



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**OF KISII**

**Constitutional Reference 95 of 2009**

**IN THE MATTER OF SECTION 84(3)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OR**

**FUNDAMENTAL RIGHT AND FREEDOM UNDER SECTION 72(3)**

**IN THE MATTER OF CRIMINAL CASE NO. 685 OF 2009 AT SENIOR**

**RESIDENT MAGISTRATE COURT AT KEROKA**

**BETWEEN**

**EVANS MAUTI OKONGO.....**

**APPLICANT**

**-VERSUS-**

**REPUBLIC.....**

**RESPONDENT**

## RULING

The applicant was arrested on 24/5/2009 by manga police station and arraigned before the Senior Resident Magistrate Keroka, on 15/6/2009 on a charge of manslaughter contrary to *section 202 and 205 of the Penal Code*, whose particulars were that on 24/5/2009 at Kiajauri market in Borabu District within Nyanza province he unlawfully killed Chrispinus Omwenga Okoyo. The issue of delay in charging the applicant arose and the trial court referred it to this court to determine whether the applicant's right to liberty under *section 72(3) (b) of the Constitution* was violated.

The applicant was kept by the police for 22 days before he was produced in court. *Section 72 (3) (b) of the Constitution* provides that:

*“3 a person who is arrested and detained*

*a).....*

*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 reasonable practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention.....*

.....*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.*”

The appellant was arrested for manslaughter and was therefore supposed to be charged in court within 24 hours of his arrest. He was not charged until after 22 days. The burden is on his arresters to prove that he was charged as soon as was reasonably practicable and therefore that the provisions of *section 72(3) (b) of the Constitution* have been complied with. This is because the applicant alleges that his right to liberty was violated when he was so detained without charge.

Inspector Stephen Ndeti who is deputy OCS Manga police station, swore an affidavit to state that when the applicant was arrested on 24/5/2009 investigations begun immediately. The file was compiled and on 3/6/2009 it was forwarded to the DCIO returned to file with instructions that additional statements be recorded from other witnesses. This was done and the file resubmitted on 11/6/2009. On 11/6/2009 the file left the DCIO Nyamira for the state counsel who perused it and returned it on 12/6/2009 with instructions that the applicant be charged. That was on Friday. The applicant was charged on 15/6/2009, which was the following Monday.

Mr. Kemo for the state submitted that the explanation was reasonable and asked the court to find that the provisions of the Constitution had been complied with.

The law recognizes that there may be occasions when the police may not be able to produce a suspect in court for charge within the provided 24 hours. The investigations required in the case may be lengthy or complicated. The police may have serious operational difficulties that may make it difficult for them to be within the law. Whatever complications or difficulties must clearly come out in the explanation being offered. The delay must be an exception and not the rule. It should be a short delay. The court has to look at the explanation and notice that, throughout the detention of the suspect, there was a desire on the part of the police to obey the law. The court has to bear in mind that behind every prosecution there is a helpless complainant who is looking upon the police to vindicate his grievance.

I have carefully considered the explanation by Inspector Ndeti. He is not saying the case the station was investigating against the applicant was a complicated one. He does not say witnesses were difficult to trace. There was no particular operational difficulty that the station encountered. By the time the file was left the station, the applicant had been detained for 10 days without charge. Even if after that there were the logistics of the file moving from one office to another, the 10 days delay was not explained. I am not able to find

that there were reasons for the delay such that when they are considered it can be said that the applicant was charged as soon as reasonably practicable. 22 days of detention of the applicant without charge was, in the circumstances of this case, far too long. I find that this detention infringed on the applicant's right under *section 72 (3) (b)*, and this vitiates the charge he is facing. The charge is quashed and he is ordered to be set at liberty forthwith unless he is otherwise being lawfully held.

Dated, signed and delivered at Kisii this 24<sup>th</sup> Day of November, 2009.

**A.O.MUCHELULE**

**JUDGE**

**24/11/2009**

**24/11/2009**

Before A.O.Muchelule-J

Mr. Mutai for the State

Appellant-present

**COURT:** Ruling in open court.

**A.O.MUCHELULE**

**JUDGE**

**24/11/2009**

