



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII Constitutional Reference 71 of 2008

ERICK OGARO.....APPLICANT

-VERSUS-

ATTORNEY GENERALRESPONDENT

RULING

The applicant was arrested on 7/2/2007 and on 14/2/2007 arraigned before the Chief Magistrate's Court at Kisii on a charge of defilement contrary to *section 8(1)* as read with *section 8(2)* of the *Sexual offences Act (No. 3 of 2006)* whose particulars were that on 6/2/2007 in Kisii Central District within Nyanza Province he intentionally and unlawfully penetrated to the genital organ of *L.K* child aged 13 years with his genital organ. He faced the alternative charge of indecent assault *under section 11(1) of the Act*. This matter was referred to this court to determine whether the applicant's detention for 7 days before charge was a violation of his rights conferred by *section 72(3) of the Constitution*.

When this issue arose in the subordinate court, the OCS Kisii police station, Chief Inspector *Nathan Nyange* was summoned to explain the delay. This officer took over the management of the station in April, 2008. He sought to find out what had happened. He found the case had been investigated by one PC (W) *Abigael*. She was on leave but told him that the complainant was brought to the station on 7/2/2007 by her aunt, the offence having been committed on 6/2/2007 at 11.p.m. *Abigael* asked the aunt to take the child to Kisii District hospital where the child was taken, treated and discharged. The hospital asked that they return to the police station but they did not. In the meantime, the applicant had been arrested and escorted to the police station. On 8/2/2007 *Abigael* tried to contact the complainant's aunt through the mobile phone number provided. She could not access her. It was not until 10/2/2009 when she managed to contact her. It was a Saturday. She asked her to take the complainant back to the hospital for P3 to be completed. They did not get the Doctor until Monday, 12/2/2007, when the P3 was completed. That is when they were able to take the applicant to court.

Quite unfortunately, the subordinate court did not express its opinion on whether the explanation was acceptable or not; whether the reasons given for the delay were valid. An explanation was offered to the trial court. It ought to have dealt with the matter conclusively and only referred the matter to the High Court if the explanation was not reasonable or acceptable.

Before this court, when the Honourable Attorney General was served he sought explanation from the DCIO Kisii but none was forthcoming. He left the matter to court. The accused's contention was that his rights were violated.

Under section 72(3) (b) of the Constitution the applicant, on these non-capital charges was required to be arraigned before court within 24 hours of his arrest. In the instant case where there was delay in bringing the applicant to court by 6 days the section requires the prosecution to demonstrate that there were reasons for the delay such that when such reasons are considered then it would appear to the court that the applicant had been taken to court as soon as was reasonable practicable withstanding the delay.(See *Joseph Amos Owino .V. Republic, Criminal Appeal No. 450 Of 2007 at Kisumu*). The explanation offered must be *bonafide*; should show such operational difficulty as may have prevented timely arraignment of the applicant in court; should show that the police did exercise genuine professional care in conducting the investigations in the case; and were alive to the fact that applicant had constitutional rights to be taken care of.(See *Fan XI & Others .V. AG.MisC.Criminal Application No. 860 of 2007 at Nairobi*).

The DCIO may not have sworn an affidavit of explanation, but the proceedings in the subordinate court contain the explanation of the OCS. I have considered that explanation. It is clear that the complainant was a child who was under the care of her aunt and it was the aunt who, against advice, did not return to the police station from Hospital. When she was eventually traced, the Doctor was not available immediately to complete the child's P3. There was also an intervening weekend. I find there was delay in bringing the applicant to court, but the reasons given for the delay were acceptable and lead this court to conclude that he was brought to court as soon as was reasonably practicable in the circumstances. The consequence is that there was no violation of the applicant's fundamental rights. It is directed that the file be returned to the trial court to proceed with the matter as provided by the law.

Dated at Kisii this 12th day of October, 2009

A.O.MUCHELULE

JUDGE

12/10/2009

12/10/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Mutai for the State

Applicant-present

COURT: ruling in open court.

A.O.MUCHELULE

JUDGE

12/10/2009