



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

Criminal Misc. 96 of 2008

JAMES MWANGI MAINA)

WACHIRA KABUGO) APPLICANTS

VERSUS

REPUBLIC RESPONDENT

R U L I N G

By a petition dated 15th August 2008 and filed in court on the same day, the applicants namely, James Waithaka Mwangi and Wachira Kabugo have moved to this court seeking a declaration that the investigating officer in their case deliberately violated their right to be taken to court within 24 hours since he was fully aware of the provisions of the constitution to that effect. That the investigating had the applicants arrested on 12th January 2008 but it was not until 23rd January 2008 that he arraigned them in court. To the applicants their contention is that they ought to have been taken to court within 24 hours. Failure to take them to court within 24 hours on grounds that they were transferred for further investigations by the C.I.D. does not hold any water. The applicants raised these concerns before the trial.

The trial court having carefully considered the issues raised was of the opinion that the police contravened the fundamental rights and freedoms of the petitioners by holding them for more than 24 hours. In accordance with rules 24, 25 and 26 of the constitution of Kenya (Supervisory jurisdiction and protection of the Fundamental Rights and Freedoms of the Individual) High Court Practice and procedure rules, 2006; Mr. Bidali; learned Senior Resident, referred the issue to this Court for determination.

When the matter came up for hearing in this Court, Ms Ngalyuka, learned state counsel bluntly stated that the state had no explanation to offer for the delay in arraigning the applicants in court in good time as required by law. She submitted that the investigating officer who would have shade light on the cause(s) for the delay had been un-cooperative and was unwilling to swear an affidavit in response to the petition by the applicant. Accordingly the best she could do was to leave the matter to court.

However I note from the subordinate court's record that a feeble explanation for the delay was given. It was to the effect that the delay according to the investigating officer, P.C. William Shivachi was occasioned by the fact that the applicants were transferred from the police station of arrest and into the custody of C.I.P Joseph Mutua for further investigations. This is the most outrageous explanation I have ever come across. The rights of an accused person are not kept in abeyance merely because the accused person has been transferred from the custody of one police officer to another. Time does not stop running

in favour of an accused person because of the activities of police officers with regard to such an accused person. Clearly the reasons given for the delay in charging the applicants lack merit. Small wonder that the investigating officer opted not to swear an affidavit to explain the delay when he got wind of this matter having been referred to this court.

It is not in dispute that before the applicants were arraigned in court, they had been kept in police custody for some eleven or so days outside the mandatory 24 hours for which the police were entitled to hold them in custody before they could be taken to court for they were charged with a non-capital offence, to wit, preparation to commit a felony contrary to section 308(1) of the Penal Code. The feeble explanation for delay of eleven days or so was wholly unacceptable nor can it be said it was reasonable.

Commenting on the need for the police to uphold the rule of law, the court of appeal in the case of Elizabeth Akinyi Odoyo & Another v/s Republic, Cr. Appeal No. 161 of 2006 (unreported) had this to say.

“..... As this court has said time and time again, the prosecution must learn to operate within the laws upon which our fledging democracy is based. We are all, the police, the Attorney General and the court’s bound to accept that we are governed by law and the concept of the rule of law must be given a reality.....”

The applicants were thus right in raising the issue before the trial court and in this court as well. The delay of Eleven days before the applicants were arraigned in court to face the charges having been unreasonably explained, it will be an act of gross injustice to subject the applicants to trial. As it were the trial was a nullity and defective for the reason that fair trial provision of the constitution were breached even before the applicants were arraigned in court. I would thus agree with the opinion of the trial court that the police contravened fundamental rights and freedoms of the applicants by holding them for more than 24 hours. In the premises I allow the petition with the consequence that the applicants stand acquitted of the charges.

Dated and delivered at Nyeri this 30th day of January 2009

M. S. A. MAKHANDIA

JUDGE