



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Criminal Case 25 of 2006

REPUBLIC PROSECUTOR

VERSUS

KITSAO NGUMBAO MWAMBIRE 1ST ACCUSED

DAMA MAKANGE MWATELA 2ND ACCUSED

JULILUS KAZITU KARISA 3RD ACCUSED

RULING

The accused persons Kitsao Ngumbao Mwambire (hereinafter “the 1st accused”), Dama Makange Mwatela (hereinafter “the 2nd accused”) and Julius Kazitu Karisa (hereinafter “the 3rd accused”) have moved the court for orders that the charges facing them be dismissed on the grounds that their prosecution is in breach of their fundamental rights guaranteed them under Section 72 (3) of the Constitution as they were detained for more than 14 days. The 1st and 2nd accused have lodged notices to dismiss the charge and the 3rd accused has lodged a motion of preliminary objection. The notices were canvassed before me on 6.7.2009. This ruling is in respect of the three notices.

With respect to the notice lodged by 1st accused, the complaint relates to his detention for 55 days beyond the prescribed period. He contends that he was arrested and placed in police custody on 23.9.2006 and was not brought to court until 4.12.2006. The 2nd accused contends that, he was arrested and placed in police custody on 10.12.2006 and was not brought to court until 4.12.2006. The 3rd accused contends that he was arrested on 11.1.2007 and was not arraigned until the 12.2.2007. The accused have invoked the provisions of Section 72 (3) (b) of the Constitution which requires that a suspect be charged and/or arraigned in court within 14 days of his arrest so as to guarantee a fair hearing within a reasonable time. As they were detained beyond the 14 days the accused contend that there was a violation of their Constitutional rights to a fair hearing within a reasonable time which violation renders the charges and proceedings against them invalid, incompetent and unlawful.

The accuseds’ notices have been opposed and there is one replying affidavit sworn by C.I. Tarus, the current Officer In charge of Mariakani police station. It is deponed in the affidavit that the 1st and 2nd accused could not be arraigned within the prescribed period because the station motor vehicle was undergoing repairs which repairs were completed on 6.12.2006 whereafter the two accused were arraigned in court. It is further deponed in the affidavit that the 3rd accused could not be arraigned in court within the prescribed period because, the station vehicle had no fuel.

The 1st and 2nd accused have challenged the above explanation in their replying affidavits sworn on

18.5.2009. They aver that C.I. Tarus does not state when the station motor vehicle allegedly broke down. They further deponed that at the material time, other inmates were arraigned in court and that they were detained to be intimidated to confess.

In their oral submissions before me, counsel for the accused persons restated their clients' positions as stated in their affidavits aforesaid. They were of the view that the detention of the accused beyond the 14 days prescribed under the Constitution was contrary to the terms of Section 72 (3) (b) of the Constitution. Counsel further discredited the replying affidavit of C.I. Tarus on the grounds that he was not the Investigating Officer at the material time and no explanation had been given for the failure of the Investigating officers to file replying affidavits.

On his part counsel for the respondent (state counsel) contended that, the prosecution had adequately explained the delay in arraigning the accused persons and urged me to find that the accuseds' rights under Section 72 (3) of the Constitution were not violated.

I have now considered the notices to dismiss the charges, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. There is now a plethora of authorities on a suspect's trial rights under the constitution. In **Dominic Mutie Mwalimu**

– v – Republic (Criminal Appeal No. 217 of 20050) (UR), the Court of Appeal stated as follows: -

“thus where an accused person charged with a non-capital offence before the court after twenty four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution have not been complied with the prosecution can still prove that he was brought to court as soon as is reasonably practicable, notwithstanding that he was not brought to court within the time stipulated by the Constitution. 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. The wording of Section 72 (3) (b) is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been breach, the court must act on evidence.”

In **Albanus Mwasia Mutua – v – Republic [CR. Appeal No. 120 of 2004] (UR)** the Court of Appeal cited possible situations that may provide justification for delay in arraigning a suspect before the court. In their own words: -

“It could be that he (the appellant) fell ill during the fourteen days the police were entitled to hold him in custody; that he was admitted in hospital and, was detained in hospital ... as a result of which the police were unable to produce him in court. It could also be that the appellant had been presented to the court earlier but his case was terminated for one reason or another he was discharged and subsequently recharged afresh. Constitutionally, the burden was on the police to explain the delay.”

It is plain that the court of Appeal did not cite all possible situations that would justify a delay in arraigning a suspect in court. Those situations will vary from case to case. So, whether or not there has been unreasonable delay in arraigning an accused before the court and whether or not a reasonable explanation for delay has been given will depend on the facts and circumstances of each case. The High court has the discretion to determine, the issue and like all judicial discretions, will be exercised reasonably, judiciously and on the basis of known principles always maintaining the correct balance. That balance was alluded to in the **Albanus Mwasia Mutua case**. In their own words: -

“On the one hand it is the duty of the courts to ensure that crime where it is proved is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences particularly the human rights guaranteed to them under the Constitution.”

Turning to the notices at hand, the undisputed fact is that all the accused were arraigned in court beyond the prescribed period of fourteen (14) days. But is the explanation furnished by the prosecution reasonable? The prosecution blames lack of a vehicle and fuel for the delay in arraigning the accused in court beyond the prescribed period. With respect to the 1st accused, the delay involved was of about 57 days and with regard to the 2nd accused, the delay involved was of about 34 days. Could it take the police 57 days to repair a broken down vehicle? With regard to the 3rd accused the delay involved was of about 10 days. Would the police lack fuel for a whole 10 days? I bear in mind the gravity of the offence facing the accused and further that three people lost their lives. It cannot be gainsaid that the rights of the society at large should also be considered and those rights are also enshrined in the Constitution. After considering all the circumstances and the competing rights of both the accused and the society, I have come to the conclusion that the explanation proffered by the prosecution for the delay in arraigning the accuseds before court is reasonable. There is therefore no basis for terminating these proceedings and acquitting the accused persons as in my view there has been no breach of their fundamental rights under Section 72 (3) (b) of the Constitution of Kenya.

In the end the accused persons' notices to dismiss the charge are dismissed. .

The case should now be set down for hearing on the basis of priority.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of:

Gathuku for the 3rd accused and holding brief Onjoro for 1st and 2nd accused.

F. AZANGALALA

JUDGE

26.8.2009