



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Review 58 of 2009

JOSEPHAT NYARONGI ONDIEKI APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING:

On 4/2/2008 Mr. Nyambati, the applicant's learned counsel, raised an objection regarding taking of the plea, saying that his client had been held in police custody for a period of 11 days, contrary to the Provisions of **Section 72 (3) (b)** of the Constitution. He urged the court to acquit him of the charge of obtaining money by false pretences which had been preferred against him.

The prosecutor opposed the said application and gave reasons for the delay. He explained that the delay was caused by the post election violence that rocked parts of Sotik area at the time. There is also on record a letter dated 4th February, 2008 by the D.C.I.O. Kisii Central, to the Senior Principal Magistrate.

The learned trial magistrate dismissed the application and ordered the plea to be taken. The trial court delivered a considered ruling on 19th February, 2008. Immediately thereafter the plea was taken and the accused pleaded not guilty to the said charge. The hearing commenced on 28th March, 2008 and the prosecution closed its case on 17th February, 2009, having called a total of 8 witnesses. Mr. Nyambati submitted that a *prima facie* case had not been made out against his client. He raised the aforesaid constitutional issue once again. The prosecution responded and reiterated the same reason as earlier advanced.

The learned trial magistrate framed several issues for determination and forwarded the file to this court.

The accused did not appeal against the ruling of 19th February, 2008. The defence counsel, prior to the delivery of that ruling, had not asked the trial court to refer the matter to the High Court for determination of the constitutional issue. He had merely urged the court to acquit the accused of the charges that he was facing. The action of taking the plea after dismissal of the said application and thereafter proceeding with the hearing was an indication that the accused was no longer challenging the constitutional validity of the charges that had been preferred against him. The accused's advocate and the trial court may not have adopted the right procedure as prescribed under the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure rules, 2006. That notwithstanding, no appeal was preferred against the said ruling.

In any event, I have perused the lower court record and noted the reasons that were advanced for the delay in arraigning the accused before the trial court. It is not in dispute that around 24th January, 2008 when the accused was arrested, the unprecedented post election chaos that rocked most parts of Kenya were still simmering. The police force was over stretched in its capacity and many of its officers were engaged in activities aimed at restoring law and order.

It is unreasonable or unexplained delay in arraigning an accused person in court that amounts to violation of his rights. I hold that the accused's Constitutional rights were not violated and dismiss this constitutional reference. The hearing should proceed in the normal manner before the trial court.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF JULY, 2009.

D. MUSINGA

JUDGE.

20/7/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Kemo for the state.

Mr. Ombati for the applicant.

Court: Ruling delivered in open court on 20th July, 2009.

D. MUSINGA

JUDGE.