REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 3 of 2007

REPUBLIC…….PROSECUTION

VERSUS

MWANDAZA MALUKI MWANDAZA

MAITA MWAYAMA

MWAIWE BORA……...…ACCUSED

RULING

The accused persons Mwandaza Maluki Mwandaza, Maita Mwayama and Mwaiwe Bora, have moved the court by way of their Originating Notice of Motion for orders that the charges facing them be declared invalid, incompetent and unlawful; that they be discharged and set at liberty forthwith as the charges facing them are a violation of their constitutional rights to a fair trial within a reasonable time. The Originating Notice of Motion, which is supported by three affidavits sworn by each accused, is based on one primary ground that the charges are a violation of Sections 72 (3) and 77 (1) of the Constitution which requires that the accused ought to have been charged and/or arraigned in court within 14 days of their arrest so as to guarantee a fair hearing within a reasonable time.

The accused contend that they were arrested on 15th December 2006 and taken to Lunga Lunga Police Station where they were detained till 6th February 2007 when they were arraigned before court. As a result, they were detained for a total of 53 days before they were arraigned in court which period went beyond the 14 days allowed under the constitution. In consequence, so the accused further contend, there was a violation of their constitutional rights to a fair hearing within a reasonable time which violation renders the charges and proceedings against them invalid, incompetent and unlawful.

The application is opposed and there is a Replying affidavit sworn by one Duncan M. Musuku, the Investigating Officer in the case. In the said affidavit it is deponed that the accused were arrested between 12th December 2006 and 17th December 2006 and were placed in cells at Lunga Lunga Police Station. Statements of witnesses were then recorded on 19th December 2006. It is then deponed that it took sometime before the accused underwent a mental assessment due to the none availability of a Dr. Mwangombe who finally completed the exercise on 30th January 2007. It is further deponed that when the Investigating Officer was ready to have the accused arraigned before court, there was no duty Judge to take the plea of the accused. It is further deponed that after liaising with a Ms. Mwaniki, a state counsel, the Investigating Officer was informed that a duty Judge would be available on 6th February 2007. The

accused were then duly arraigned on the said date. The Republic therefore contends that the earliest practicable date, the accused could be arraigned in court was the said 6th February 2007 and there had been no breach of their trial rights under the Constitution.

Learned counsel Mr. Mushelle, who appeared for the accused, substantially restated the accused's position as stated in their affidavits in support of the Originating Notice of Motion. He urged that the detention of the accused beyond the 14 days prescribed under the Constitution was contrary to the terms of Section 72 (3) (b) of the Constitution. He invoked to his aid, the decisions of the Court of Appeal in **Albanus Mwasia Mutua – v – Republic [Cr. Appeal No. 120 of 2004 (UR)]** and **General Macharia Githuku – v – Republic [Criminal Appeal No. 119 of 2004 (UR)].** Counsel further placed reliance upon three decisions of the High Court in **Ann Njogu & 5 others – v – Republic [Misc. Criminal Application No. 551 of 2004] (UR), Republic – v – Lucas Mono Chinyesi [Criminal case No. 38 of 2003] (UR)** and **Vincent Odhiambo – v – Republic [Criminal case No. 10 of 2008] (UR).**

There is now a plethora of authorities on a suspect's trial rights under the constitution. The view taken by O. K. Mutungi J in **Ann Njogu & Others – v – Republic** that there is no room for extension of the constitutionally provided for period, does not have the support of the Court of Appeal. The latter in **Dominic Mutie Mwalimu – v – Republic [Criminal Appeal No. 217 of 2005] (UR)** stated as follows:

"**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 Section 72 (3) (b) 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, the court must act on evidence."**

The same Court of Appeal cited possible examples of situations that may provide justification for delay in arraigning a suspect before the court in **Albanus Mwasia Mutua – v – Republic (supra).** In their own words:-

"**He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for the delay. It could be that he fell ill during the fourteen days the police were entitled to hold him in custody; that he was admitted in hospital and was detained in hospital for the eight months, as a result of which the police were unable to produce him in court. It could also be that the appellant had been presented to the court earlier but his case was terminated for one reason or another, he was discharged and subsequently recharged afresh. Constitutionally, the burden was on the police to explain the delay."**

What emerges from the authorities is that whether or not there has been unreasonable delay in arraigning an accused before the court and whether or not a reasonable explanation for the delay has been given will depend on the facts and circumstances of each case. The High Court has been given that discretion to make that determination which discretion like all judicial discretions will be exercised reasonably, judiciously and on the basis of known principles. The correct balance must be maintained. The Court of Appeal expressly said so in the Albanus Mwasia Mutua case. In their own words:-

"**On the one hand it is duty of the courts to ensure that crime where it is proved is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under Constitution."**

Whereas each case will depend on its own special facts and circumstances, where there has been delay, it has, in my view to be explained and in the absence of a reasonable explanation, the court's discretion

would be taken away especially with regard to significant delays. In the Albanus Mwasia Mutua's case the Court of Appeal put it in the following way:-

"**The jurisprudence which emerges from the cases….. appears to be that an unexplained violation of constitutional right will normally result in an acquittal."**

Turning to the application at hand, I ask myself whether the explanation given by the Republic for the delay in arraigning the accused before the court is reasonable. It is significant that the factual position given in the Investigating Officer's replying affidavit was not rebutted by a subsequent, further or supplementary affidavit. That factual position is that the police encountered difficulties in obtaining assessment reports on the mental status of the accused and when they finally succeeded, there was no duty judge before whom the accused would be taken for plea. Their case is that as soon a duty Judge was available, the accused were arraigned before him.

In the absence of a different factual position, the explanation proffered by the Republic is not unreasonable. I also bear in mind the gravity of the offence facing the accused and the competing rights of the society to a secure environment which competing rights are also enshrined in the Constitution. After considering the able submissions of counsel and the relevant case law as well as the affidavits filed both for and in opposition to this application, I have come to the conclusion that there is no basis for terminating these proceedings and acquitting the accused as there has been no breach of their fundamental rights under Section 72 (3) (b) of the Constitution of Kenya.

The upshot is that the accused's Originating Notice of Motion dated 10th November 2008 and filed on the same date is dismissed. The case should now be set down for hearing on the basis of priority.

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kamoti holding brief for Mushelle for the Accused and Mr. Monda for the Republic.

F. AZANGALALA

JUDGE

29TH APRIL 20