



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 52 of 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GEOFFREY MUIRURI MUIGAI..... ACCUSED**

**RULING**

The plea in this case was taken on the 17<sup>th</sup> July 2009 to which the accused pleaded not guilty to a charge of **Murder contrary to section 203 as read with section 204 of the Penal Code**. The hearing of the case was set for the 30<sup>th</sup> of September, 2009 and 1<sup>st</sup> of October 2009. On the date set for the hearing, Mr. Keengwe for the accused person informed the court that the accused wished to raise a preliminary objection to the proceedings in accordance to a Notice that Mr. Keengwe had filed on his behalf on the 24<sup>th</sup> September 2009. The Notice of Preliminary Objection on a point of Law states as follows:

- 1. That the Constitutional rights of the accused person as guaranteed under section 70(a) of the Constitution of Kenya were violated.**
  
- 2. That the detention of the accused beyond the fourteen days provided for under section 72(3) (b) of the Constitution of Kenya was a violation of his constitutional rights.**
  
- 3. That the detention of the accused applicant in police custody without a court order violated the constitutional and fundamental rights of the accused as enshrined in section 77(1) of the Constitution of Kenya.**

The court gave instructions on the point of law raised by the accused and directed that the court should be addressed on the issue **whether the Notice of Preliminary Objection filed by the accused person raised a Preliminary Objection on a Point of law? Whether there are any procedural rules**

## **governing the manner in which Preliminary Objections can be raised in criminal cases regarding violations of constitutional and fundamental rights?**

Each of the counsels made their submissions in answer to issues raised by the court. I will set out herein below the submissions of Mr. Keengwe for the accused and Mr. Imbali for the state.

Mr. Keengwe agreed that the criminal jurisprudence did not clearly stipulate the form in which an accused could move the court in addressing an issue which according to the counsel ought to be determined prior to the main hearing. Counsel contended that the only provision under the criminal procedure where preliminary issues should be determined are those where there is a partly heard matter and those other matters where issues arise which need to be determined, and in which trial within a trial is held. Mr. Keengwe urged that despite the lack of such procedure, an accused person had an option, which option had been accepted in practice, that an accused is not foreclosed from raising a Point of Preliminary Objection on a point of law. Mr. Keengwe contended that it is as a result of this practice, which has been adopted and accepted by the High Court, that many Preliminary Objections on points of law and specifically those which raise issues of breaches of constitutional rights. Mr. Keengwe urged that the practice had gained root as it has been accepted, just like in the Civil jurisprudence where one could be able to raise a Point of Preliminary Objection at the time of pleadings.

On the question of the stage at which the Points of Preliminary Objections on constitutional breaches could be raised, Mr. Keengwe learned counsel for the accused drew support from the Court of Appeal case of **THOMAS SANGARE KELLON VS REPUBLIC CA NO. 169 OF 2006(UNREPORTED)** for the proposition that an appellant should raise the issues of violation and constitutional rights at the trial before the High Court, and that failure to do so especially where represented by the counsel, the accused may be deemed to have waived their right to raise that point. Mr. Keengwe argued that going by the ruling of Court of Appeal in the above case, issues of violation of constitutional breaches should be raised at the initial stage of the case. Mr. Keengwe also relied on the case of **JAMES AMOS OWINO VERSUS REPUBLIC CRA NO. 450 OF 2007**. Mr. Keengwe urged that he represented the appellant in the Court of Appeal in this case. Mr. Keengwe relied on the latter case for the proposition that matters of constitutional violation were so important that the Court of Appeal agreed to re-open the matter and allowed the accused person to urge his Point of Preliminary Objection before it for the simple reason that he was unrepresented during the trial and at the first appeal in the courts below.

Mr. Keengwe urged the court to invoke the provisions **section 3 of the Civil Procedure Act (CPA)**, which deals with the inherent powers of the High Court. Mr. Keengwe urged that even though the Civil Procedure Act deals only with cases of civil nature, the inherent powers of the court under that section cannot be confined only to civil matters. Counsel urged that it is a power which can be exercised in dealing with any matter even those not provided for in the law. Counsel urged that the same power can be invoked to determine constitutional issues.

Mr. Keengwe drew a parallel with a case whose copy he did not provide, of Ann Njogu's. I will comment no further on this case because the full citation was not given and neither was the authority provided.

On the issue whether the Point of Preliminary Objection raised by the accused person could determine the case, Mr. Keengwe urged the court to find that it was a preliminary matter that could determine the case if the point of law was determined in favour of the accused person, since in the circumstances it will not be necessary to go into trial. Mr. Keengwe urged that on a similar point of law the Court of Appeal in the case of **ALBANUS MWASIA MUTUA C.A. 120 OF 2004** captured the PO to the point of quashing the conviction and setting the accused person free. Mr. Keengwe submitted that the court of Appeal in the **Albanus Mwasia Mutua's** case, supra, considered the case of **Ndede vs Republic (1991)KLR 567**, in determining under what circumstances an accused person could raise the issue of constitutional violations and under which circumstances the court could let such an accused person go scotch free.

