



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Petition 1 of 2008

IN THE MATTER OF SECTION 84 (1)
(CRIMINAL CASE NO.1276 OF 2006 AT WEBUYE)

IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 72 (3)
OF THE CONSTITUTION OF KENYA

AGNES NAMAEMBA NYONGESA
EDWARD WANYONYI NYONGESA.....PETITIONERS/APPLICANTS

~VRS~

REPUBLIC.....RESPONDENT

RULING

This is a ruling on a petition dated 7th May 2008 where the Petitioners Agnes Namaemba Nyongesa and Edward Wanyonyi Nyongesa pray for a declaration that the charges now before Webuye Court vide Criminal Case No.1276 of 2006 be declared a nullity and that the Petitioners be acquitted. The petition has six (6) grounds which the Petitioners' counsel Mr. Onchiri argued before me. He submitted that the Petitioners were arrested by police officers from Webuye Police Station on 31/08/2006 for charges of malicious damage to property and interfering with boundary features. The suspects were detained in police custody for five (5) days and later charged in Webuye Senior Resident Magistrate's Court. The charges facing the accused are bailable and the law allows incarceration in police custody for not more than 24 hours. Mr. Onchiri relies on the NAIROBI HIGH COURT CIVIL APPLICATION NO.40 OF 2007 REPUBLIC - VRS- JAMES NJUGUNA NYAGA where Justice O. K. Mutungi declared proceedings in a criminal case a nullity based on the similar facts. I was also referred to the case of ANNE NJOGU & 5 OTHERS -VRS- REPUBLIC NAIROBI HIGH COURT CRIMINAL APPLICATION NO.551 OF 2007 where the same judge made similar findings in a case with similar facts.

The state did not file an answer to the petition. However, Mr. Onderi for the state argued that the petitioners were

arrested on 31/08/2006 which was on a Friday. The prescribed twenty four (24) hours expired on a Saturday 1st September, 2006. The suspects would not have been taken to court on a weekend. They were therefore released on cash bail on the 4th September 2006. Mr. Onderi relies on the case **GERALD MACHARIA GITHUKU –VRS- REPUBLIC** where it was held that over remand for one (1) day does not amount to violation of Constitutional Rights.

The petition is based on section 72 (3) of the Constitution which provides:

“ A person who is arrested or detained

a) for the purpose of bringing him before a court in execution of the order of a court: or

b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, 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, the burden of proving that the person arrested or detained has been brought before a court as soon as it is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with”

The rights of the accused for expeditious disposal of cases in criminal trials is envisaged in section 77 (1):

“ If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

Section 77(2) (a) ***“provides that every person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.”*** He shall be informed of the charges facing him in the language he understands and shall be given adequate time and facilities for the preparation of his defence.

The provisions of section 72 (3) are very clear that in regard to offences of malicious damage to property and interfering with boundary features, a suspect should be remanded for not more than 24 hours. The state admits that the suspects were in custody from 31/8/2006 to 4/09/2006 but pleads that two days in between were during the weekends. Weekends are not working days and it is only Sunday or a public holiday that are not counted for purposes of computing days. In this petition, the suspects were over kept in police custody for two days namely Monday 4th and 5th September 2006. The two days delay was not explained by the state. Section 72 (3) refers to the period that an accused is kept in police custody without being charged. It does not matter that police offered release on cash bail as an option on 4th September 2006. The truth is that the petitioners were in police custody for two days in excess of the prescribed period in unexplained circumstances. I find that for these two days, the Petitioner’s rights were violated.

Does this render the criminal proceedings a nullity? This will depend on several factors. It appears the police did not have sufficient evidence to charge the Petitioners. They were released after five days in custody and were to be charged several days later. Was there some external pressure on the police to charge the Petitioners and arraign them in court? The prosecution are duty bound to operate within the law and comply with legal requirements for an expeditious disposal of cases. The concept of the rule of law must be given a practical reality. The prosecution delayed to charge the

accused in court initially. The state argues that the delay of the case generally is attributable to the defence who chose to bring this petition to this court as the criminal case was pending in Webuye Court. This was in spirit of pursuing the constitutional rights of the Petitioners which action can not be faulted.

In the case of **ELIZABETH AKINYI ODOYO & ANOTHER**

-VRS- REPUBLIC Court of Appeal Nos.161 and 162 of 2006, the court held that the trial was a nullity where the rights of the accused were violated under section 72 (3) and section 77 where the delay to charge the Petitioners after release from custody was not explained. I therefore allow the prayers sought in the petition and declare the criminal proceedings in Webuye SRM Court a nullity. There will be no order as to costs. The Petitioners to be released forthwith unless otherwise lawfully held.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma

This 26th day of November 2009 in the presence of

The petitioners and Mr. Situma for Onchiri for petitioners and Mr. Onchiri for the State.