



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

**Miscellaneous Criminal Application 64 of 2008**

**BENARD RUTO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant/Petitioner herein has petitioned this court vide his petition dated 3/7/2008 asking the court to determine and make a finding that his constitutional rights under Section 72(3) (b) and 77 (1) of the constitution of the Republic of Kenya have been violated. The petition is supported by his affidavit dated 3/7/2008. In paragraph 2 of the said affidavit, it comes out clearly that the petitioner was indeed arraigned before the *Embu Senior Principal Magistrate Court on 10/4/2006* having been arrested on 3/4/2006. His contention therefore is that he was arraigned in court 7 days later and his trial therefore ought to be declared a nullity. I have read the replying affidavit by one Sgt Jacob Muriithi which is undated. The said “*affidavit*” being undated offends the provisions of cap 15 of the laws of Kenya and the same cannot therefore be said to be an affidavit. An affidavit must indicate the date and place it was commissioned. This one does not have a date and for all intents and purposes, it is an invalid document. I will therefore strike it out. Be that as it may however, this is an important petition as it touches on the constitutional rights of a citizen of this country. I will therefore determine the same on its merits.

Section 77 (1) of the constitution has not been infringed in this matter. I say so because that provision safeguards an accused person’s right to a fair and speedy trial. The subordinate court file or proceedings have not been availed here to show that the matter was delayed and if so why? This court cannot be called upon to make a finding pertaining to the delay of a matter without any evidence whatsoever. There is no evidence of any nature before me to show that this petitioner has been denied a fair and speedy trial.

On the issue of the non-compliance of Section 72(3) (b), I have noted that indeed the petitioner was taken to court 7 days after the expiry of the 24 hours stipulated in the constitution provides that a person who is charged with a non-capital offence shall be taken to court within 24 hours or “*as soon as is reasonably practicable.*”

This right is not therefore absolute. The prosecution needs to prove that the suspect was taken to court as soon as practicably possible. This is why in cases such as this, this question should be raised at the earliest opportunity to give the prosecution a chance to explain the delay. As held by the Court of Appeal in *DOMINIC MUTIE MWALIMU –V-REPUBLIC*

*“Where an accused person charged with a non-capital offence is*

*brought before the court after 24 hours.....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 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 the 24 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) is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances.....”*

In this case therefore, this issue must be considered within its own circumstances. The petitioner's own annexures show that he was arrested in Mukurweini which is in fact in a totally different province from Embu and which is over 100 Kilometres away. The matter appears to have been investigated by Nyeri Police Station who drafted the charge sheet. The state counsel who was supposed to give the consent to prosecute was based in Meru again over 100 Kilometres from Embu and the charge was supposed to be registered in Embu court. The logistics involved were therefore complicated and valuable time had to be wasted as all these different stations handled their post. My considered view is that this situation was quite different from a situation where a person is arrested and detained at a police station within the local jurisdiction of the court where the plea is supposed to have been registered. Had for instance this petitioner been arrested within Embu, and the plea was supposed to be handled by Embu Court with the state counsel Embu required to give the consent on behalf of the Attorney General, then a delay of 7 days would have been unconscionable. My finding in this matter is that the petitioner herein was taken to court as soon as practicably possible. The reasons for the delay is evident from the petitioner's own annexures.

Having considered the above issues and the charges facing the Petitioner/Applicant, I have come to the following conclusion:-

- 1. That the fact that the applicant was taken to court after the prescribed period of 24 hours does not ipso facto render the charges or proceedings against him null and void;*
- 2. That the matter must be judicially determined through a complete trial.*
- 3. That if the petitioner feels that he was unlawfully detained, he has an alternative recourse under Section 72 (6) of the constitution of Kenya.*

This petition is therefore dismissed with orders that .....9/06 pending before Senior Principal Magistrate's Court Embu be heard with expedition on priority basis. If there is now in place an anti-corruption court in Nyeri, the matter should be transferred to that court for hearing and final disposal unless there is good reason for it to be heard here.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 9<sup>th</sup> day of June 2009.