



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

**Petition 12 of 2008**

**ERICK KIMUTAI CHEPKIYENG.....1<sup>ST</sup> PETITIONER**

**ABEDNEGO MWILU MWANIA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT**

**RULING**

The petitioners were charged with the offence of **stealing by servant contrary to section 281 of the Penal Code**. According to the charge sheet the petitioners were arrested on 5<sup>th</sup> December 2007. They were arraigned in court on 7<sup>th</sup> December 2007. On 8<sup>th</sup> September 2008, they filed this petition under the provisions of **Section 84(1) of the Constitution of Kenya** in which they have challenged the Constitutionality of the proceedings that are still pending in CMCC No. 5568 of 2007.

The petitioners allege that their Constitutional rights to a fair trial were infringed upon by the police. The petitioners state that they were arrested within Nakuru on 3<sup>rd</sup> December 2007. They were illegally detained at Nakuru Central Police until 7<sup>th</sup> December, when they were released on police bail and brought to court on 11<sup>th</sup> December 2007, and they were charged with the offences of **stealing by servant, breaking into a building and committing a felony and for failing to prevent the commission of a felony**.

Counsel for the petitioners submitted that the petitioners' Constitutional rights to a fair trial were infringed upon when they were held at the Police custody for 4 days. The reason for their detention and arrest was not disclosed. They were kept in inhuman conditions. They were denied access to relatives and an advocate and they were not taken to court for any cognizable offence known in law within 24 hours. Counsel for the petitioners relied on the Court of Appeal in the cases of **Paul Mwangi Murunga vs. Republic [2008]** *eklr* and the case of **Albanus Mwanzia Mutua vs. Republic** Criminal Appeal No. 120 of 2004.

The State opposed this petition, the learned state counsel **Mr. Njogu** submitted that the charge sheet that is annexed to this petition shows that the petitioners were arrested on 5<sup>th</sup> December 2007. They were taken to court on 7<sup>th</sup> December 2007. No delay is disclosed, counsel submitted that, in a situation where the delay is not inordinate, and where the Police have not blatantly failed to charge an accused person such delay should be excused in the interest of justice. There should be a balance between the commission of a crime, the culpability of the offender as regards the commission of the offence. Regard must also be taken of the victim of the offence and the protection of the society by the rule of law, especially the same provisions of the Constitution, before acquitting the accused person on the grounds that his fundamental rights were infringed upon.

This court is called upon to determine whether the Constitutional rights of the petitioners were infringed upon by the Police under the provisions of **section 72(3)(b) of the Constitution**. This application is based on the affidavit of the petitioners. The petition is also supported by the annexed charge sheet which contains the information. According to that charge sheet, the petitioners were arrested on 5<sup>th</sup> December 2007, and they were arraigned in court on 7<sup>th</sup> December 2007. Going by the information on that charge

sheet, there is no delay that is apparent.

Applications of this kind are a dairy fare in our courts today, there is a long line of authorities by the Court of Appeal on this aspect. It is generally directed that each case must be considered according to its own facts and the issue of delay should be raised at the earliest opportunity before the trial court where the investigating officer is put to task to explain why the petitioners were not arraigned in court within 24 hours or within a reasonable time. Although the petitioners alleged that they were arraigned in court on 11<sup>th</sup> December 2007 having been released on Police cash bail on 7<sup>th</sup> December 2007, that information is not before this court. The information that they were arrested on 3<sup>rd</sup> December 2007 and released on 7<sup>th</sup> December 2007 is not borne by any documents in support of the petition.

Accordingly the petitioners have not been able to persuade me that their Constitutional rights to a fair trial have been infringed upon. In any event the petitioners can always seek for damages in a civil suit if they can prove that the Police subjected them to inhuman conditions while in Police Custody. As far as this petition is concerned I find no merit in the allegations contained in the petition. It is hereby dismissed.

**Ruling read and signed on 1<sup>st</sup> day of April, 2009**

**M. KOOME**

**JUDGE**