IN THE HIGH COURT OF KENYA
AT MOMBASA
Miscellaneous Criminal Case 111 of 2008

NDEGWA SAIDI……..……..APPLICANT

VERSUS

REPUBLIC……..RESPONDENT

RULING

The Applicant, has by his Notice of Motion dated 9th September 2008, applied to this court to make orders releasing the applicant on the grounds of violation and infringement of his fundamental rights and freedoms as encompassed in the Constitution of the Republic of Kenya. The application is expressed to be brought under the provisions of Sections 72 (2), 73 (3) (b), 72 (5), 77 (1), 77 (2) (b) and 77 (2) (c) of the Constitution.

The grounds for the application are contained in the applicant's affidavit sworn on 10th September 2008 in support of the application. In the affidavit, it is deponed that the applicant was arrested and detained on 22nd July 2008 without a warrant at Msambweni Police Station and arraigned before the Chief Magistrate's Court at Mombasa on 25th July 2008 after a period of 72 hours without explanation. It is also deponed that the applicant was not informed as soon as reasonably practicable of the grounds for his arrest and detention and was not also given access to witness statements thereby rendering preparation of his defence difficult. Because of those violations, the applicant swears that the continuance of proceedings before the Chief Magistrate against him violates or is likely to further violate his rights under the Constitution and the proceedings should be stopped.

The application is opposed and there is a replying affidavit sworn by one Silas Toroitich, the Investigating Officer in the matter. It is deponed in the said affidavit that the applicant was indeed arrested and booked at Msambweni Police Station on 22nd July 2008 at 2.00 p.m. at which time the said Investigating Officer recorded statements and issued the complainant with a P3 form. The Investigating Officer further depones that on 23rd July 2008 the applicant was not taken to court at Kwale because the court was not sitting then. The Investigating Officer further swears that on 24th July 2008 the P3 form was dully completed by the Police Doctor and the applicant arraigned in court the same day. In the view of the Investigating Officer, 24th July 2008 was the earliest practicable date the applicant could have been arraigned in court. In the premises, the Respondent contends that the applicant was in lawful custody and his constitutional rights were not violated. The applicant did not respond to the averments in the replying affidavits by way of a further or supplementary affidavit.

I have now considered the rival arguments made before me by both sides. I have also carefully considered the constitutional provisions cited to me. Having done so, I take the following view of this matter. The applicant's complaint appears to be that he was detained longer than is allowed by the Constitution of the Republic. Section 72 (3) (b) of the Constitution is therefore the relevant provision to

be considered. The section reads as follows:-

"**A person who is arrested or detained –**

(a)

(b) Upon reasonable suspicion of him 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 arrest or detention within fourteen days of his detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable 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 sub-section have been complied with."

The Court of Appeal has, correctly in my view, interpreted the above provisions as allowing suspects to be held after the time frames given in the said section have lapsed, save that there has to be an explanation for any delay. In **Dominic Mutie Mwalimu – v – Republic [CA No. 217 of 2005] (UR)** the Court of Appeal stated as follows:-

"**A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence among other things has to be brought before the court as soon as is reasonably practicable.**

The section further provides that where such a person is not taken to court within either the twenty four hours for non-capital offences or fourteen days for capital offences as stipulated by Law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence is 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."

The Court of Appeal has also held that what may be considered as reasonable basis for delay will depend on the peculiar circumstances and facts of each case. In the case of **Albanus Mwasia Mutua – v – Republic [CA No. 120 of 2004] (UR)** the court gave some of the examples of what may amount to acceptable explanation for delay. Those examples were again given in **Paul Mwangi Murunga – v – Republic [CA No. 35 of 2006] (UR).** In their own words:-

"**It may be that upon arrest and on being taken to the police station the accused person fell ill, was taken to hospital, and was admitted and kept there in excess of the period allowed. Or it may be that the accused person was arrested on Friday evening and as our courts do not work on weekends and it being not possible to release the accused on bail, he is brought to court on the next working day. Or it may be that the court house is far from the police station and the station vehicle broke down or had no fuel."**

It cannot be gainsaid that the examples given by the Court of Appeal are not exclusive. Each case will be considered on its own special facts and circumstances. In this case the applicant should have been arraigned before court on or before the 23rd July 2008 at 2.00 p.m. He was not. The Investigating Officer has deponed that on that day the nearest Court, which is the Kwale Chief Magistrate's Court, was not sitting. The next day, the 24th July 2008 the applicant was arraigned before court which date according to the Investigating Officer was the earliest practicable date the applicant could have been arraigned in court. As I have already observed those averments of the Investigating Officer were not rebutted by the

applicant.

Having considered all the circumstances surrounding this case, I find and hold that the Republic has satisfactorily explained the delay in bringing the applicant before the court. I caution myself that I am considering the applicant's allegations of violation of his rights under the Constitution - the supreme Law of the Land. Those rights however, must be considered together with other rights and duties equally important under the Constitution. The High Court in considering allegations of violation of Constitutional rights of suspects cannot disregard its duty to the society at large. The Court of Appeal indeed said as much in the **Albanus Mwasia Mutua's case (supra).** In its own words:-

"**On the one hand it is the 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 the Constitution."**

Turning back to our case, I find and hold that the explanation proffered by the Republic is reasonable in the particular circumstances of this case. I am constrained, to hold therefore that the applicant's trial rights under Section 72 (3) (b) of the Constitution have not been infringed.

With regard to the applicant's complaint that he has not been given access to witness statements, I am of the view that the trial is still at its nascent stage and that complaint will be adequately addressed when the trial resumes after this ruling.

This application is devoid of merit and is dismissed. The trial of the accused should now resume expeditiously.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OFAPRIL 2009.

F. AZANGALALA

JUDGE

Read in open court in the presence of the Applicant and Mr. Onserio.

F. AZANGALALA

JUDGE

28TH APRIL 2009