



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

**Criminal Case 95 of 2008**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**SAMUEL WAINAINA KARIUKI.....ACCUSED**

**R U L I N G**

The issue before me is a preliminary objection raised by the accused person. He asserts that his constitutional rights had been violated. In particular, the accused says that his rights under the following sections of the Constitution, have been violated;

- (i) 70 (a);
- (ii) 72 (2);
- (iii) 72 (3) (b);
- (iv) 74 (1); and
- (v) 77 (1).

He told the court that he was arrested on 5<sup>th</sup> October 2008. He also said that, as far as he was concerned, he should have been taken before a court of law by 18<sup>th</sup> October, 2008.

By the calculations of the accused, the 18<sup>th</sup> of October 2008 was the 14<sup>th</sup> day from the date of his arrest. Therefore, had he been taken to court by that date, the prosecution would have complied with section 72(3) (b) of the Constitution.

Instead of being taken before the High Court within the prescribed period, the accused says that the police first took him before a magistrate's court on 21<sup>st</sup> October 2008.

As the magistrates courts do not have the requisite jurisdiction to hear and determine murder cases, the accused submitted that his appearance before the magistrate's court was of no legal effect

It is the case of the accused that he was taken to court 15 days later than he should have been. He gave the date when he was taken before the High Court as the 5<sup>th</sup> of November 2008.

Because of the 15 days delay in taking him to court, the accused says that the subsequent proceedings were rendered a nullity. Indeed, as far as he is concerned, the delay was fatal to the case which the prosecution may wish to make out against him.

Mr. Ondieki, the learned advocate for the accused, submitted that if the police cannot respect the Constitution, they had no business taking the accused to court pursuant to the Penal Code.

In his view the delay in taking the accused to court created a vacuum which would remain in place until the end of the case.

The accused also submitted that the delay in taking him to court was a violation of section 74 (1) of the Constitution as it constituted a degrading treatment of him.

The delay is also said to have constituted a violation of section 77(1) of the Constitution.

In those circumstances, the accused asserted that the state had two options; namely, to release him or to take him to court. But in his understanding, the state did not choose either of the options.

He therefore urged the court to quash the case, and to set him free.

In support of his case, the accused cited the following three authorities;

- (a) **GERALD M. GITHUKU Vs REP. CRIMINAL APPEAL NO. 119/2004;**
- (b) **ALBANUS MWASIA MUTUA Vs REP., CRIMINAL APPEAL NO. 120/2004; and**
- (c) **REPUBLIC Vs DICKSON NDUNGAI ALIAS M'NGAI CRIMINAL CASE NO. 41/1991**

In answer to the preliminary objection, Miss Tumaini Wafula, learned state counsel, first told the court that the facts set out by the accused were perplexing. Her reason for so saying was that the accused was not taken to court on 5<sup>th</sup> November 2008. According to the state, the accused was first taken before the High Court on 21<sup>st</sup> October, 2008.

If the date given by the state was accurate, that implies that the delay in taking the accused to court was no more than one day.

In the face of that answer, the accused said that even if the delay was for an hour, it was a violation of his constitutional rights.

Such violation, in the mind of the accused, cannot be compensated by money. He believes that the violation could only be compensated by an order that he be released.

When the state submitted that the violation, if any, should be compensated for in the manner stipulated in section 72(6) of the Constitution, the accused said that that section was only applicable to an accused person who had been unlawfully arrested or detained. On his part, the accused says that he had been lawfully arrested. Therefore, he is of the view that section 72(6) was not applicable to his case.

As there is a dispute about the date when the accused was first taken before the High Court, I did peruse the court file. I verified from the records that the accused was taken before Apondi J., on 21<sup>st</sup> October 2008.

In effect, when Mr. Ondieki, learned advocate for the accused, told the court that on 21<sup>st</sup> October 2008, his client was first taken before a magistrate's court, that was wholly inaccurate.

In my view, the learned advocate stands guilty of an attempt to mislead the court. I direct that this unfortunate conduct be drawn to the attention of the Law Society of Kenya for appropriate action, as they may deem appropriate.

