



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CRIMINAL APPLICATION 94 OF 2008**

**LIBIN GICIRA WAWERU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By his Originating Notice of Motion dated 11<sup>th</sup> August 2008, Libin Gicira Waweru (hereinafter “the applicant”) seeks two primary orders of the court expressed as follows:-

- 1) That his intended prosecution in Mombasa Chief Magistrate’s Criminal Case No. 2246 of 2008: **Republic – v – Libin Gicira Waweru** is illegal and a nullity.
- 2) That the said case be terminated forthwith and the applicant be set free.

The application has been brought under the provisions of sections 72 (1), (3) and 77 (1) of the Constitution, section 123 of the Criminal Procedure Code and the inherent power and jurisdiction of the court. The applicant states in the general grounds founding the application that he was arrested on 22<sup>nd</sup> July 2008 at 2.00 p.m. and was held by the police upto 25<sup>th</sup> July 2008 when he was arraigned in the Chief Magistrate’s court at Mombasa in the aforesaid criminal case; his constitutional and fundamental rights under section 72 (3) of the Constitution have been violated in that he was not produced before the court within 24 hours of his arrest and that his intended prosecution is thus illegal and a nullity and hence should be terminated and he be set free. These grounds are elaborated in his supporting affidavit sworn on 13<sup>th</sup> August 2008.

The application is opposed on the basis of a replying affidavit sworn by Constable David Morogo, the Investigating Officer in the case. In the affidavit, it is deponed, *inter alia*, that the applicant was indeed arrested on 22<sup>nd</sup> July 2008 and arraigned before the Mombasa Chief Magistrate’s Court on 25<sup>th</sup> July 2008. It is further deponed that on 23<sup>rd</sup> and 24<sup>th</sup> July 2008, the then Investigating Officer was engaged in seeking and obtaining documentary evidence and the earliest time the applicant could be arraigned was the said 25<sup>th</sup> July 2008.

Learned counsel for the applicant submitted that the prosecution had not adequately explained the delay in arraigning the applicant given that all witness statements and documentary evidence were available long before the applicant was arraigned before the court. Counsel therefore contended that the applicant’s

trial rights under the Constitution had been infringed and his prosecution was illegal and a nullity. Counsel placed reliance upon several cases among them **Gerald Macharia Githuku – v – Republic: [Cr. Appeal No. 119 of 2004] (UR).**

In his response to the applicant's submissions, Learned State Counsel contended that the delay in arraigning the applicant before the court had been adequately explained in the replying affidavit of the Investigating Officer.

Having considered the application, the affidavits filed and the submissions of Learned counsel, it is clear to me that the applicant was indeed held beyond the prescribed period of 24 hours. He was arrested on 22<sup>nd</sup> July 2008. Under section 57 (a) of the Interpretation and General Clauses Act, the period of lawful detention would actually commence on 23<sup>rd</sup> July 2008 and end on 24<sup>th</sup> July 2008. The applicant was arraigned on 25<sup>th</sup> July 2008. So the applicant was in fact held beyond the prescribed period for just one day. However, even one day's delay would have to be explained by the prosecution. What is the explanation? It is in paragraph 5 of the replying affidavit of the Investigating Officer. It reads as follows:-

**“5. That I was further informed by Cpl. Soita that on the 23<sup>rd</sup> July 2008 he went to obtain Documentary evidence from Southern Credit Banking Corporation Limited Mombasa which was in form of cash withdrawal slips, cheques and account statements however, the said documents were only successfully obtained on 24<sup>th</sup> July 2008.”**

Counsel for the applicant submitted that the explanation contradicted the Investigating Officer's own statement recorded on 23<sup>rd</sup> July 2008. I have considered the statements and note that in the one recorded on 23<sup>rd</sup> July 2008, the actual documents which the Investigating Officer took possession of were not stated. The replying affidavit however discloses the documents obtained on 24<sup>th</sup> July 2008. It is illustrative that the applicant did not file a further or supplementary affidavit which would have challenged the Investigating Officer's replying affidavit and would have given the prosecution an opportunity to offer a clarification of the documents taken possession of on 24<sup>th</sup> June 2008. In the premises, I have come to the conclusion that the prosecution has adequately explained the delay in arraigning the applicant before the court.

Even if there had been no explanation, it would not automatically mean that the applicant's trial would be declared a nullity. In **Dominic Mutie Mwalimu – v – Republic: Criminal Appeal No. 217 of 2005** the Court of Appeal stated as follows:-

**“Thus where an accused person charged with a non-capital offence 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 have 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 the 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).....is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In decided whether there has been a breach of the .....provision, the court must act on evidence.”**

So each case will be considered on the basis of its own peculiar facts and circumstances. The same court made the following observation in **Paul Mwangi Murunga – v – Republic: [Criminal Appeal No. 35 of 2006] (UR):**

**“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.”**

The delay in this case was of not more than two days beyond the proper period of twenty four hours. In

the premises, there is no basis for the contention that the applicant's Constitutional and Fundamental Rights under section 72 (3) of the Constitution have been violated. I therefore reject the claim that the prosecution of the applicant in Mombasa Chief Magistrate's Criminal Case No. 2246 of 2008 is illegal and unlawful. This application is therefore dismissed.

The trial before the Chief Magistrate's court should now proceed to conclusion. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF JUNE 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Ananda holding brief for Mr. Kenzi for the Applicant and Mr. Onserio for the Republic.

**F. AZANGALALA**

**JUDGE**

**9<sup>TH</sup> JUNE 2009**