



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CRIMINAL APPEAL 6 OF 2009

JULIUS WANGO OLALE.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

The Appellants, Julius Wango Olale (1st Applicant) and Dennis Maende Odera (2nd 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 8th December 2007 and held in police custody until 11th 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 11th December 2007 police 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 8th 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 10th December 2007. However they were not taken to court on 10th December 2007 as there were attempts to arrest applicant's accomplices who were on their way from Nairobi.

However, the applicant's accomplice got wind of the applicant's arrests and so escaped the trap and subsequently the applicants were taken to court on 11th 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 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 prosecution/police. It does not for one instance mean that the minutes 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? 8th 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 10th 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 consider the decision in **HCC Nairobi 17 of 2007 Republic V David Matzoth 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 is three days (two which are easily explained 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.51 OF 2007** which held that at the tick of the 60th minute of the 24th hour then every other minute's delay is a violation of the Constitution. The jurisprudence developed from two Court of Appeal decision, which offers useful prudence definitely discloses that there had to be a reasonable explanation for the delay. These are the cases of **Eliud Njeru Nyaga V Republic Cr. Appeal No. 182 of 2006** were judges of Appeal stated.

“While we would reiterate

the position that under the fair

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.....the burden
was on the police to explain
the delay.”*

The explanation given is really that police wanted to put their act together, get the accomplices, perhaps in the hope of gathering 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, circumscribing 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 Court must be weighed alongside the rights guaranteed under section 70 of the constitution

which places and obligation on this court to consider the public interest as well as the rights of to others. The applicants are charged with being in possession of paper for forgery contrary to section 367 (a) Penal Code and preparation to commit a felony – which must be considered in the light of public interest and I repeat tht 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 20th day of **July 2009** at Malindi.

H. A. Omondi

JUDGE

Applicants present

Mr.Ogoti for State