Notwithstanding the direction above, the conduct of the learned advocate will have no bearing on the decision made on the preliminary objection. I have deemed it necessary to make that position clear because the mistake of counsel ought not to be visited upon his client. The client is entitled to have his case determined solely on the basis of the facts thereof, as read with the applicable law.

In *REPUBLIC Vs DICKSON NDONGAI ALIAS M'NGAI*, CRIMINAL CASE NO. 41/1991, the accused had been held in custody for more than 14 years before his trial could commence.

His trial did not commence when it ought to have, because the accused conducted himself in a “troublesome and belligerent” manner. He refused to be represented by an advocate. He was also noisy in court. He was not prepared to listen to anybody.

Notwithstanding the said conduct of the accused, the court held that the proper course of action would have been to proceed with the trial, in the absence of the accused.

I think that my learned brother was correct to so hold.

However, the said case is distinguishable from the one before me. First, because, the accused in that authority was in custody for over 14 years without any trial proceedings. In contrast, the trial of the accused herein was first fixed on a date that was less than 4 months from the date of his arrest. Had the accused not filed the current preliminary objection to the trial proceeding, his trial would have been conducted within a reasonable time.

Secondly, whilst the accused in the authority cited remained behind bars, without either the court or the prosecution re-activating the case for over 14 years; in the present case, the proceedings have never been held in limbo save only by the preliminary objection. The accused cannot therefore be heard to say that because of his own preliminary objection, he cannot be tried within a reasonable time.

In *ALBANUS MWASIA MUTUA Vs REPUBLIC*, CRIMINAL APPEAL NO. 120 of 2004, the Court of Appeal held that an unexplained violation of a constitution right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge.

In the same breadth, the Court of Appeal emphasized that;

***“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place.”***

One of the provisions in the Constitution is at Section 72 (6); and it provides as follows;

***“A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”***

To my mind, that is one of the constitutional provisions which the courts of law are obliged to enforce. And because it is a remedy not only specified in the Constitution, but also within the same substantive provision as that which talks of the period within which an accused should be taken to court, I hold the view that it could not be open to the accused to argue that monetary compensation would not sufficient.

Furthermore, although the arrest of the accused was lawful, as he has conceded, it is my understanding that as soon as the state failed to take him to court within the prescribed 14 days, his continued detention in police custody was unlawful. Therefore, in my considered view, the circumstances of the accused fall

squarely within section 72 (6) of the Constitution.

In **GERALD MACHARIA GITHUKU Vs REPUBLIC, CRIMINAL APPEAL NO. 119/2004**; the appellant was taken to court after 17 days. In other words, he was taken to court 3 days later than he should have been.

The Court of Appeal appreciated that the delay of 3 days did not give rise to any substantial prejudice to the appellant. The said court also noted that the evidence on record proved that the appellant was guilty as charged. Nonetheless, the court went on to find that it should not disregard the failure by the prosecution to abide by the requirements of section 72 (3) of the Constitution.

Finally, the court took into account the fact that the appellant had already been in custody for over 12 years, and also the fact that his two co-accused had died in custody.

In comparison, the accused herein has only been in custody for 12 months. That duration, coupled with the fact that a delay of one day was not capable of giving rise to any substantial prejudice to the accused, leads me to adopt the following words from the case of **PAUL MWANGI MURUNGA Vs REPUBLIC, CRIMINAL APPEAL NO. 35/2006**;

*“Again, the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that.”*

When arriving at that conclusion, the Court of Appeal had taken into account their earlier decision, in **ALBANUS MWASIA MUTUA Vs REPUBLIC** (above-cited).

In like manner, although there was a delay of one day in taking the accused to court, I find that that does not render the proceedings illegal or null and void.

I therefore direct that the trial of the accused shall proceed to its logical conclusion.

**Dated, Signed and Delivered at Nairobi, this 29<sup>th</sup> day of September, 2009.**

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**FRED A. OCHIENG**

**JUDGE**