



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 104 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD GATHIRI GATOYA.....1ST ACCUSED

ANTONY MUIRU KAMAU.....2ND ACCUSED

R U L I N G

The accused has raised a preliminary objection to his trial, on the grounds that his constitutional rights had been infringed, thus rendering the proceedings illegal, null and void.

His view is that in the light of the alleged constitutional violations, there had arisen a

“constitutional vacuum that cannot be cured by any explanation.”

He also stated that any subsequent proceedings and/or charges would be null and void notwithstanding the weight of any evidence which may be adduced against the accused.

His reason for that contention is that some rights were so deep that if they were violated, the said violation would render prosecution a nullity.

In this instance, the applicant was arrested on 25th July 2008. He was then held in police custody until 11th August 2008, when he was taken to court and charged with murder.

By his calculations, he was taken to court on the 17th day after his arrest.

Even though the prosecution has offered an explanation for the delay in taking the applicant to court, it is his submission if there was to be an excusable delay, the police ought to have applied to the court for an extension of the time within which to take the accused person to court. As far as the applicant herein is concerned, the police should have invoked the provisions of section 72(4) of the Constitution, to seek an extension of time, even before they charged the accused.

In the absence of an order of extension of the time for bringing an accused person to court, the applicant contends that notwithstanding any explanation by the police, the rights of the accused person would have been already violated.

In this case, the applicant was taken to court on a Monday, the 11th August 2008. As that was the 17th day after his arrest, it means that the applicant ought to have been brought before the court by Friday 8th

August 2008, which was the 14th day from the date of his arrest.

The applicant's position was that if his trial were allowed to proceed, that would constitute further violation of his constitutional rights.

His view is that the said violation could only result in his acquittal.

As far as he was concerned, section 72(6) of the Constitution could not be said to be available to an accused person, by first having his rights violated by charging him late, then offering him compensation. He submitted that if the courts simply offered to console accused persons whose constitutional rights had been infringed, by ordering that they be compensated, that would lead to blatant violations of the constitution. In any event, the applicant believes that there is no legal support to the contention that the remedy for constitutional violations was compensation.

In answer to the preliminary objection, the state submitted that if the applicant were to be set free before he was tried, that would defeat justice, especially on the part of the deceased.

As far as the state was concerned, the fourteenth day fell on the weekend, when courts do not sit. However, by my calculations, the fourteenth day fell on Friday 8th August, 2008.

By virtue of the provisions of section 57 (b) of the Interpretation and General Provisions Act;

“if the last day of the period is Sunday, or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day.”

In so far as Friday 8th August 2008 was the last day when the applicant should have been taken before a court of law, in compliance with section 72(3) (b) of the Constitution, it was not an excluded day.

It therefore follows that by taking the applicant before the court on Monday 11th August 2008, there was a delay of 3 days.

Pursuant to the decision in **REPUBLIC VS. NATHANIEL NGUGI MWAURA, CRIMINAL CASE NO. 60 OF 2007**, the applicant herein submitted, if any delay in bringing an accused person before the court is to be justifiable;

“...the extension must be sought and obtained, from the court, before the expiry of the stipulated period. It is trite learning to add that once the stipulated period has expired, in the case before me, 14 days, the doors for application for extension of the period are firmly shut, and any step taken in promotion of the prosecution for the suspicion for which the arrested person is held, including detention of the suspect, is null and void as it comes subsequent upon the violation of the fundamental rights of the person, as per Section 72(3) (b) of the Constitution.”

My learned brother, Mutungi J., went on to hold that;

“violation of the fundamental rights of an arrested/detained person, under Section 72(3) (b), cannot be justified.”

His considered view Was premised on the understanding that any affidavit which sought to explain the delay could not justify the violation of the constitutional rights.

With all due respect to my learned brother, I find myself unable to agree with his conclusion, to the effect that;

“The minute the detention went beyond the 14 days permitted by the Supreme Law of the land without

his being brought to court, any proceedings in relation to the alleged offence became illegal.”