On the importance of the court enforcing constitutional rights of an accused, Mr. Keengwe contended that the Court of Appeal had gone to the extent of holding that even where a conviction had been entered on a

plea of guilty and was therefore not challengeable under Section 361 of the Criminal Procedure Code, that if a constitutional issue were raised the court will not be limited by that section.

In conclusion Mr. Keengwe urged that the breach of constitutional and fundamental rights of an accused person were so paramount that they did not depend on any form or procedure in order for them to be canvassed before the court. Counsel contended that the High Court, being a constitutional court is under obligation to determine whether the accused person's constitutional and fundamental rights have been violated.

Mr. Imbali learned state counsel for the State submitted as follows:-

Mr. Imbali submitted that the State was not opposing the fact that an accused person has a right to raise a Point of Preliminary Objection at any stage during the trial, and neither was the State in doubt regarding the jurisdiction of the High Court to hear the Point of Preliminary Objection. Counsel submitted that in his understanding the question before the court was whether the Point of Preliminary Objection raised the accused was competent to be heard and determined. Mr. Imbali, commenting on the submissions by Mr. Keengwe for the accused agreed with the defence counsel that constitutional matters touching on the rights of the accused can be raised at the trial where the case was partly heard. Mr. Imbali observed that Mr. Keengwe had conceded that the only reason why the notice of Point of Preliminary Objection herein was filed was because it had become a matter of practice before the High Court. Mr. Imbali submitted that going by the case cited by Mr. Keengwe of **THOMAS & SANGARE KELOLO**, supra, it was very clear that a Point of Preliminary Objection should be raised during the trial. Mr. Imbali then posed a question that is "when does a trial begin?" Mr. Imbali did not offer any answer to that question. Counsel however sought to distinguish **JOSEPH AMOS OWINO**, supra, stating that it did not apply to the instant case because the accused in the cited case was unrepresented at the trial.

Mr. Keengwe in response to the submission by Mr. Imbali contended that since the instant case had hearing dates already fixed the matter was already set for hearing and was ready to be heard, and that therefore it was not premature to raise the Preliminary Objection at the time the accused person had filed it. Counsel also submitted that a trial of an accused person begins at the time the accused is produced before a court of competent jurisdiction.

I have considered the submissions by both counsel for the accused and the State. The questions that counsel were addressing in this matter are the questions that were posed by the court. The questions were: **whether the Notice of Preliminary Objection filed by the accused person raised a Preliminary Objection on a Point of law? Whether there are any procedural rules governing the manner in which Preliminary Objections can be raised in criminal cases regarding violations of constitutional and fundamental rights?**

In **Black's Law Dictionary** defines a preliminary Objection *as an objection which, if upheld would render further proceedings before the tribunal impossible or unnecessary*. The locus classicus authority on Preliminary objections is the case of **MUKISA BISCUITS VERSUS WEST END DISTRIBUTOR LTD 1969(EA) 696** at Page 700 where Sir Charles Newbold observed as follows:

**"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."**

I had been urged to adopt the practice which I was informed had evolved, and which it was contended this Court had adopted, of cosidering applications by accused persons raising preliminary objections on points of law raising issues of violation of their constitutional or fundamental rights, before commencing the actual trial of the accused person for the charge they face. Mr. Keengwe has placed reliance on the case

of **THOMAS & SANGARE KELOLON** supra, for the proposition that an accused person should raise issues of violation of their constitutional rights at the time of the trial and not after. Mr. Keengwe relied in particular on page 7 of the judgment of the Court of Appeal where the Court observed as follows:-

**“In view of this Court’s recent decisions in JAMES GITHUI WATHIACA & ANOTHER VS. REPUBLIC, Criminal Appeal No. 115 of 2007 (unreported) and PROTAS MADAKWA alias COLLINS AND TWO OTHERS VS. REPUBLIC, Criminal appeal No. 118 of 2007 (unreported), we do not think this appellant is entitled to an acquittal merely on the basis that he was detained for more than fourteen days before being brought to court. As we said at the beginning of this judgment right from the day he was brought to court on 15<sup>th</sup> September, 2003, the appellant was represented by counsel. The High Court and any Judge of that court is the constitutional court. On 15<sup>th</sup> September, 2003, 2003 Mr. Ondika who held Mr. Mogire’s brief and represented the appellant before Wambiyangah J. did not raise before that Judge the issue of the appellant having been unlawful detained in police custody. Had Mr. Ondika done so, Wambilyangah J being a constitutional Judge, would have been obliged to rule on that point. Then the late Bauni, J. took over the trial and before the Judge, the appellant, as we have seen, was represented by two experienced advocates, M/s. Sunkuli and Mogire. At no stage during the long-drawn out trial, did any of those advocates complain to the learned Judge that the appellant’s constitutional rights guaranteed by section 72(3) of the Constitution had been violated and he could, therefore, not be tried on the charge of murder.”**

I have carefully considered the authority cited by Mr. Keengwe for the accused. In my understanding of that case the Court of Appeal did not state that issues of violation of constitutional rights under section 72(3) of the constitution must be raised or should be raised as preliminary objections. The Court of Appeal cleared stated:

