

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Miscellaneous Criminal Application 127 of 2008

JULIUS OLUOCH BENARD APPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

This application is brought by way of a Petition and a Notice of Motion, both undated, under Sections 84(1), 72(3) (b) and 77(1) and (2) of the Constitution of Kenya, and in the matter of Criminal Case No. 1582/07 in the Chief Magistrate’s Court, Mombasa.

The applicant seeks an order terminating the proceedings in the said criminal case and acquitting him forthwith. His ground for the application is that he was arrested on 13th May, 2007 and arraigned in court on 16th May, 2007, which was more than 24 hours as prescribed in Section 72(3) (b) of the Constitution. The relevant part of that Section reads as follows-

“A person who is arrested or detained upon reasonable suspicion of 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 ... 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.”

The prosecution in this case contends that the provisions of Section 72(3) (b) have been complied with. In support of that contention is the replying affidavit of Joseph Wainaina of the Provincial CID Headquarters (Anti-Narcotics Section) Mombasa. He deposes in that affidavit that the applicant was arrested on 13th May, 2007 at 6.30pm. Upon arrest, the applicant was found in possession of narcotic drugs and was handed over to Anti Narcotics Section of the CID Provincial Headquarters where he was received on 14th May, 2007, and placed in cells at the Central Police Station. On the same day, Mr. Wainaina weighed the drugs which were suspected to be cannabis sativa and the total weight was 339 kilogrammes. He then sent a sample to the Government Chemist for analysis. He also accessed the lease document for the hire of the vehicle which the accused had hired, and recorded a statement from the owner of that vehicle. The following day the applicant was arraigned before the Chief Magistrate.

Since he was arrested on 13th May, 2007 at 6.30pm, the twenty-four hour period ended at 6.30pm on 14th May, 2007. Between that hour and 16th May, 2007 when the applicant was brought to court was a span of about 40 hours over and above the 24 hours allowed by the Constitution.

Mr. Wainaina has explained his activities over the period in question, and clearly he was not idle. He was working on the case and his explanation is reasonable and acceptable. In any event, a delay of about 40 hours is not outrageously inordinate. I therefore bear in mind the words of the Court of Appeal in *MURUNGA v. REPUBLIC* [2008]eKLR wherein the Court said-

“So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that ...”

Having found the explanation for the delay reasonable and acceptable, and as the delay was not inordinate, I accordingly leave the matter at that. I therefore dismiss the application and direct that the applicant be produced before the lower court for continuation of his trial.

It is so ordered.

Dated and delivered at Mombasa this 19th day of May, 2009.

L. NJAGI

JUDGE