With tremendous respect, I regret to disagree with my said learned brother, because Section 72(3) (b) of the Constitution actually provides that;

“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.”

In effect, when an accused person is brought before a court of law within 24 hours or 14 days of his arrest or from the commencement of his detention, the state need not offer any explanation.

It is only if there is a delay beyond the 24 hours or the 14 days that the Constitution provides a window of opportunity to the person who says that the accused was brought to court as soon as was reasonably practicable, to justify his contention. If the explanation tendered is reasonable, then the court will find that the accused person was taken to court as soon as was reasonably practicable. But if the court finds the explanation unsatisfactory, it will find that the constitutional rights had been infringed.

In my considered view, the expiry of the stipulated period does not necessarily constitute the automatic conclusion that any delay beyond that time becomes unconstitutional. Had that been the intention of the makers of our constitution, they would not have expressly provided a window of opportunity to the persons who assert that the accused person had been brought to court as soon as reasonably practicable. The Constitution would simply have stipulated that suspects must be brought before court within 24 hours or if they were charged with capital offences, within 14 days.

In **DOMINIC MUTIE MWALIMU V. REPUBLIC, CRIMINAL APPEAL NO. 217 OF 2005**; the Court of Appeal said;

“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.

In this case, the applicant was taken to court, some three (3) days late. That is the same length of time as in **GERALD MACHARIA GITHUKU VS REPUBLIC, CRIMINAL APPEAL NO. 119 of 2004**.

As the appellant in that case was set free, the applicant herein invited me to act in like manner. However, he did not take into account the other factors in that appeal. I say so because in that appeal, the Court of Appeal actually expressed the view that the delay of three days in bringing the appellant to court did not give rise to any substantial prejudice to the appellant. Thereafter, that court made it clear that their decision was influenced by the facts that the appellant had been in custody for over 12 years and that his co-accused had died while in custody.

In this case, the applicant was arrested on 25th July 2008. That was about six days after the offence had been committed on 19th July 2008.

The post mortem examination was conducted on the body of the deceased on 31st July 2008. As it is essential to have the cause of death established before a suspect can be charged with murder, it is clear that no charges could be preferred against the applicant until after the post mortem.

And after the results of the post mortem were received, the police continued with investigations, which culminated in the Identification parade on 5th August 2008. Three days later, the Investigating officer sought and obtained instructions from the Attorney General.

As the instructions to have the applicant charged with murder were received on Friday 8th August 2008, it is understandable that it may have been too late in the day to prefer charges against him on the same day. And as the courts do not sit on Saturdays or Sundays, the next working day was Monday 11th August, 2008.

Having given due consideration to the explanation tendered by INSPECTOR JOSEPH MUGUNA, the Investigating Officer, I am satisfied that the applicant was taken to court as soon as was reasonably practicable. In the event, I find and hold that his constitutional rights, pursuant to Section 72(3) (b) were not violated.

Finally, in my understanding of section 72(4) of the Constitution, the same vests in the court only, the power to order that a person who has been produced before it, be either released or otherwise be held in custody, if such detention in custody is in connection with the proceedings before the court. In other words, whilst the police may have legal authority to grant bail to a suspect before they produce him in court; once the suspect is taken before the court, it is only the court that can either order that he be released or that he should remain in custody.

On my part, I do not think that any court of law is empowered to extend the period stipulated in the Constitution.

Having said so, I must hasten to add that by accepting, as satisfactory, the explanation put forward by the police in this case, this court is not purporting to extend the period stipulated in the Constitution. I am acknowledging that there was a delay, but that the applicant was nonetheless taken before the court as soon as was reasonably practicable.

In **PAUL MWANGI MURUNGA V REPUBLIC, CRIMINAL APPEAL NO. 35/2006**, the Court of Appeal acknowledged that;

“So long as the explanation proffered is reasonable and practicable, 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.”

In the result, the preliminary objection herein is overruled. I therefore order that the trial of the applicant should now proceed.

Dated, Signed and Delivered at Nairobi, this 28th day of July, 2009.

FRED A. OCHIENG

JUDGE