



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT KISII**  
**Constitutional Reference 45 of 2008**

**CHARLES ONDERA ONCHAKO ..... APPLICANT**

**VERSUS**

**STATE ..... RESPONDENT**

**RULING:**

The applicant was charged with stealing from a locked room contrary to **Section 279 (G)** of the **Penal Code**. He was alleged to have opened a locked room with a key on 23<sup>rd</sup> January 2008 and stealing therefrom a cellphone, cash Kshs. 18,000/=, a Revolver and 5 rounds of ammunition, the property of a police officer. The applicant was arrested on 24<sup>th</sup> January, 2008 but was not arraigned in court until 30<sup>th</sup> January, 2008.

Before commencement of the trial, the applicant alleged that his constitutional rights had been violated because he had been kept in police custody for nearly 6 days contrary to the provisions of **Section 72 (3) (5)** of the **Constitution**.

The trial court ordered the prosecution to file an affidavit and explain the cause of the delay.

**Corporal Adan Isaack, the Investigating Officer**, filed an affidavit. He stated that the applicant was arrested on 24<sup>th</sup> January 2008 at about 4.00 p.m. but the stolen Revolver (pistol) was not recovered. On 25<sup>th</sup> January, 2008 a robbery was committed within Kisii central District and the robbers were armed with pistols.

The police were dispatched to the scene of the robbery to carry out investigations. It was suspected that one of the pistols used in that robbery was the one that had been allegedly stolen by the applicant. At that time of the year, the country was had been gripped by the post election violence and most of the time the police were attending to incidents related to the said violence.

The Investigating Officer further explained that 26<sup>th</sup> and 27<sup>th</sup> January was a weekend, Saturday and Sunday respectively. On 28<sup>th</sup> January, 2008 the police were summoned to the border of Borabu District to quell incidents of violence that had arisen. On 29<sup>th</sup> January the Investigating Officer compiled the police file and took the applicant's statement and caused him to be arraigned in court on the following day.

I have taken into account the above explanation. But for the fact that the applicant was arrested at a time when the country was facing the unprecedented post election violence when the police force was over stretched by the numerous acts of mass violence, the court would have easily rejected the said explanation. The court takes judicial note of the fact that in the month of January 2008 police officers were overwhelmed by the post election violence incidents and had to be assisted by other disciplined forces like the Army and prison warders. Given the above scenario and the fact that the delay was not inordinate, I hold that the said delay did not amount to violation of the applicant's constitutional right. I therefore reject the application and direct that the trial proceeds expeditiously before the appropriate

court.

**DATED, SIGNED AND DELIVERED AT KISII THIS 31<sup>ST</sup> DAY OF MARCH, 2009.**

**D. MUSINGA**

**JUDGE.**