



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Constitutional Reference 99 of 2008

IBRAHIM RIOBA NYAMAGAINI APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The applicant was charged with the offence of Store Breaking and committing a felony contrary to **section 306 (a)** of the **Penal Code**. He also faced an alternative charge of failing to prevent the commission of a felony contrary to **section 392** of the **Penal Code**. The applicant was arrested on 10th October, 2008 and kept at Ntimaru police station until 22nd October, 2008 when he was arraigned in court at Kehancha. When the learned magistrate looked at the charge sheet he noticed that the applicant had been kept in police custody for twelve days. When an explanation for the delay was sought from the prosecutor none was forthcoming. Consequently, the trial court forwarded this matter to this court to determine whether the applicant's constitutional right as guaranteed under **section 72 (3)** of the **Constitution** had been violated. I commend the learned magistrate for taking the aforesaid step on his own initiative. That is in line with the Court of Appeal decision in **PAUL MWANGI MURUNGA –VS- REPUBLIC**, Criminal Appeal No. 35 of 2006. In that appeal the court stated, *inter alia*,

**“We do not accept the proposition that the
burden is upon an accused person to
complain to a magistrate or a judge about
the unlawful detention in the custody of
the police. The prosecuting authorities
themselves know the time and the date
when an accused was arrested. They also
know when the arrested person is taken to
court and accordingly, they know or ought
to know whether the arrested person has**

been in custody for more than twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under section 72 (3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint but in case the prosecution does not offer any explanation, then the court, as the ultimate enforcer of the provisions of the Constitution must raise the issue.”

When the matter came before this court, the police,

through **Acting Inspector Kennedy Maina**, the Officer Commanding Ntimaru police station, filed an affidavit to explain the delay in arraigning the applicant in court. He deposed that on 8th October 2008, one **Josephat Mutiti Muniko**, lodged a complaint against the applicant that the applicant had together with other persons broken into his store and stolen finger millet. Investigations were commenced and the applicant was arrested on 10th October 2008. Upon interrogation, the applicant volunteered to lead the police to Nyasicha area in Tarime within the Republic of Tanzania where the other suspects had escaped to with the stolen property. The police proceeded to Nyasicha police station in Tarime, Tanzania, and sought assistance from the Tanzanian police in apprehending the said suspects. At around the same time there was massive theft of stock at Tarangi area within the jurisdiction of Ntimaru police station and that event triggered inter communal conflict in the area. This caused the police to put on hold investigations relating to theft of the finger millet and all officers within Kuria District and the neighbouring ones were mobilized to maintain security to avoid further clashes. The security operation was called off on 21st October 2008 after the situation had improved. Police officers were released to go back to their stations. On the following day the applicant was taken to the Senior Resident Magistrate’s court at Kehancha, a distance of about 30 kilometers, where he was charged with the aforesaid offences.

The Constitution recognizes that there may be instances where an accused person may not be arraigned in court within the stipulated period of time in terms of **section 72 (3)**. In such instances the burden is placed upon the prosecution to prove that the person arrested was taken before a court as soon as was reasonably practicable in the circumstances of the case. It is not therefore every delay in taking an accused before a court of law that amounts to violation of his constitutional rights, it is only unexplained delay or such delay that is not explained to the court’s satisfaction.

In **ALBANUS MWASIA MUTUA –VS- REPUBLIC**, Criminal Appeal No. 120 of 2004 the appellate court suggested some examples of what might amount to an acceptable explanation for the

delay.

In this case, having taken into consideration the contents of the affidavit sworn by Acting Inspector Kennedy Maina, which affidavit was unchallenged, I am satisfied that the police gave a satisfactory explanation why the applicant was not arraigned in court within twenty four hours of his arrest. Consequently, I hold and find that the applicant's constitutional right was not violated. His case should proceed before the trial court as usual.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF NOVEMBER, 2009.

D. MUSINGA

JUDGE.

19/11/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Kemo for the Respondent

N/A for the Applicant

Court: Ruling delivered.

D. MUSINGA

JUDGE.