



NO. 204

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONST. REF. NO. 6 OF 2009

HENRY NYANARO MOKENU

ANDREW MOKENU MUSENO

EDINA NYANDUKO.....APPLICANTS

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

This ruling is in respect of a constitutional reference filed by **Henry Nyanaro, Andrew Mokenu Museno** and **Edna Nyanduko**, hereinafter “*the applicants*”. Their basic complaint is that their Constitutional rights as enshrined in section 72 (3) of the then constitution of Kenya were violated. The applicants were arrested for the offence of creating disturbance in a manner likely to cause a breach of peace contrary to section 95 (1) (b) of the **Penal code** on 17th June, 2007. However it was not until 20th June, 2007 that they were arraigned before the Senior Resident magistrate’s court at Nyamira to answer to the charge. As the offence preferred was non-capital, the Constitution required that they be brought to court within 24 hours or as soon thereafter as it was reasonably practicable. According to **Mr. Momanyi**, learned counsel for the applicants, there was a delay of two (2) days before the applicants were presented before court to answer to the charge. 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 and acquit the applicants. It is instructive that the learned counsel raised the issue with the trial court on the day that the court was scheduled to hear the case. Having set out the complaint in detail, learned counsel urged the trial court to refer the issue to this court for determination of the alleged contravention of section 72 (3) of the constitution of Kenya.

The learned magistrate having listened to the response by the prosecution was satisfied that a case for the reference of the complaint to this court had been made out. In Preferring the reference to this court, the learned magistrate was satisfied that the applicants were arrested and placed in police custody on 17th June, 2007. They ought to have been arraigned in court thereafter on 18th June, 2007 at the very earliest

which was a Monday. Instead they were presented before court on 20th June, 2007 which was a Wednesday. So there was a 2 days delay which had not been explained by the prosecution despite having been given opportunity to do so. On that basis she formed an opinion that the applicants had been held in custody for more than 24 hours contrary to the constitution and the prosecution had failed to explain the delay, hence the reference.

When the reference came up for hearing before me on 29th September, 2010, **Mr. Momanyi**, reiterated the submissions he had made before the trial court as aforesaid, to wit, that there was no explanation given by the prosecution as to why the applicants were not brought to court within 24 hours. There was a delay of 2 days in so doing. The prosecution though given a chance to explain the delay, they were unable to do so. Thus the applicants constitutional rights were violated and were entitled to an acquittal as a matter of course.

On his part, **Mr. Gitonga**, learned state counsel whilst conceding to the unexplained delay of 2 days nonetheless opted to leave the issue to court.

Section 72(3) of the then Constitution of Kenya provided 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 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 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 applicants herein 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 when detected, perpetrators identified, arrested and prosecuted successfully they should be appropriately punished. For they too have violated the rights of the others. On the other hand it is equally the duty of the court to uphold the Constitutional and fundamental rights of such accused persons. 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 also 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.

Under section 72(3) of the Constitution the police were entitled to hold the applicants in custody for 24 hours as they had been arrested for a non-capital offence, failing which, bring them to court as soon as was reasonably practicable. The police, prima facie, in detaining the applicants for two (2) extra days before arraigning them court were in violation of the constitution. There was therefore a delay of 2 days. The burden to explain the delay was on them. They did not take up the challenge and to date the delay remain unexplained. 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 act within its mandate and hold the proceedings a nullity with the consequence that the victims be acquitted of the charge(s). Both sides of this reference concede that there was a delay of 2 days in arraigning the applicants in court. No explanation whatsoever was proffered by the prosecution before the trial court nor before me. In view of the foregoing, I am satisfied that there was or no acceptable explanation by the prosecution why the applicants were not taken to court within 24 hours of their arrest or so soon thereafter. Accordingly I find merit in reference and hold that the subsequent arraignment and prosecution of the applicants was illegal and a nullity for want of compliance with the fair trial provisions of the Constitution. I therefore allow the reference with the consequence that the applicants are acquitted of the charge. Unless they are otherwise lawfully held, they should be set at liberty forthwith.

Ruling dated, signed and delivered at Kisii this 15th October, 2010.

ASIKE-MAKHANDIA

JUDGE