REPUBLIC ……..…… PROSECUTION

VERSUS

KIDANGU KUTSUKA RUWA Alias Ali …… 1ST ACCUSED

MTONDOO MWAGUYA RUWA …… 2ND ACCUSED

****

RULING

Before court is the Originating Summons dated 21st October 2008 by which the Accused/Applicants seek the following orders:-

"***(1) THAT the charges facing the accused be declared invalid, incomplete and unlawful***

(2) THAT the charges are a violation of the accused's constitutional right to a fair trial within a reasonable time

(3) THAT the accused be discharged and set at liberty forthwith."

The application is supported by the affidavit of both accused persons. Mr. Mushelle Advocate argued the application on behalf of the two accused persons whilst Mr. Onserio who appeared for the State opposed the application.

The two accused persons allege that their continued detention for trial would amount to a nullity as neither was brought before a court of law within 14 days as required by S. 72(3) as read with S. 77(1) of the Constitution of Kenya, both accuseds having been charged with the offence of Murder which is a felony. The first Applicant **KIDANGU KUTSUKA RUWA** in his supporting affidavit dated 21st October 2008 states that he was arrested on 18th October 2006 and taken to Kinango Police Station. He was detained therein until 15th November 2007 when he was taken to Mombasa High Court for plea. The 2nd Applicant **MTONDOO MWAGUYA RUWA** in his supporting affidavit dated 21st October 2008 states on his part that he was arrested on 20th December 2006 and taken to Kinango Police Station. He remained in police cells until 15th January 2007 when he was taken to Mombasa High Court for plea. It is clear therefore that the two accused persons were detained in police custody for a period of 28 and 26 days each. I note that this fact is not denied or challenged in the replying affidavit of PC. Boniface Kiilu

of Kinango Police Station dated 24th April 2009. S. 72(3) of the Constitution of Kenya provides that:-

"***A person who is arrested or detained … and who is not released shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death …"***

This provision makes it clear that where a suspect is arrested on suspicion of his having committed a capital offence (such as murder in the case of the two accuseds) he is required to be arraigned in court within a period of 14 days. This clearly did not happen as the two accused were brought to court after 28 and 26 days respectively. S. 72(3) goes on to provide that –

"… ***the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."***

Contrary to the commonly held belief by many suspects held in police custody the mere fact that a suspect has been held in custody for a period exceeding the 24 hour or 14 day period provided for by the Constitution is not a magical key providing automatic release from prison and automatic acquittal of all charges they may face. In the case of **Dominic Mutie Mwalimu –vs- Republic Criminal Appeal No. 217 of 2005** the Court of Appeal held at page 7 that –

"***A plain reading of that provision of the constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things has to be brought before the court as soon as is reasonably practicable."***

Therefore it is not a matter of merely counting days. The test is whether the suspect has been brought before a court as soon as is reasonably practicable. Who determines whether or not this test has been complied with? In the same **Dominic Mutie case** cited above the Court of Appeal proceeded to observe that:-

"***The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the constitution has been complied with."***

In this case it would be the State or more precisely Cpl. Boniface Kiilu who swore the replying affidavit on 24th April 2009. Whilst conceding that indeed the two accuseds were taken to court several days beyond the 14 days provided for in S. 72(3) of the Constitution of Kenya, he states that this delay was occasioned by the need to take the two suspects to a Psychiatrist for mental assessment and secondly by the lack of fuel for the one motor vehicle at Kinango Police Station. On the first reason I find that this is not a valid enough reason. There is absolutely nothing to prevent the police from arraigning a suspect before court even **before** a Psychiatric examination is conducted. It would be quite in order to arraign the suspect in court first and then apply for time to have the Psychiatric examination conducted. In my view this is a feeble excuse and is not a convincing enough explanation for the delay in taking the suspects to court. I therefore reject this first reason as lacking in merit.

Secondly Cpl. Kiilu states that the trip to Mombasa Law Courts was hampered by the fact that Kinango Police Station wherein the two accuseds were held has only one motor-vehicle. The station had no fuel for the vehicle and it was not until 15th January 2007 that a good Samaritan provided fuel for the vehicle thus enabling the police to take the two to court. Whilst this too may appear to be an outlandish

excuse, in a developing country such as ours it is not so. Kinango is a rural police station about 150 kilometres away from Mombasa Law Courts. It is entirely feasible that the police station had only one vehicle assigned to them. It is also entirely feasible that the police vehicle had no fuel. This unfortunately is a common occurrence in several police stations across this country. As a court I must and I will take judicial notice of the very severe limitations under which the police in Kenya are called upon to perform their duties. Whilst it is hoped that with the current police reforms these limitations will soon become a thing of the past, at this present time several police stations have only one vehicle and often lack fuel for the vehicle. The police could not walk the suspects to court – it is too far away. These are the realities of the situation. I find it perfectly feasible that fuel only became available on 15th January 2007 at which point the two accuseds were brought to court. The failure to arraign them in court earlier was not in my view due to lack of commitment by police but rather due to factors beyond their control. I find that indeed the two accuseds were brought to court as soon as was reasonably practicable in the circumstances to do so. There was no violation of the suspect's constitutional rights. As such I reject this application in its entirety and find that the charges are lawful and valid. I do hereby order that this matter proceed to a full trial of the charge.

Dated and Delivered at Mombasa this 26th day of October 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Mushelle for both accused

M. ODERO

JUDGE

26/10/2009