



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Miscellaneous Criminal Case 19 of 2009**

**LIVINGSTONE ANDIKA ..... APPLICANT**

**VRS**

**REPUBLIC .....RESPONDENT**

**RULING**

Pursuant to the provisions of section 72(3) of the Constitution a suspect who is arrested upon reasonable suspicion of his having committed, or being about to commit a criminal offence, and who is not released, should be brought to court as soon as is reasonably practicable.

If the suspect is not brought to court within 24 hours of his arrest or within 14 days of his arrest where he is facing a capital offence, the burden of proving that he was brought before a court as soon as is reasonably practicable rests upon the person who alleges that there has been compliance with the requirement under sub-section (3) of section 72.

In this case the applicant is being tried for murder. But before his trial commenced, the police had held him in their custody for about four and a half months. He was arrested on 14<sup>th</sup> June, 2006, but was not taken before a court of law until 27<sup>th</sup> October, 2006.

Clearly, the 14 days limit was exceeded by 4 months. When the applicant asserted that his constitutional rights had been infringed, the District Criminal Investigation Officer (D.C.I.O) Butere/Mumias failed to provide this court with any explanation for the delay in taking the applicant to court.

In the event, I find that the applicant was not taken before the court as soon as was reasonably practicable. Therefore, that means that his constitutional rights were violated.

The next question that needs to be addressed is whether or not the said violation of his constitutional rights should automatically earn him an acquittal.

The state submitted that the applicant should not be acquitted because the family of the victim needs to be accorded an opportunity to give their evidence. Meanwhile, as far as the state was concerned, the applicant could invoke the provisions of section 72 (6) of the constitution, to seek compensation from the person who had violated his constitutional rights.

Whereas the applicant did not give a direct answer to the state's above – cited reference to section 72 (6), it is noteworthy that the applicant stated as follows;

***“I was forced to confess due to torture in the police station. I was not involved in the offence.”***

Having given due consideration to the competing interests of the victim’s family and of the applicant, I hold the view that an acquittal of the applicant, at this stage, would constitute a second mistake. It would be tantamount to saying that because the rights of the applicant had been violated, it did not matter anymore whether or not he would otherwise have murdered the victim. To my mind, that would be completely wrong. My view is based on the provisions of section 70 of the constitution which recognizes that whereas every person in Kenya is entitled to the fundamental rights and freedoms of an individual, the constitution;

***“shall have effect for the purpose of affording protection to these rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”***

One of the rights that every person in Kenya is entitled to is the right to life. In this case, the life of the victim has been taken away. And it is the state’s case that the victim was murdered by the applicant.

The applicant has, in his submissions herein, said that although he appears to have confessed to the murder, he only did so after being tortured at the police station. That allegation of torture may or may not be true but, I hold the view that provided it is not given an opportunity to be tested, the applicant and the family of the victim will not have been accorded justice.

The family of the victim would feel that the court had set free someone who had confessed to the murder of their kin. On the other hand, the applicant would have been deprived of the opportunity to demonstrate that any such confessions as he is alleged to have made, was not voluntary at all.

In the circumstances, I find that justice demands that the trial of the applicant should proceed to its logical conclusion. It is only by so doing, that justice will be accorded to all those concerned.

I therefore decline to terminate the criminal case against the applicant.

Finally, before concluding this ruling, I wish to point out the fact that pursuant to rule 23 of the **Constitution of Kenya (Supervisory and Protection of Fundamental Rights and Freedoms of the Individual) High Court practice and Procedure Rules, 2006;**

*“Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”*

To my mind, that rule not only indicates that assertions that the constitutional issues had arisen, ought to be raised at the earliest possible opportunity, (hence the requirement that they be treated as preliminary points), but also that such issues ought to be raised within the case in which the issue has arisen.

*Dated, signed and delivered at Kakamega this 30<sup>th</sup> day of April, 2009.*

FRED A. OCHIENG’

JUDGE