



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc. Crim. Appli. 722 of 2007**

**EVANSON K. CHEGE.....APPLICANT**

**- VERSUS -**

**REPUBLIC .....RESPONDENT**

**RULING**

The applicant moved the Court by Notice of Originating Motion dated 15<sup>th</sup> October, 2007, and brought under ss. 72(1), 72(3) (b) and 77(1) of the Constitution, and s. 123 of the Criminal Procedure Code (Cap. 75, Laws of Kenya). The application carried several prayers, as follows:

- (i) that, the arrest and detention of the applicant from 28<sup>th</sup> September, 2007 to 4<sup>th</sup> October, 2007 without being brought to Court be declared unconstitutional;
- (ii) that, the institution and prosecution of Makadara Senior Resident Magistrate’s Court Criminal Case No. 4243 of 2007 against the applicant be declared unconstitutional;
- (iii) that, Makadara SRM Crim. Case No. 4243 of 2007 be terminated.

The applicant states in the general grounds founding the application that: he was arrested on 28<sup>th</sup> September, 2007 and held at Ruai Police Post; he was then moved to Kayole Police Station on 3<sup>rd</sup> October, 2007; he was released from Police custody on 4<sup>th</sup> October, 2007; he was not brought before any court within 24 hours of his arrest and detention; he was arraigned before the Makadara SRM’s Court on 5<sup>th</sup> October, 2007 in Criminal Case No. 4243 of 2007; his arrest and detention from 28<sup>th</sup> September, 2007 to 4<sup>th</sup> October, 2007 was a violation of his fundamental rights and freedoms; instituting Makadara Criminal Case No. 4243 aforesaid was a further violation of the applicant’s fundamental rights and freedoms under the Constitution; it “is just to bring to an end the constitutional breaches complained of.”

The several points are detailed out in the supporting affidavit of the applicant, sworn on 15<sup>th</sup> October, 2007.

Learned counsel **Ms. Githui**, who had the conduct of the applicant’s case, submitted that the applicant had been arrested and detained on 28<sup>th</sup> September, 2007, but not arraigned in Court until *seven days* later, on 5<sup>th</sup> October, 2007; and she urged that this was contrary to the terms of s. 72(3) (b) of the Constitution which mentioned twenty-four hours as the period within which arraignment in Court should have taken place. Counsel contended that “every minute thereafter of continued detention was an unmitigated illegality”; and she remarked that no explanation had been proffered for the delay. As the accused had

been arrested on a Friday, counsel urged that he should have been taken to Court at least on Monday, 1<sup>st</sup> October, 2007. So she submitted, the arrest, detention and arraignment of the applicant were all “unconstitutional”. Counsel urged the Court to find that the prosecution of Cr. Case No. 4243 of 2007 is unconstitutional; and so the trial in question should be terminated.

Counsel endeavoured to validate her argument, in its juridical standing, with the persuasive authority of this Court (*Mutungu, J*), in

*Ann Njogu & Five Others v. Republic*, Nbi High Ct. Crim. Application no. 551 of 2007.

The application was opposed by learned respondent’s counsel, **Mr. Makura**, who urged that the facts relied on by the applicant were not well-founded; the proceedings showed that the applicant was not in custody but was out on a Police bond.

**Mr. Makura** also contested the argument which had been attributed to principles culled from the *Ann Njogu* case: that “any detention beyond the stipulated period was an illegality”. Counsel, on this point, called in aid the Court of Appeal’s decision in *Dominic Mutie Mwalimu v. Republic*, Crim. Appeal No. 217 of 2005 – the following passage in particular:

**“Thus, where an accused person charged with a non-capital offence brought before the Court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution [have] not been complied with, the prosecution can still prove that he was brought to Court as soon as is reasonably practicable, notwithstanding that he was not brought to Court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to Court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of s. 72 (3) ... 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 a breach of the ... provision the Court must act on evidence.”**

Learned counsel urges that there has to be *an allegation*, before the prosecution may be called upon to give their explanation of delay in bringing the applicant before the Court after arrest.

Counsel urged that the instant application lacked merit, and should consequently be dismissed.

