



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CONSTITUTIONAL REFERENCE 32 OF 2008**

**IN THE MATTER OF SECTION 84(3) OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOM UNDER SECTION 72(3) AND (5) OF THE CONSTITUTION OF**  
**KENYA.**

**IN THE MATTER OF CRIMINAL CASE NO. 20 OF 2008 KEROKA S.R.M COURT.**

**BETWEEN**

**DICKSON NYABANDO OSORO ..... APPLICANTVERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

The applicant was charged with creating disturbance in a manner likely to cause a breach of peace contrary to **section 95(1)** of the **Penal Code**. The particulars of the offence were that on the 18<sup>th</sup> day of January 2008 at Matangi sub-location in Masaba District, the applicant created disturbance likely to cause a breach of peace by chasing **Osoro Nyabando Omurwa** with a sword.

Before commencement of his trial, the applicant told the trial court that he was arrested on 18<sup>th</sup> January 2008 and was not arraigned in court until 22<sup>nd</sup> January 2008. He stated that his constitutional rights had been violated by the delay in producing him before a court of law. The learned trial magistrate formulated the issues for determination and forwarded the matter to this court as by law prescribed.

**Police Constable Paul Mwema** of Keroka Police Station swore an affidavit and stated that he was the

investigating officer who was dealing with the applicant's case before the trial court. On 18<sup>th</sup> January 2008 at about 7.30 p.m. members of the public took the applicant to Keroka police station on allegation that he was creating disturbance likely to cause a breach of the peace as herein above stated.

The applicant was booked in and the people who had escorted him were advised to report back to the station the following day to record their statements. The 19<sup>th</sup> and 20<sup>th</sup> of January, 2008 fell on a Saturday and a Sunday and it was not therefore possible to take the applicant to court. The police did not manage to escort the applicant to court until the 22<sup>nd</sup> of January 2008.

**Mr. Kemo, Principal State Counsel** submitted that the delay in arraigning the applicant before court was neither deliberate nor inordinate and urged the court to dismiss the constitutional reference.

**Mr. Mogire** for the applicant submitted that the police had not given any reasonable explanation for the delay in arraigning the applicant in court and urged this court to acquit the applicant of the charges.

It is now settled law that an explained delay in arraigning an accused person in court amounts to violation of his constitutional rights. Such violation will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge, see ALBANUS MWASIA MUTUA VS REPUBLIC, Criminal Appeal No.120 of 2004. In this case the police did not explain why they did not either release the applicant on bond or escort him to court on 21<sup>st</sup> January 2008. If there was any explanation the court would have considered the same but it is not enough to merely state that the delay was neither deliberate nor inordinate. Any delay beyond the period stipulated by the Constitution has to be explained sufficiently. While I am satisfied that 19<sup>th</sup> and 20<sup>th</sup> January, 2008 fell on a Saturday and a Sunday respectively, the police did not give any explanation as to why they did not take any action on 21<sup>st</sup> January 2008. In the circumstances I agree with Mr. Mogire that there was violation of the applicant's constitutional rights and therefore discharge him of the charges that had been preferred against him before the trial court.

**DATED, SIGNED and DELIVERED at KISII this 18<sup>th</sup> day of May, 2009.**

**D. K. MUSINGA.**

**JUDGE.**

Delivered in the open court in the presence of:

1. Mr. Mogire for the Applicant.
2. The Applicant.
3. Mr. Kemo, Counsel for the Republic.

**D. K. MUSINGA.**

**JUDGE.**