitted that there was positive identification of the appellant. There was sufficient and ample light at the scene. There was also evidence of penetration. The ingredients of the offence were thus met. The conviction was safe. On sentence, he submitted that though legal, it was nonetheless lenient

In my view the fate of this appeal may be determined on the narrow issue of violation of the appellant's constitutionally guaranteed fundamental rights

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

"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 was 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.

It is the case of the appellant that he was arrested on 28th January, 2006 at Keroka township and placed in custody until 13th February, 2006 when he was arraigned in court. This amounted to a total of 16 days as opposed to the 24 hours permitted by the constitution of Kenya. This contention was not at all rebutted. Indeed it seems to be borne out by the record. The charge sheet seems to buttress that claim. PW1, PW2 and PW4 too support the contention by the appellant. The record also confirms that the appellant was actually arraigned in court on 13th February, 2006 for that is when he took the plea. There is no evidence that for all the time the appellant was ever released on police cash bail or bond nor was he produced in court so that the police could seek extension of time to continue holding the appellant in their custody. The appellant raised the issue in his supplementary petition of appeal. The state had ample time to Marshall necessary evidence to counter the assertion but elected to do nothing about it. The criminal Procedure Code allows the respondent to call additional evidence even at the appellate stage. The state did not again take up that challenge. It must therefore be taken what the appellant is saying is correct and the state has no rebuttal.

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 in court did so for a period beyond that which is 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. No such explanation was and has been forthcoming. It is trite law now that in case the prosecution does not offer any explanation, for such delay 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.v. Republic Criminal appeal no. 35 of 2006 (UR).** 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? 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 as was reasonably practicable. 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 30th June, 2010.

ASIKE-MAKHANDIA
JUDGE