



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Criminal Case 46 of 2007**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DAVID THUMBI CHEGE.....ACCUSED**

**RULING**

When this case came up for hearing before me on 12<sup>th</sup> February, 2008, **Mr. Mandi**, learned counsel appearing for the accused intimated to the court that he had a preliminary objection to raise with regard to the competency or otherwise of the proceedings so far. Counsel stated that his objection was premised upon *section 72 (3)* as read together with *section 77 (2)* of the Constitution of Kenya. Counsel submitted that the accused's fundamental rights and freedoms as enshrined in the aforesaid provisions of the constitution were violated to the extent that he was not charged in court within fourteen days as contemplated by *section 72 (3)* of the constitution. He was therefore not accorded a fair trial within reasonable time.

According to counsel, the accused was arrested on 2<sup>nd</sup> September, 2007 but it was not until 24<sup>th</sup> September, 2007 that he was arraigned in court. The delay of about 23 days had not been explained to court as required and accordingly the accused was entitled to an acquittal. For this proposition counsel relied on the following court of appeal and high court decisions respectively:

- (i) Gerald Macharia Githuku V Republic, Criminal Appeal No.119 of 2004 (unreported).
- (ii) Ann Njogu & 5 others V Republic, MISC.CR.APP.NO.551 OF 2007.

In response, **Ms Ngalyuka**, learned state counsel called one, **Chief Inspector John Mururu** who was the Investigating Officer to the stand in abid to have him explain the essence of the delay if at all. Chief Inspector **John Mururu** explained that the accused was arrested on 2<sup>nd</sup> September, 2007 at around 9.30 A.M and taken to Kangema police station. He thereafter commenced investigations. On 11<sup>th</sup> September, 2007, he forwarded the investigations file to the District Criminal Investigations Officer (D.C.I.O) Murang'a for advise. The file was however returned to him by the D.C.I.O with instructions that he covers certain aspects of the case to wit, to record a statement from the Chief of the area. The officer went on to state that he had problems recording a statement from the Chief apparently because he was said too be busy. It was not until 28<sup>th</sup> September, 2007 that the statement from the Chief was eventually recorded.

Under cross-examination by **Mr. Mandi**, the officer conceded that by 16<sup>th</sup> September, 2007 he had completed the investigations and forwarded the file to the D.C.I.O. He conceded further that indeed there was a delay in charging the accused in court and that such delay was occasioned by police internal processes.

Under *section 72 (3)* of the supreme law of the land, that is the Constitution of Kenya, the accused was required to be arraigned in court on or before the expiry of fourteen (14) days following his arrest on a capital charge. As **Justice Mutungi** said in **Ann Njogu's** case (supra) whose sentiments I totally agree and endorse;

**“... the section is very clear and specific – that the applicants can only be kept in detention or the cells, for up to 24 hours. At the tick of the 60<sup>th</sup> minute of the 24<sup>th</sup> hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants....”**

In the circumstances of this case however I would substitute 24 hours with 14 days and 60<sup>th</sup> minute with the 14<sup>th</sup> day.

In the case of **Albanus Mwasia Mutua** (supra) and **Gerald Macharia Githuku** (supra), the court of appeal held that upon determination that the Constitutional rights of an accused have been violated, any prosecution against him on the basis of the events that prompted the charge(s) is null and void. And that is so, and will remain so, irrespective of the weight of the evidence that the prosecution might have in support of their case. The rational being that such a prosecution would be based on an illegality, a null and void case.

The accused herein was arrested on 2/9/2007. The investigations were as good as concluded by 11<sup>th</sup> September, 2007 yet the accused was not brought before court until 24<sup>th</sup> September, 2007. The delay according to the investigating officer was occasioned by what he referred to as internal police procedures. He made no attempts at all to explain what those internal procedures are all about. The term is ambiguous. The law has to be obeyed by those entrusted to enforce it. The police should be in the forefront of obeying the law and enforcing it. If the supreme law of the land says that an accused person has to be brought in court within 24 hours in the event of a non-capital offence and 14 days for a capital one, that law must be strictly observed failing which the police have a burden cast on them to satisfy the court that the accused had been brought before the court as soon as was reasonably practicable. I do not think that the Investigating Officer herein has been able to discharge that heavy burden in the circumstances of this case.

The Investigating Officer also explained away the delay by alluding to the problem he had in getting the Chief to record a statement as directed by D.C.I.O. The Chief according to the Investigating Officer was too busy to record a statement. I do not buy this explanation for the simple reason that indeed the accused ended up being charged before the investigating officer had obtained the Chief's statement. From his own testimony, he only managed to obtain the Chief's statement on 28<sup>th</sup> September, 2007 by which the time the accused had already been charged in this court. Indeed from the record the accused was arraigned in court on 24<sup>th</sup> September, 2007. If he could still charge the accused with the offence before the Chief's statement, he could as well have done it much earlier and within the confines of the law. I am not aware of the requirement that all witness statements must be recorded before a suspect is arraigned in court. I am however aware that statements of potential witnesses are at times recorded as the case progresses. I cannot also accept that the Chief was so busy as not to spare a few minutes from his “*busy schedule*” to attend to this matter. I think the investigating Officer was just lax and did not treat this case with the seriousness it deserved.

We are no longer in 1980's where the fundamental rights of the citizens were trampled upon by the police. The courts of law could not stand up to the challenge and as the court of appeal said recently the courts chose to see no evil and hear no evil giving rise to the infamous Nyayo house torture chambers. The consequences of this silence of conspiracy on the part of the courts was as the court of appeal went on to observe the infamous Nyayo house torture chambers, a history which the courts can never be proud of. It should never be allowed to happen again in this country. It was a result of the foregoing legacy that the citizens of this country lost faith in the judiciary particularly when it came to enforcement and securing the constitutional and fundamental rights of the citizenry. Time is nigh for the judiciary to rise to the occasion and reclaim its mantle by scrupulously applying the law that seeks to secure, enhance and

protect the fundamental rights and freedoms of an accused person. A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the statutory period required to arraign him in court. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity. For the court of appeal said again in the case of **Albanus Mwasia Mutua**:

**“..... At the end of the day it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place.....”**

In the end, and for the above reasons, I hold that the accused having been brought in court in breach of the provisions of *section 72 (3)* of the constitution, his continued prosecution is illegal and a violation of his constitutional rights. Accordingly I order for his immediate release, unless he is otherwise lawfully held.

*Dated at Nyeri this 6<sup>th</sup> day of March, 2008.*

**M.S.A. MAKHANDIA**

**JUDGE**