**“At no stage during the long-drawn out trial, did any of those advocates complain to the learned Judge that appellant’s constitutional rights guaranteed by section 72(3) of the Constitution had been violated and he could, therefore, not be tried on the charge of murder.”**

Mr. Keengwe also relied on the case of **ALBANUS MWASIA MUTUA**, supra. I have also studied this case. At page 3 of this case the Court of Appeal was at a dilemma and they expressed it in the following words:

**“We must admit that the matter has caused us some considerable thought and anxiety. On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution.”**

The Court of Appeal proceeded to review some of the cases it had determined dealing with issues of violations of constitutional rights of an accused person. I will mention these cases a little later in this ruling. At the end of the day, the Court of Appeal did not prescribe the filing of preliminary objections as the manner in which issues of violations of constitutional and fundamental rights could be raised before the trial court. The Court of Appeal emphasized that under the Constitution the burden was upon the prosecution to explain the delay in bringing an accused person before the court within the time prescribed under the Constitution. The court’s conclusion was as follows:

**“The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of**

**the nature and strength of evidence which may be adduced in support of the charge.”**

The Court of Appeal reviewed the case of **NDEDE VS REP**, supra. That case is a little different from all the others cited in the instant case for the simple reason that the accused person had pleaded guilty to a noncapital offence and had been sentenced to a jail term, before raising the issue of violation of constitutional rights in the Court of Appeal. In the **Ndede** case therefore there was no opportunity for the accused person to raise a preliminary objection at the trial having pleaded guilty to the charge.

The other case reviewed was that **KIYATO VS REP (1982-88) KAR 418**. This case involved violation of the accused rights under s. 77(2)(f) of the Constitution in that the accused was not provided with an interpreter during the trial. The next case reviewed was **SWAHIBU SIMBAUNI SIMIYU VS REP CA NO. 243 OF 2005**, which also involved alleged violation of the right of an accused to an interpreter during the trial. These two latter cases involved violations of the fair trial provisions under section 77 of the Constitution. Obviously these violations could only be raised at the appeal stage of the proceedings and not before. The two cases do not apply to this case.

Mr. Keengwe places reliance on the Court of Appeal decision of **JOSEPH AMOS OWINO**, supra. This case concerned the violation of the accused constitution rights as provided by section 72(3) of the Constitution. I have carefully read the cited case. What sticks out in this case is the concern of the Court of Appeal regarding the lack of any explanation by the prosecution to demonstrate that the date the accused person was taken to court was the reasonably practicable time for producing him in court. The Court of Appeal put it in the following words:

**“As we have stated, he was taken to court about seventeen days outside the time he should have been taken to court. No explanation was given in the trial court, or in the first appellate court nor in this Court. His rights were clearly violated and no explanation exists for such violation. We need to make it clear that all the law requires the prosecution to do is 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 accused has been taken to court as soon as was reasonably practicable notwithstanding the apparent delay. This court has given instances of what explanations would suffice, for example that the accused fell sick soon after his arrest and would not be taken to court immediately within the fourteen (14) days provided or that he was required in other courts and so could not be taken to court for the particular offence for which he was arrested in time or such like other explanations.”**

Having carefully considered the issue at hand, and having carefully analyzed the various cases cited from the Court of Appeal as presented before me by counsel, I find that nowhere has the Court of Appeal or any court suggested that issues of violation of constitutional and fundamental rights of an accused person under section 72(3) of the Constitution should be raised by way of preliminary objections. The various decisions from the Court of Appeal boldly state that where issues of violation of constitutional rights arise, and in particular where an accused person alleges that his rights under section 72(3) of the Constitution were violated, it is the duty of the prosecution to offer explanations and to demonstrate that there were reasons for the delay and that the accused has been taken to court as soon as was reasonably practicable, notwithstanding the apparent delay. That means that the prosecution is expected to adduce evidence to demonstrate the reasonableness behind the delay in producing the accused person in court. It is a cardinal principle in civil law, and I believe the same applies in criminal law, that an issue ceases to be a preliminary point of law the moment evidence is required to be adduced in order to establish the alleged point of law. The words of Sir Newbold in **Mukisa Biscuits** case, supra, carry the day that

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

In view of my observations as above stated, I conclude by stating that the issues of violations of constitutional and fundamental rights require evidence to be adduced especially by the prosecution, in order to establish the alleged violations but more importantly in order to enable the court determine whether the delay complained of resulted in violation of the accused persons constitutional rights. For that reason and for that reason they cannot be raised as preliminary points of law or preliminary objections. I need not add here that they should be considered during the trial proceedings as one of the various issues which the court ought to consider in the case.

Dated this 20<sup>th</sup> day of November, 2009 at Nairobi.

**LESIIT, J**

**JUDGE**

Read, signed and delivered in the presence of:

Accused person.....present

Elisha .....Court clerk

Ms Rutto h/b Mr. Imbuli..... For the State

Mr. Keengwe.....For the Accused

**LESIIT, J**

**JUDGE**