In her reply, **Ms. Githui** acknowledged that the applicant had, on 4<sup>th</sup> October, 2007 been released on a Police bond, and so he is now at large.

When the Court, at this stage, sought to be addressed on the principles laid down in the case of *Dominic Mutie Mwalimu*, learned counsel agreed that each case was to be determined on the basis of its special facts; and she asked that the instant matter too, should be considered on the basis of its peculiar facts; for her part, counsel urged: “In the instant case, there is no explanation.”

So it is agreed that for seven days, the applicant was held in custody before being brought before the Court to be charged. Learned counsel for the respondent did not urge that any explanation at all had been proffered by the prosecution for the belated arraignment of the applicant in Court; and it was the applicant’s position too, that no explanation had been given.

From the record in the Court file, I have to conclude that, indeed, beyond the proper period of twenty-four hours during which the applicant could have been detained prior to being charged, he was held for *some five or so days*. Since the respondent has not sought to justify such delay, it is to be concluded that the said delay was wrongful, and a breach of the applicant’s constitutional, trial- rights. How does such a breach of trial-rights relate to on-going prosecution of the applicant?

Learned counsel **Ms. Githui** has urged that there exists an attrition-chain to legal validity, which starts with delayed arraignment in Court rendering the *charge* null; a null charge rendering the *trial process*

null; a null trial process rendering the *eventual verdict* itself null – so that the moment it is established that arraignment in Court was delayed, then it follows perforce that the applicant is to be prematurely *acquitted*, without proceeding further to the stage of preliminary submissions on the merits of the criminal case. The juristic basis for this proposed syllogism has not been cogently presented before this Court. I have found difficulty with the said syllogism, besides, as it is highly theoretic, and would rule out practical and real scenarios, such as the *facts and circumstances* of a case; it would also take away the *judicial discretion*. If the Courts had a *legal obligation* to apply the syllogism, their task would be all too easy; but the *ideal of justice* is unlikely to be found embedded in the easiest options. The Constitution itself has a provision in s. 72 (6) for possible *compensation* for breaches of trial-rights; and the inference which I must draw is that the Court has a *discretion* as to what remedy to allow, where an accused person has been detained in custody for an unduly long period, before being arraigned in Court.

The prosecution of suspects, where offences have been committed, is itself a *constitutional obligation*, provided for in detail in s. 26 of the Constitution.

It is clear in the circumstances, that such contentions as may be made on trial-rights under s. 72 (3) of the Constitution, are often running *in parallel with the different constitutional claims*. I am still persuaded as I had stated, on this very point, in *David Karobia Kiiru v. Republic*, Nbi High Ct. Misc. Crim. Application No. 863 of 2007, that:

***“... criminal prosecution is a public-interest, governance process itself founded on the constitutional document. So, if that process is, as is herein the case, being challenged by citing the same Constitution, then conflicts within the provisions of the Constitution become apparent; and in that case, it is within the jurisdiction of the High Court to interpret the Constitution, and to declare what its true meaning is. I hold, therefore, that the reading of a line, or a clause, or a section of the Constitution will not be the answer, when such competing claims emerge; it is for this Court to declare the law of the Constitution, in those circumstances”.***

I do not agree there is a basis for the contention that the criminal case now facing the applicant should not be prosecuted, since there is a definite constitutional foundation to the prosecution process. I therefore reject the claim that Makadara S.R.M.’s Court Criminal Case No. 4243 of 2003 2007 should be terminated and the accused acquitted.

From the facts on record, however, it is clear that the applicant was detained for several days beyond the twenty-four hour period, before being charged in Court; and as no explanation was given for the delay in commencing prosecution, I hold that there was a *violation* of the applicant’s trial-rights as provided for in s. 72 (3) (b) of the Constitution. I hereby *declare* that the applicant thus suffered in his safeguarded right; and that the applicant may make an *application* before the High Court for *compensation*, by virtue of s. 72 (6) of the Constitution.

The trial file shall forthwith be returned to the trial Court, for continuation with the trial proceedings.

***Orders accordingly.***

**DATED and DELIVERED** at Nairobi this 26<sup>th</sup> day of January, 2009

**J B OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Huka**

**For the applicant: Ms. Githui**

**For the respondent: Mr. Makura**