



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

**Miscellaneous Criminal Appeal 6 of 2009**

**JULIUS WANGO OLALE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

The Appellants, **Julius Wango Olale** (1<sup>st</sup> Applicant) and **Dennis Maende Odera** (2 Applicant) have sought that the proceedings in the lower court be declared a nullity and they be set at liberty because their rights under the Constitution of Kenya were violated. Both state that they were arrested on 8<sup>th</sup> December 2007 and held in police custody until 11<sup>th</sup> December, 2007 when they were taken to court. It is their contention that this was a violation of their rights under section 72 (3) (b) of the Constitution of Kenya which requires that they should have been presented in court within 24 hours of their arrest as they were not facing a capital offence. Upon being produced in court on 11<sup>th</sup> December 2007 they requested that they be further held in custody as investigations were incomplete.

Their prayers are opposed by the state based on the contents of an affidavit sworn by I.P. Dennis Onyango of Malindi police station. He confirms that the applicants were arrested on 8<sup>th</sup> December 2007 – which was a Saturday and no court was working over the weekend, so the earliest date that applicant’s could have been taken to court was 10<sup>th</sup> December 2007. However they were not taken to court on 10<sup>th</sup> December 2007 as there were attempts to arrest applicant’s accomplices who were on their way from Nairobi.

However, applicant’s accomplice got wind of the applicant’s arrests and so escaped the trap and subsequently the applicants were taken to court on 11<sup>th</sup> December 2007.

In arguing the application, the applicants have simply repeated the contents of their petition section 72 (3) (b) of the Constitution of Kenya provides as follows:-

*“A person who is arrested or detained –*

*shall upon reasonable suspicion of*

*having committed, or being about to*

*commit a criminal offence, and who is*

*not released, shall be brought before a*

*court as soon as is reasonably practicable  
and where he is not brought before court  
within twenty four hours of his arrest, from  
the commencement of his detention .....  
the burden of proving that the person  
arrested or detained has been brought  
before a court as soon as  
reasonably practicable shall rest upon  
any person alleging that he provisions  
of this section have been complied with.”*

What this means is that where there is delay in presenting an accused person within the constituting recognized period then the burden of explaining that delay lies with the prosecution/police. It does not for one instance mean that the minute there is a whiff of delay, then what follows is an automatic acquittal. Mr.Ogoti has urged this court to crusade the explanation given by I.P. Onyango in his affidavit and to accept the delay as excusable.

Was there a three days delay? Yes what was the reason? 8<sup>th</sup> December 2007 was a Saturday, courts in Kenya do not sit on Saturdays and Sundays so the earliest that applicant’s ought to have been brought to court was 10<sup>th</sup> December 2007. They were brought a day later – reason? Police had hoped to arrest them accomplish who were said to be on their way to Malindi over the same deal. Is that a reasonable explanation?

Applicants urge this court to crusade the decision in **HCC Nairobi 17 of 2007 Republic V David Muthotho Kamau** which held that protracted investigations do not constitute acceptable or satisfactory explanation for failure to bring a person arrested on suspicion of committing an offence within the period stipulated by section 72(3) b of the Kenyan Constitution.

Pray, what is satisfactory or acceptable? That definition is not to be found in the Constitution and I suppose it is left to the sensibilities of the presiding officer. One distinguishing fact is that in **David M. Kamau’s case**, the accused had been held in police custody for 82 days which is inordinately long, whereas in the present case, the delay in three days (two which are easily expect as they fell on a weekend) and which would then for purposes of the legal provision bring it to one day’s delay.

To counter this one day’s delay, they have cited the decision in **Anne Njogu and 5 others V Republic HCCR MISC. 551 of 2007** which held that at the tick of the 60<sup>th</sup> minute of the 24<sup>th</sup> hour the every other minute’s delay is a violation of the Constitution. The jurisprudence developed from two Court of Appeal decision, which often useful prudence definity discloses that there has to be a reasonable explanation for the delay. These are the case of **Eliud Njeru Nyaga V Republic Cr. Appeal no. 182 of 2006** were judges of Appeal stated.

*“While we would reiterate the  
position that was the far trial*

*provisions of the Constitution,  
an accused person must be  
brought to court within twenty-four  
hours for non capital offences.....,  
yet it would be unreasonable to hold  
that any delay must amount to a  
constitutional breach and must result  
in an automatic acquittal.”*

*The learned Judges of Appeal then expounded on this by referring to the celebrated case of Albanus Mwasia Mutua V Republic Cr. Appeal No. 20 of 2004.*

*“.....He was brought before the  
Trial Magistrate some eight months  
from the date of his arrest and  
No EXPLANATION AT ALL was  
offered for the delay. It could be that  
he fell ill during the.....days  
the police were entitled to hold  
him in custody..... constituting the  
burden was on the police to explain  
the delay”.*

The explanation given is really that police wanted to put them act together, get the accomplices, perhaps in the hope of fathering further evidence and hence the one day’s delay. That delay is not inordinate and I would quote my brother JB Ojwang (J) bid

*“It is a matter of reasoned judgment  
whether or not reasonable explanation  
has been given for a phenomena. There  
are no hard and fast rules, circumstancing*

*what is reasonable, it is common forensic technique to press one side of the contention in such a skewed manner as would tip the balance in favour of one of the sides. But this is where Court's judicial assessment comes in, and its hallmark is objectively that rests on clear facts and circumstances of merit"*

I am not persuaded that a chain of attrition exists beginning with delayed arrangement in court rendering the charge and trial process a nullity and opening the stage for an acquittal.

I have considered the gravity of the offence which applicants face, and the inevitable challenges police face in conducting investigations and effecting arrests the rights of an accused person under section 72 (3) (b) of the Constitution must be weighed alongside the rights guaranteed under section 70 of the constitution which places an obligation on this court to consider the public interest as well as the rights of others. The applicants are charged with being in possession of paper for forgery chamber summons 367 (a) P.C. and preparation to commit a felony – which must be considered in the light of public interest and I repeat that the one day's delay has been sufficiently explained, it is not inordinate and would not be a reason to nullify or terminate the proceedings pending in the lower court. Consequently, the applications are dismissed.

**Delivered and dated this 20<sup>th</sup> day of July 2009 at Malindi.**

**H.A. OMONDI**

**JUDGE**

Applicants present

Mr. Ogoti for State.