



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

**Criminal Miscellaneous Application 110 of 2008**

**ALI RAMA ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

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**RULING**

The Applicant has brought this application by way of a Notice of Motion filed in court on 11<sup>th</sup> September 2008. In his application the Applicant seeks inter alia the following orders:-

***“3 THAT the honourable court be pleased to make orders to release the applicant on grounds of violation and infringement of his fundamental rights and freedoms as encompassed in the Constitution of the Republic of Kenya”.***

The Applicant in his supporting affidavit dated 10<sup>th</sup> September 2008 avers that he is a Kenyan male aged 14 years. On 27<sup>th</sup> April 2008 he was arrested and detained at Kinango Police Station. He was arraigned in court on 2<sup>nd</sup> May 2008 which was five days later and charged with committing an unnatural offence contrary to section 162(a) of the Penal Code. The Applicant claims that his detention in police custody for over 24 hours amounts to a violation of his fundamental rights as guaranteed by S. 72(3) of the Constitution of Kenya. Mr. Ondari Senior State Counsel opposed the application and relied on the replying affidavit of Corporal James Chongwo the investigating officer.

In his supporting affidavit the Applicant claims that he was arrested on 27/4/2008 and taken to Kinango Police Station. This is not borne out by the investigation diary annexed to the replying affidavit of Cpl. James Chongwo. The diary vide OB No. 11 of 30<sup>th</sup> April 2008 indicates that the Applicant was brought to the police station by the complainant on 30<sup>th</sup> April 2008. He was placed into cells by one PC Mugendi. Based on this evidence I find as a fact that the Applicant was actually arrested on 30<sup>th</sup> April 2008 and **not** on 27<sup>th</sup> April 2008 as he alleged. The fact that the Applicant was arraigned in court on 2<sup>nd</sup> May 2008 is not in dispute. This was three (3) days after his arrest and detention in police cells. S. 72(3) (b) of the Constitution of Kenya provides that:-

***“(3) A person who is arrested or detained ... 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 a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with”.***

A clear reading of this provision of the Constitution is that a suspect in a non-capital offence (such as the Applicant) must be arraigned before a court of law within twenty-four hours or as soon as is reasonably practicable. I do agree with Mr. Ondari learned State Counsel that it is not every delay in bringing an accused to court that will entitle the accused to an acquittal. In the case of **Dominic Mutie Mwalimu – vs- Republic Criminal Appeal No. 217 of 2005** at page 7 the Court of Appeal held that:-

***“In our view, the mere fact than an accused person is brought to court either after the twenty-four hours of 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) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances”.***

Therefore the mere fact that the Applicant was taken to court after three days instead of within twenty four hours is not conclusive proof of a violation of his constitutional rights. The Applicant was placed into police custody on 30<sup>th</sup> April 2008 a Wednesday. The investigating officer has explained in his replying affidavit that on the following day 31<sup>st</sup> April 2008 he took the Applicant for medical assessment. The following day 1<sup>st</sup> May 2008 was a public holiday and no court was sitting. The Applicant was given a police cash bail of Kshs.5000/- which he was unable to raise. He then remained in police custody until 2<sup>nd</sup> May 2008 which was the next available working day when courts were sitting. I am satisfied from this narrative that although the Applicant was not brought before a court within twenty-four hours he was taken to court as soon as was **reasonably practicable**. The police even offered to release the Applicant on bail but he was unable to raise the cash bail. In my opinion these circumstances do not reveal any violation of the Applicants constitutional rights. I find no merit in this present application and I therefore dismiss this present application in its entirety.

**Dated and delivered at Mombasa this 29<sup>th</sup> day of July 2009.**

**M. ODERO**

**JUDGE**

Read out in open court in the presence of:

Mr. Monda for State

Accused in person

**M. ODERO**

**JUDGE**

**29/7/2009**