



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Criminal Case 22 of 2009

GRACE NYANCHAMA MACHONI.....APPLICANT

-VERSUS-

STATE.....RESPONDENT

RULING

This is an application by way of Notice of Motion under sections 65,72(3) and 77(1) and (2) of the Constitution in which the applicant seeks that the court makes a finding that her being held in custody for a period of 35 days was a violation of her fundamental rights. The applicant faces a charge of murder contrary to *section 203 and 204* of the Penal Code whose particulars are that on 22/3/2009 at Kanyimbo sub-location in Gucha District within Nyanza province she murdered Mary Nyabare Machoni.

In the affidavit supporting the application, the applicant stated that she was arrested on 23/3/2009 and was not arraigned in court until 27/4/2009, which she says was a period of 35 days. She expected to be in custody for not longer than 14 days as provided by *section 72(3) (b)* of the Constitution.

The application was served on the Honourable the Attorney General. The OCS Ogembo police station swore a Replying Affidavit, although he called it a Supporting Affidavit. He is Duncan Ngiki He did not provide his rank. He stated that after the applicant was arrested on 23/3/2009, she was charged with murder on 3/4/2009 and presented to court on 7/4/2009 for plea. He stated that following her arrest the police station began preparing her file. The officer used a borrowed laptop computer to type statements. However, on 23/3/2009 the owner of the laptop went with it to Nairobi for official duty, He did not return until 5/4/2009 when the OCS was able to retrieve the statements. He swore that he did not have any typing machine at his office and had no other way of processing the statements.

The explanation by OCS regarding the delay was not challenged. However, the date when the applicant was first presented to court was on 21/4/2009, and not on 7/4/2009 as deponed. On 21/4/2009 the applicant found the Deputy Registrar who remanded her to 27/4/2009 when she took plea before this Court. If the laptop was available to the OCS on 5/4/2009, the officer knew that he had only one day left before charging the applicant. He had about 24 hours to hold the applicant. What happened was that he went on to hold the applicant for a total of 16 days after that. It was 15 days in excess of the period the Constitution allowed him. He has offered absolutely no explanation for the holding of the applicant for that period without charging her. The law requires the state to demonstrate to the court in cases where a person is taken to court outside the period allowed by *section 72(3)* that there were reasons for the delay such that when such reasons are considered then it would appear to court that the person was charged as soon as was reasonable practicable. (See *Joseph Amos Owino .V. Republic, Criminal Appeal no. 450 of 2007 at Kisumu*). In the case the accused was taken to court about 17 days after the 14 days allowed by

law. The prosecution had offered no explanation. The Court of Appeal found his constitutional rights had been violated and quashed the conviction. The court referred, with approval, to their own decision in *Paul Mwangi Murunga .V.Republic, Criminal Appeal no. 35 of 2006* in which the conviction was quashed because the accused had been kept in police custody for 10 days beyond the permitted 14 days and no explanation for the delay had been offered.

I determine that the applicant's constitutional right to be presented to court within 14 days from date of arrest was transgressed. There was no explanation for the illegal detention. The consequence is that the murder charge that she is facing will be quashed and an order is made that she is henceforth at liberty unless she is otherwise being lawfully held.

Dated, signed and delivered this 21st day of October,2009

A.O. MUCHELULE

JUDGE

21/10/2009

Before A.O.Muchelule-Judge

Mongare court clerk

Mr. Kemo for state

Mr. Nyawencha for accused

Accused-present

COURT: Ruling in open court.

A.O.MUCHELULE

JUDGE

21/10/2009