



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Petition 4 of 2008

**IN THE MATTER OF SECTION 84 (1) BGM CR. CASE NO.94 OF 2008 AT BUNGOMA CHIEF
MAGISTRATE’S COU
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER SECTION 72 (3) OF THE CONSTITUTION OF
KENYA**

DICKSON SUNDWA PETITIONER

~VRS~

REPUBLIC RESPONDENT

RULING

The Petitioner Dickson Sundwa brings this petition under section 72 (3) of the Constitution of Kenya. The procedure of such matters is governed by rule 11 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.

The Petitioner was represented by Mr. Onchiri who submitted that his client was arrested by police officer from Kimilili Police Station on 17/01/08 and detained in the cells for ten (10) days. He was arraigned in court on 25/01/2008 in Bungoma Criminal Case No.94 of 2008. The offence preferred against the Petitioner was that of breaking into a building contrary to section 306 (a) of the Penal Code.

The Petitioner’s counsel submitted that the period of detention by the police amounted to ten (10) days as opposed to the 24 hours allowed by the law where one is charged with bailable offences. It is the Petitioner’s case that the non-compliance with the law renders the proceedings in the criminal case a nullity. The court was referred to a number of authorities relevant to the matter.

The provisions of section 72 (3) of the Constitution are as follows:

“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 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 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 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 it is reasonably practicable shall rest upon

any person alleging that the provisions of this subsection have been complied with.”

Section 72 (3) provides that a person arrested and detained for an offence other than capital offence shall be arraigned in court within twenty four (24) hours. The State Counsel, Mrs. Leting, conceded to the petition and said that the state had no explanation to offer.

I find that the Petitioner was remanded in custody for eight (8) days and not ten days as alleged. Having been arrested on 17/01/2008 and taken to court on the 25/01/2008, the petitioner spent eight (8) days in custody. The offence he is charged with is a bailable offence and the law allows the police only 24 hours detention in the cells. The excess remand period in this case is six (6) days. The petition has been conceded to by the State who said that they have no explanation to offer. The State is therefore responsible for violating section 72 (3) of the Constitution. The purpose of the section is to protect suspects from undue delay in prosecution and ensuring that the police do not violate the law.

In the absence of any explanation, I find that the constitutional rights of the Petitioner were indeed violated by the State through Kimilili Police Station. The issue to decide is whether the accused is discharged from criminal liability due to the violation. The only inference that may be drawn from the over detention of the Petitioner for six (6) days is that the police had no evidence to charge him. The charges preferred after eight days must have been an afterthought.

This court was referred to some decided cases by Mr. Onchiri and I have found some of them quite helpful.

In the case of Court of appeal **ELIZABETH AKINYI ODYO & ANOTHER –VRS- REPUBLIC CRIMINAL APPLICATION NO.161 & 162 OF 2006** where the Applicants were remanded in such unexplained circumstances for more than 24 hours. The court declared violation of rights under section 72 (3) and nullified the criminal charges.

The authorities of the **NAIROBI HIGH COURT OF REPUBLIC –VRS- JAMES NJUGUNA APPLICATION NO.40 OF 2007 AND THAT OF ANNE NJOGU & 5 OTHERS –VRS- REPUBLIC CR. APPLICATION NO.551 OF 2007** enumerate the same principles. In those cases, the Judges declared that the Applicants’ rights were violated and ruled that the criminal proceedings against them null and void.

Having found that the constitutional rights of the Petitioner were violated, the issue which arise is whether the criminal proceedings become a nullity. The police know the law and cannot pledge ignorance of the same. Even if they did, the maxim that **“ignorance of the law is no defence”** defeats such a plea. The police are duty bound to operate within the law and comply with all legal requirements to promote expeditious disposal of cases. The concept of the law must be promoted by the law enforcers. The police, it appears had no reasonable suspicion to arrest the petitioner. If they had, the Petitioner would have been charged within 24 hours. By allowing the criminal charges in Criminal Case No.94 of 2008 to proceed against the Petitioner means that their fundamental rights which have been violated will continue to be violated. This holding was made in the case of **ALBANUS MWASIA MUTUA -VRS- REPUBLIC IN CRIMINAL APPEAL NO.120 OF 2004** and it fortifies my observation. It is my finding that the criminal proceedings facing the petitioner are *void ab initio* due to the blatant violation of the Petitioner’s rights.

In effect, I allow the prayers sought in the petition.

F. N. MUCHEMI
JUDGE

Ruling dated and delivered on the 20th day of July, 2010 in the presence of Mr. Kituyi for Mr. Onchiri for the Petitioner.

F. N. MUCHEMI
JUDGE