



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Case 14 of 2008**

**REPUBLIC.....
.....COMPLAINANT**

VERSUS

**JUDAH KIOGORA NGARUTHI.....1ST
ACCUSED/APPLICANT**

WILFRED GATOBU.....2ND ACCUSED/APPLICANT

**Constitutional law – delay in bringing accused charged of a capital offence before a court – Contrary to Section 72 (3) (b) of the Constitution - is a breach of the Constitution –
Constitutional Law – the prosecution of a person brought before a court of law after the prescribed period is not null and void**

RULING

This Ruling relates to a Preliminary Objection dated and filed on 17th April 2009 by M/s Mbogo & Muriuki learned Counsel for the accused that “the accused persons constitutional rights under section 72 (3) of the Constitution have been infringed.”

Contrary to the practice in raising preliminary objection on points of law, (and are argued on the basis that all facts are agreed upon and none is to be ascertained), the preliminary objection herein was supported by Affidavit each of the 1st and 2nd accused persons. Both Affidavits were sworn on the same day, the 23rd April, 2009, and were filed on 30th April 2009 about 14 days after filing the preliminary objection.

The facts are not in dispute. The 1st accused according to his own Supporting Affidavit was arrested on 23rd January 2008 and was arraigned in Court on 27th February 2008. He was detained for over 30 days, that is to say beyond the 14th days prescribed under the Constitution. The 2nd accused was arrested on 24th December, 2008 and was not arraigned in Court until 9th January 2009. Again, that is to say, a period beyond the constitutionally prescribed period of 14 days.

Section 72 (3) (b) of the Constitution of Kenya provides as follows-

72 (1) - (2)

(3) A person who is arrested or detained –

(a)

(b) Upon suspicion of his having committed or being about to commit a criminal offence –

And who is not 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 detention or within fourteen days 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 reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

When the Preliminary Objection was urged before me on 11th May, 2009, Mr. Muriuki learned Counsel for both accused submitted that there is no explanation for the delay. He submitted from the Bar (no doubt on the basis of the witness statements in his possession), that the statements had been recorded well before the accused were arrested and it is not explained why they were not brought before court within the prescribed period. He prayed that the accused be acquitted forthwith on the ground of the violation of their constitutional rights (to liberty).

The Preliminary objection was opposed by Mr. Oluoch Deputy Chief Litigation Counsel. His submission was that Section 73 (3) of the Constitution requires the prosecution authority to give a reasonable explanation that the accused person was brought to court without unreasonable delay.

With regard to the arraignment of the 1st accused, the Information/charge sheet particulars refer to the accused – “Wilfred Gatobu jointly with another not before Court murdered Patrick Muriera.” Counsel submitted that the delay was due to the fact the investigation authority was looking for the 2nd accused who had gone underground, and was not arrested until 24th December 2008, that the intention was to charge both accused persons together and bring them to court at the same time.

However on 24th December 2008 the Court was on Vacation, it was the eve of a public holiday. The Court was not sitting. The second accused was brought to court on 9th January 2009, while the Court was still on vacation. Learned Deputy Chief Litigation Counsel submitted that there is no provision in section 72 (3) of the Constitution that an accused person is entitled to an acquittal. The remedy Counsel submitted is in compensation under Section 72 (6) of the Constitution, and that even if the Court were to find that the delay was unreasonable, the Court could only make a declaratory order of breach.

Counsel further submitted that there are also rights of the complainants, the relatives of the deceased, and that a Court is both a court of law and a court of justice. For those reasons Counsel prayed that the Preliminary Objection be disallowed.

The rejoinder to the above submissions by learned Counsel for the accused will be considered in the following passages of this Ruling.

This is what I said in the case of REPUBLIC VS DAVID GEOFFREY GITONGA (Meru H.C. Criminal Case No. 79 of 2006) (unreported) – at p.3-

“My understanding of the above provision (72) (3) (b) is that a person who is arrested or detained for a crime or offence which is not punishable by a sentence of death should be brought before a court within

24 hours, and a person suspected of being about to commit or having committed an offence punishable by death should be brought before a court within 14 days. If the prosecution authority fails to do so, the burden of explaining that the accused could not have been brought to Court within the prescribed period lies with the prosecution authority.’

In this matter there were two persons suspected of having committed the offence of murder contrary to Section 203 of the Penal Code as read together with Section 204 thereof. According to the Information, the offence was committed on 18th January 2008. From the Supporting Affidavit of the 1st Accused, he was arrested on 23rd January 2008, barely five days after the offence was committed. He was not however brought before Court until the 9th January, 2009. The explanation from the Bar by learned Deputy Chief Litigation Counsel is that this accused was charged with the offence – that he along with another not before Court murdered the deceased. That other one, was the 2nd accused who became the 1st accused in the consolidated Information dated 4th March 2009. He was arrested on 23rd January 2008 and was not brought before Court until the 27th February 2009, some 34 days or so days from the date of his arrest.

Whereas there is reasonable explanation for the delay in bringing the 2nd accused to Court on 9th January 2009 following his arrest on 24th December 2008, there seems to be no explanation for the delay of some 34 days in bringing the 1st accused, Judah Kiogora Ngaruthi following his arrest on 23rd January 2008. This was certainly a violation of his constitutional right to liberty as guaranteed under Section 70 of the Constitution. The expression or phrase “shall be brought before a Court as soon as is reasonably practicable” has to my knowledge not been judicially considered in the context of Section 72 (3) (b) of the Constitution.

“Reasonably practicable” in ordinary language means within “reason” and “reason” is defined as “a statement of some fact- (real or alleged) employed as an argument to justify or condemn some act, prove or disapprove some assertion, idea, or belief” and includes a “fact or circumstance forming, or alleged to be forming a ground or motive leading or sufficient to lead a person to adopt or reject some course of action or procedure”.

