



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**PETITION 1274 OF 2007**  
**IN THE MATTER OF SECTION 84(1)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS**  
**AND FREEDOMS UNDER SECTION 70(a), 72(1), 74(1) AND 77(1)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL**  
**RIGHTS AND FREEDOMS UNDER SECTIONS 70(A), 72(1), 74(1) AND 77(1)**

**B E T W E E N**

**LUKE OBARE OWITI..... PETITIONER**

**AND**

**REPUBLIC OF KENYA..... RESPONDENT**

**J U D G M E N T**

Before me is a petition dated 10<sup>th</sup> December, 2007 filed by Alphose Mutinda & Company advocates on behalf of the petitioner named as **LUKE OBARE OWITI**. The respondent is named as **REPUBLIC OF KENYA**.

The petition was filed pursuant to sections 70(a), 72(1), 74(1) and 77(1) of the Constitution. The petition seeks for the following orders-

- (a) A declaration that the petitioner's Constitutional rights have been violated.*
- (b) A declaration that an attempt to prosecute him amounts to further violation of his Constitutional rights.*
- (c) A declaration that his further detention amounts to further violation of his Constitutional Rights and is therefore an abuse of the process of law and is otherwise vexatious and oppressive.*

**(d) The costs of this Application be provided for.**

**(e) Any further or other orders or directions the Honourable Court considers appropriate in the circumstances.**

The petition was filed with an affidavit sworn by the applicant on 10<sup>th</sup> December, 2007. It was deponed in the said affidavit, inter alia, that on 30<sup>th</sup> November, 2007 the petitioner went to his bank, Kenya Commercial Bank Ltd. Narok branch, and deposited a cheque for Kshs.25,000/= and was then called by the Branch Manager, whom he knew, to his office and police officers arrested him over a certain cheque for Kshs.576,320.30 which was said to have been deposited in his account in September. It was also deponed that the petitioner was known widely in the small town of Narok as a government contractor and it would not have taken 3 months for him to be arrested; that the amount of money was and is still in the bank account, as he did not know who had deposited that money; that he was kept in custody for more than 24 hours before he was charged in court contrary to the Constitutional requirements; that he raised the constitutional violation issue at the Kibera Law Courts; and that the charges preferred against him indicated that the cheque in question was a Standard Chartered Bank Ltd. cheque and therefore the complainant should have been that bank, not the Kenya Commercial Bank Ltd.

The petitioner also, through his counsel, filed written submissions. In the submissions it was contended that the petitioner's constitutional rights were violated contrary to section 72(3) of the Constitution in that he was kept in custody for more than 24 hours after arrest before he was charged for a bailable criminal offence. It was contended that though in the charge sheet it was indicated that an apprehension report was made on 5<sup>th</sup> December, 2007, that could not have been true, as the court where the report was made was not disclosed.

In addition, the charge sheet indicated that the cheque in question was the property of Standard Chartered Bank Ltd, and therefore Kenya Commercial Bank Ltd. had no right to be the complainant.

Reliance was placed on the case of ANN NJOGU –Vs- REPUBLIC NAIROBI H.C. MISCELLANEOUS APPLICATION NO. 551 OF 2007; REPUBLIC –VS- JAMES NJUGUNA NYAGA –Criminal Case No. 40 of 2007; PAUL MWANGI MURUNGA –Vs- REPUBLIC – Criminal Appeal No. 35 of 2006; and the case of ALBANUS MWASIA MUTUA -VS- REPUBLIC – Criminal Appeal No. 120 of 2004.

At the hearing, Mr. Were appeared for the petitioner, while Mr. Obiri appeared for the respondent. Mr. Were emphasized that there was a court in Narok and the petitioner was neither charged there, nor was there an apprehension report made. Instead the petitioner was brought to court after being held in custody for 6 days, in contravention of section 72 and 74(1) of the Constitution. Counsel submitted that the affidavit of **INSPECTOR NGIGI** did not give the source of the information deponed to.

Mr. Obiri submitted that the affidavit of **INSPECTOR NGIGI** explained the delay that the petitioner was arrested on a Friday, which date should not be included in the computation. There were two days of a weekend, when courts do not work. The applicant was thereafter transported to Nairobi on the 4<sup>th</sup> day because the bank police fraud unit was stationed in Nairobi. Counsel sought to distinguish the cases relied upon by the petitioner. He relied on the case of DOMINIC MUTIE MWALIMU -VS- REPUBLIC – Nairobi Criminal Appeal No. 217 of 2005.

This is a petition seeking reliefs on an alleged contravention of section 72(3) of the Constitution. The relevant part of which provides-

**72(3) A person who is arrested or detained**

**(a) .....**

**(b) 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 the court as soon as reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”***

In my view, it is clear from the above provisions of the Constitution that the bringing of a person arrested or detained to court within 24 hours for other offences and 14 days for those suspected of committing offences punishable by death, is the ideal situation. However, Constitution envisages that an arrested or detained person may be brought to court, as soon as is reasonably practicable after the lapse of the time allowed by the Constitution. In such a case, the burden is always on the person alleging compliance with the law to prove that the person has been brought to court as soon as is reasonably practicable.

In our present case, there is no dispute that the petitioner was kept in custody, after arrest for an offence which is not a capital offence, for more than 24 hours before he was brought to court. He was kept in custody for 6 days before being charged.

The Petitioner says the Constitutional issue was raised before the subordinate court. However, the documents filed do not show what was decided by the subordinate court. Be that as it may, it is admitted by counsel for the parties that an explanation has been given for the delay. There is also no dispute that there was an intervening weekend.

In my view, the explanation given is reasonable proof for the reasons for delay. There was an intervening weekend, and the petitioner was charged in Nairobi. In my view, the cases relied upon are all in agreement that contravention can only be established where there is no explanation for the delay. Where an explanation for the delay is given, same has to be taken into account by the court. Its reasonableness has to be considered. I find that the prosecution has given a sufficient explanation to prove that though there was a delay, the petitioner was brought to court within a reasonable time, or as soon as was reasonably practicable. My finding is with regard to the criminal proceedings, and does not affect any other right or cause of action that the petitioner has under the law.

Consequently, and for the above reasons, I dismiss the petition herein.

Dated and delivered at Nairobi this 18<sup>th</sup> day of June, 2009.

**George Dulu**

**Judge.**

**In the presence of-**

Mr. Were for petitioner

Mr. Obiri for respondent