



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

CRIMINAL CASE 34 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

PETER KIBUE WANYEKI.....

.....ACCUSED

R U L I N G

The accused has moved the court by way of a chamber summons. Through that application the accused asks the court to:

“1..... issue any further orders and all directions as to the orders of justice may require.

2.....squash this case as its illegal prosecution. (sic!)”

When canvassing the application, Mr. Mbaluka, the learned advocate for the accused submitted that the accused was first taken to court 7 days later than is permissible under section 72 (3) of the Constitution.

It is common ground that the accused was arrested on 18th March 2009. It is also common ground that the plea was taken on 7th April 2009.

In those circumstances, the accused submits that his constitutional rights were infringed because he was denied liberty for seven days.

He reminded the court that although he was a suspect, he was presumed to be innocent until and unless the prosecution proved to the court that he was guilty. He was therefore entitled to the full protection of the law.

The accused further submitted that there had to be compliance with the provisions of section 72 of the constitution before a trial could commence. In that regard, he said that the state should not wait until an accused person raises the issue about the violation of his constitutional rights before offering an explanation for any delay in bringing the accused person to court. As far as he is concerned, the state was obliged to tender an explanation for any such delay, as soon as the accused was brought to court.

In this case the court was told that it could not commence the trial because such a trial would be based on an illegality.

It is the contention of the accused that the state had not provided any proper explanation for the delay in bringing him before the court. In his view, the fact that a crucial witness was away, in Mombasa for a period, was not a good enough explanation.

In answer to the application, the Investigating Officer, PC Josephat Wafula swore a replying affidavit. First, he conceded that there was a delay. But by his calculations, the delay was for only 3 days, as opposed to the 7 days asserted by the accused.

PC Wafula does not dispute the fact that the accused was arrested on 18th March 2009. However, he says that it was not until 12.09a.m, on 19th March 2009, that the accused was booked into the police station.

In my understanding of the provisions of section 72 (3) (b) of the Constitution, the period within which an accused is supposed to be brought before a court of law is calculable from the time of his arrest or detention. The time is not calculable from the time when the accused person is booked into the police station.

In this case, the accused says that he was arrested at about 8.30p.m; and that he was thereafter booked into the Occurrence Book at Ruiru police Station at about 11.30p.m., on 18th March, 2009.

It is common ground that as at the time the accused was arrested and booked into the police station, the victim was alive. Therefore, the entry in the Occurrence Book showed that the accused would be charged with assault.

The Investigating Officer says that the victim of the assault passed away on 22nd March 2009. Thereafter, the post mortem examination was conducted on 27th March 2009.

The Investigating Officer did record the statements of all potential witnesses, save one, within 14 days of the incident. And, it is his word that the one person whose statement had not yet been recorded was the "crucial witness". That person's statement could not be recorded within the time allowed, "***because the witness had traveled to Mombasa and could not come in time.***"

In the circumstances, the Investigating Officer only managed to record the statement of the said crucial witness, on 2nd April 2009. The following day, the Investigating Officer forwarded the investigations file to the Attorney General, for purposes of obtaining advice thereon.

As 3rd April 2009 fell on a Friday, the Investigating Officer explains that he could not have taken the accused to court on either the 4th or the 5th of April 2009, because those two dates fell on a weekend, when courts do not sit.

By my calculations, the accused should have been taken before the court on or before 1st April 2009. In arriving at that date, I have not excluded the days which fall on weekends, because such dates may only be excluded from the calculations if they fell on the last day when the accused was to have been taken to court.

Assuming that my calculations of the 14 days is correct, it follows that there was a delay of six days, in taking the accused to court.

The explanation given by the Investigating Officer for the delay in taking the accused person to court was that a crucial witness had not yet recorded his statement until 2nd April 2009. The said crucial witness had traveled to Mombasa, hence his unavailability to record his statement, in Nairobi, earlier than that date.

If, as the Investigating Officer says, the statement was only recorded on 2nd April 2009, it follows that

before that date, the investigations were incomplete. I say so because it would not have made sense for the police to seek the advice of the Attorney General on the issue, before the police had put together all the crucial evidence

I am therefore satisfied that the Investigating Officer acted diligently. In effect, I find that the constitutional rights of the accused have not been infringed.

But had I come to the conclusion that the accused's constitutional rights had been infringed, I would nonetheless not have held that the trial would be based on an illegality. I say so because the charge, in itself, is not in any manner illegal. And, in my understanding, a trial is founded upon a charge.

In this case, the mistake made by the state is by taking the accused to court late. By so doing, the detention of the accused became unlawful, as it went beyond the 14 days permissible under Section 72 (3) (b) of the Constitution.

To my mind, such a scenario is the kind that was envisaged by section 72 (6) of the Constitution, which then stipulated that the remedy shall be compensation.

In the event, I reject the application by the accused. Instead, I direct that the trial of the accused should now commence and thereafter proceed to its logical conclusion.

Dated, Signed and Delivered at Nairobi, this 24th day of September, 2009.

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FRED A. OCHIENG

JUDGE