Some examples will illustrate the point. A covenant in a contract or an agreement “to do a thing” “as soon as possible” means to do it within a reasonable time with an undertaking to do it in the shortest practicable time. For instance a tailor who accepts an order to make a dress “as soon as possible” need not put down a half made vest in order to begin the wedding dress, every customer knows at the time of giving the order that the manufacturer or tradesman may have other orders on hand.

On the other hand a shipper of cargo oil undertaking to deliver a cargo of oil to the Kenya Port of Mombasa “as soon as practicable” means “he must do so in the ordinary course of navigation, and not “as soon as practicable” for the convenience of the merchant’s business. If the merchant were to use the available cargo ship to deliver some other cargo to some other place, that would not be shipping the Mombasa cargo of oil “as soon as practicable.”

The term “reasonably practicable” in the context of Section 72 (3) (b) of the Constitution must be construed narrower than the terms either “as soon as possible” “as soon as may be”, or “as soon as practicable” – which all refer to doing some act within a reasonable time, and what is “reasonable time” is a question of fact. The term is narrower than the other terms because the maximum time within which the detaining authority is permitted to keep a person arrested or detained is limited to either twenty-four hours or fourteen days depending on the nature of the offence, non-capital or capital. Beyond either of those periods, the detaining authority must show by reference to all the circumstances that the accused person could not have been brought before a court within the narrowly specified period. Such circumstance must be within the realm of reason to justify the arrest and detention beyond the prescribed period.

A primary reason to justify the delay in bringing the accused before the court would be the absence of a judge or other competent court not sitting, the illness of the accused or the prosecutor, the breakdown in transportation from the detention facility to the competent court, these examples are not exhaustive.

In this case the reasonable excuse given to the Court by learned Deputy Chief Litigation Counsel was that the Court was on vacation until 9.01.2009, that the accomplice of the 2nd accused, the 1st accused had gone underground, and that the Police were investigating his whereabouts so that they both could be brought before Court to be arraigned for murder. The 2nd accused having been arrested on 24th December 2008, the eve of two consecutive public holidays, and two days of ordinary holidays (Saturday and Sunday), when Courts do not sit, and the 2nd accused having been brought to Court on 9th January 2009, the explanation given by the learned Deputy Chief Litigation Counsel for the delay is reasonable, considering all the circumstances obtaining at the end, and beginning of a new calendar year.

The 1st accused was arrested on 23rd January 2009 and arraigned in Court on 27th February 2009, that is after 34 or so days. I heard no reasonable explanation for failure to bring him to Court within 14th days. Failure to give such reasonable explanation aggravates the violation of the 1st accused's constitutional right to liberty. The reasonable explanation given in respect to the 2nd accused only mitigates against the damages he may claim under Section 72 (6) of the Constitution for his rights to liberty would already have been violated by his detention in excess of 14 days. However whether or not there is a reasonable explanation the failure to bring an accused person before a court is a violation of his constitutional right to liberty. The delay or the fact of the delay does not however render the prosecution of the accused either illegal or unconstitutional, or a nullity.

In the case of REPUBLIC VS DAVID GEOFFREY GITONGA (supra) I said at p.3

“I am aware that contrary opinions have been expressed by others in this Court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons, firstly the principle of nullity presupposes that the process of trial is void, either because it is against public policy, law, order, and indeed nullity is non-curable. For a trial to be void in law, it must be shown either that the offence for which the accused is being tried is non-existent, or that the court seized of the matter has no authority to do so.”

I also said at p. 4 of the judgment in that same case –

“It is the public policy of all civilized states that the offenders be subjected to due process in respect of defined offences, and [be tried] by duly competent courts or tribunals provided [established by law] therefor.

And I added –

“Where the offence for which a person is being tried or prosecuted albeit after 24 hours or 14 days is prescribed and person is brought before a court of competent jurisdiction, that trial cannot be a nullity. A trial will be a nullity only where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law (of the constitution). A rapacious rapist and a serial killer will not be allowed to go scot-free because either deliberately or inadvertently, the prosecution authority has not deemed it fit to have him brought before a court [of law] within 24 hours, or as the case may be within 14 days”

I further said at p.4 thereof –

“This is not to say that such an accused person's constitutional right to be brought before court within the prescribed time would not have been contravened. They would indeed have been contravened. He would of course be happier to get away with a rape or serial killing but that would clearly be both against public policy and indeed the Constitution itself, Section 72 (b) of which reads –

72 (1) – (5)

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation from that other person”

The above provision is a clear remedy for a person whose constitutional right to be brought before a Court within the prescribed period has been contravened. A release or acquittal of such a person would itself be contrary to the said provision of the Constitution. [If it were otherwise, the Constitution could have said that such person could be entitled to an acquittal]. A person therefore charged with an offence [defined in law] whether punishable by death or otherwise, will be acquitted or discharged on the basis of the evidence (adduced) before a competent court, or as the case may be, upon operation of law on the basis of a non-existent offence, or absence or lack of jurisdiction, and not merely on the failure [by the prosecution] to be brought to court within the prescribed period.”

I still subscribe to that view concerning section 72 (3) (b) of the Constitution, and the law, and I affirm those views.

Being therefore of the above mind, the accused Applicants’ Notice of Preliminary Objection dated and filed on 17th April 2009 is hereby struck out. I direct that the matter do proceed to hearing on dates available on the Court diary.

Dated delivered and signed at Meru this 22nd day of May 2009.

M. J. ANYARA EMUKULE

(JUDGE)