



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Misc Crim Appli 50 of 2008**

**1. ABDALLA KHAMISI**

**2. CENTRIC OKOMBO**

**3. DOKA ABDIRAHMAN ::::::::::::::: APPLICANTS**

**4. PAUL OPAYI**

**V E R S U S**

**REPUBLIC ::::::::::::::: RESPONDENT**

**R U L I N G**

The application before me is one that has been brought pursuant to the provisions of **section 72 (3)** and **84 (1)** of the Constitution of the Republic of Kenya.

The applicants have sought a declaration that their constitutional rights have been infringed by the police, who kept them in custody for a period of 22 days.

The Constitution stipulates that if a person is arrested or detained upon a reasonable suspicion of his having committed or being about to commit a criminal offence, he shall be brought before a court as soon as is reasonably practicable. If he is said to have committed a capital offence, the police are required to bring him to court within 14 days. But if he is suspected to have committed a no-capital offence, the police should take him to court within 24 hours of the commencement of his arrest or detention.

In the event that there was delay in taking him to court, it is then the obligation of the person who asserts that the accused has been taken to court as soon as was reasonably practicable, to prove his said assertion.

In the exercise of the authority vested in him by **section 84 (6)** of the Constitution, the Honourable Chief Justice of the Republic of Kenya has promulgated rules for the manner in which courts would go about safeguarding and enforcing the fundamental rights and freedoms of the individual.

Rule 16 of **The Constitution of Kenya (supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** provides as follows;

***“The Attorney General or the respondent, as the case may be, shall within fourteen days of***

***service of the petition, respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.”***

In this case, the Attorney General has not filed any replying affidavit. Therefore, the application ought to be construed as unchallenged.

However, even if this court were to accept the oral explanation given by the learned State Counsel, in court, I still find that the respondent has not satisfied me that the applicants were taken to court as soon as was reasonably practicable.

The state counsel told me that the delay in taking the applicants to court was attributed to the fact that the police had not completed their investigations. They therefore held the applicants in custody in an endeavour to ensure that the applicants did not interfere with the investigations and the witnesses.

In my understanding, that implies that the police had arrested the applicants prematurely. Therefore, by their own admission, the police are saying that they only finished the investigations after they had arrested the applicants and placed them in custody.

The conduct of depriving a person of his freedom when the police do not yet have sufficient reason to arrest him, must be discouraged completely. It is not right.

In the case of **ALBANUS MWASIA MUTUA Vs. REPUBLIC, CRIMINAL APPEAL NO.120 OF 2004**, the Court of Appeal said that;

**“.....an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”**

In this case, the police have violated the applicants’ constitutional rights to be taken to court as soon as was reasonably practicable. In the circumstances, and in line with the case of **Albanus Mutua** (above cited), I do now order that the criminal case against the applicants, in **Mumias Senior Resident Magistrate Criminal Case No.617 of 2008**, shall be terminated forthwith. I further order that the applicants be set at liberty forthwith unless they are, or any of them is otherwise lawfully held.

***Dated, Signed and Delivered at Kakamega, this 2<sup>nd</sup> day of April, 2009***

**FRED A . OCHIENG**

**J U D G E**