



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

**Miscellaneous Criminal Application 24 of 2008**

**KENNEDY KARIUKI GATURU)**

**CHARLES GITHAE ).....APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

By a reference dated 24<sup>th</sup> June, 2008, **Esther Boke**, learned Resident Magistrate based at Kandara Law Courts referred to this court for determination a question regarding the alleged contravention of the applicants' rights under *Section 72(3)* of the Constitution of Kenya. The facts leading to the reference are that, on 18<sup>th</sup> March, 2008 the applicants were arrested and remanded at Kandara police station on suspicion of having committed the offence of theft contrary to *Section 275* of the Penal Code. However it was not until 25<sup>th</sup> March, 2008 that they were arraigned in court to face the charge. In law they were required to be brought to court within 24 hours of arrest. This was not however the case as they were brought to court seven days later. According to the learned Magistrate the applicants were held in custody for a period exceeding 24 hours for an offence that was not of capital nature. The explanation tendered by the prosecution according to the learned magistrate, that investigations were still ongoing and that there was a public holiday in between may not be tenable.

The question framed by the learned Magistrate for determination by this court is whether the incarceration of the applicants from 18<sup>th</sup> March, 2008 to 25<sup>th</sup> March, 2008 when they were brought to court for plea to be taken was in breach of the fundamental rights and freedoms of the individual as guaranteed by *Section 72(3)* of the Constitution of Kenya.

In support of the reference, **Mr. Wachira**, learned advocate for the applicants submitted that the applicants' rights under *Section 72* of the constitution were violated. Under *Section 36* of the Criminal Procedure Code, the police had a duty to bond them or bring the applicants in court within 24 hours. The explanations given by the police for the delay were not tenable. In support of his submissions, the advocate relied on the following authorities.

- (1) **R. V. James Njuguna Nyaga Cr. Case number 40 of 2007 (UR)**
- (2) **Gerald Macharia Githuku V R, NBI CR. APP. NO.119 of 2004(UR)**
- (3) **Albanus Mwasia Mutua V R NBI CR.APP.NO.120 of 2004(UR)**

**Mr. Orinda**, learned Senior Principal State Counsel opposed the reference. He submitted that not every longer detention in police custody amount to a breach of constitutional rights. The law allows the detaining authority to explain the detention beyond the prescribed period. The court's concern should be public interest. The delay herein was 3 days. Considering the explanation given, the delay was not inordinate. Police bond exists. However the applicants never took advantage of the same. The need for detention of the applicants longer than necessary arose as a result of their own undertaking to lead the police to the recovery of the stolen items. The area of investigations was expansive. The issue of transport and stretched resources of the police cannot be ignored either. The explanation given was thus plausible. Accordingly the reference ought to be dismissed.

Having very carefully gone through the reference, the submissions and the authorities cited and relied upon, I have reached the following conclusions.

*Sections 72 and 77* of the Constitution of Kenya are part of chapter V of the constitution that deal with the protection of fundamental rights and freedoms of the individual. *Section 72 (3) (b)* thereof in particular provides interalia:-

**(b) “A person who is arrested or detained 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 detention, or within fourteen days of his arrest or 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 subsection have been complied with.”**

*Section 77 (1)* provides:-

**If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**

On the material placed before, it is common ground that the applicants who had not been arrested for a capital offence were not brought to court within 24 hours as required by law. **Mr. Orinda** concedes that much. Indeed they were brought to court 7 days following their arrest. It is their case therefore that the police had no basis to hold them for that long when they could easily have arraigned them in court within 24 hours.

However as correctly pointed out by **Mr. Orinda**, not every longer detention in police custody amounts to a breach of constitutional rights. Indeed *Section 72 (3) (b)* has proviso. It allows the detaining authority to arraign a suspect within a reasonable time. In other words detention beyond 24 hours for non-capital offence and 14 days in case of capital offences can be tolerated for as long as the suspect is brought to court within reasonable time. In other words, a plain reading of that provision 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 court as soon as is reasonably practicable. It is not that he must be brought to court within 24 hours or 14 days as the case may be. Those requirements are not cast in hard stone. The section further provides that if such person is not taken to court as required, 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. As Sated by the Judges of appeal in the case of **Dominic Mutie Mwalimu V Republic, CR.APP.NO.217 of 2005 (UR)**

**“.....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 has 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 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) above 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 of the above provision the court must act on the evidence.....”**

I totally agree with these observations.

In the circumstances of this case, an explanation for the delay was given. Following their arrest there was intervening Easter holiday between 21<sup>st</sup> to 24<sup>th</sup> March, 2008 which took away two days. There was also a weekend in between which again took away another 2 days. By dint of section 57 (a) of the Interpretation and General Provisions Act, the day on which the applicants were arrested has to be excluded from computation of time. The totality of the foregoing therefore is that there was only a delay of 2 days in arraigning the applicants in court and not 7 to 8 days as claimed by them. These facts have not at all been discounted by the applicants. It is apparent that the need to detain the applicants further arose as a result of their undertaking to lead the police to the recovery of the stolen items.

It is also not lost on me that the applicants could as well have sought from the detaining authorities police bond. They did not. They cannot blame the detaining authorities for their own inaction.

I am therefore far from being convinced that a delay of 2 days in arraigning the applicants in court amounted to a breach of their constitutional rights. They were arraigned in court within reasonable time. The explanation given for the delay is plausible and can be countenanced by this court. Accordingly, the reference is dismissed. The original record should be returned to the trial court for the trial to continue from where it had reached by the time this reference was made.

*Dated and delivered at Nyeri this 21<sup>st</sup> day of May, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**