



REPUBLIC OF KENYA

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IN THE HIGH COURT OF KENYA

OF KISII

Criminal Constitutional Ref. 15 of 2008

1. ERNEST OMWERI OGERO

2. GRACE GESARE OTWORI APPLICANTS

VERSUS

STATE RESPONDENT

RULING

The applicants were charged with several counts, the first one being abuse of office contrary to **section 101(1)** of the **Penal Code**. The particulars of the offence were that on diverse dates between 1st August 2007 and 30th September 2007 at Mwomoko village, Bomakombi sub-location, Bomorenda Location, Suneka Division in Kisii District, Ernest Omweri Ogero, being a person employed in the Public Service as a Chief, imposed Grace Gesare Otworu to be married to Victoria Kwamboka Obino in abuse of the authority of his office. They also faced other charges which included forcible detainer, malicious damage to property and assault causing actual bodily harm, which were all preferred against the second applicant and incitement to violence which was preferred against the first applicant.

The applicants were arrested on 16th August 2008 and were arraigned in court on 19th August 2008. At the commencement of their trial, the applicants raised a constitutional issue regarding delay in arraigning them in court in terms of the provisions of **section 72(3)** and **(5)** of the **Constitution of Kenya**. The learned trial magistrate framed the issues for determination and forwarded the file to this court.

Mr. Sagwe for the applicants urged the court to find that the applicants' constitutional rights were violated and hold that the charges against them are a nullity.

Mr. Kemo, Principal State Counsel, relied on an affidavit sworn by Sergeant Edward Mugatsia of the Divisional Crime Investigation office, Kisii who stated that he was the Investigating Officer in the aforesaid case. He explained that the applicants were arrested on the Saturday of 16th August 2008 at Suneka Market at about 6.35 p.m. The first applicant was released on police bond after members of the public threatened to lynch the complainant and burn her homestead. The officer further deposed that because of the security situation within Bomorenda Location where the offences were committed, the Chairman of the District Security Committee requested that the plea be deferred from 18th to 19th August 2008 to enable the Security Committee monitor the security situation in the said location. The applicants were therefore arraigned in court on 19th August 2008. The Investigating Officer further stated that the circumstances following arrest of the applicants threatened a break down of security in the area and that caused the police to delay arraignment of the applicants in court for a day.

I have considered the above submissions. **Sections 72(3)** of the **Constitutions** states as follows:

“A person who is arrested or detained -

(a) For the purpose of bringing him before a court in the execution of the order of the the 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 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 punishment by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

In **ALBANUS MWASIA MUTIA VS REPUBLIC**, Criminal Appeal No.120 of 2004 the Court of Appeal stated some of the reasons that may be sufficient in explaining delay in arraigning an accused person before a court by the prosecution. It has been held in several cases that not every delay in arraigning suspects in court amounts to a violation of his constitutional rights. It is unexplained violation of a constitutional right that may result in an acquittal of an accused person. In every case where the issue of delay is raised, a court has to consider whether there is any explanation that has been advanced by the prosecution and if so, whether the same is reasonable.

In this particular case the prosecution explained by way of an affidavit sworn by the Investigating Officer the circumstances that led to the delay in arraigning the applicants in court. The applicants faced a total of six counts and one of them was of incitement to violence contrary to **section 96(1)** of the **Penal Code**. It was alleged that the first applicant who was the area chief uttered words which were intended to incite **“sungusungu group”** to beat up Kennedy Mogire Obino and his family. The earliest date on which the applicants could have been charged in court was on Monday the 18th of August 2008 but the Chairman of the District Security Committee, who was monitoring the situation on the ground, requested that the plea be deferred to the following day so that the security committee could sufficiently monitor the security situation to ensure that peace was maintained.

The aforesaid request was not unreasonable. The District Security Committee has a legal obligation to maintain law and order and it acted responsibly. The rights of an individual are subject to the public rights of a community. The delay as aforesaid was therefore not a violation of the applicants’ constitutional rights in the circumstances of this case. The applicants’ trial should therefore proceed as usual. The Constitutional reference is dismissed.

DATED, SIGNED and DELIVERED at KISII this 31st day of March, 2009.

D. K. MUSINGA.

JUDGE.

Delivered in the open court in the presence of:

1. N/A for first applicant.
2. N/A for second applicant.
3. Mr. Mutai, Senior State Counsel for the Republic.

D. K. MUSINGA

JUDGE.