



REPUBLIC OF KENYA

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

Misc Crim Appli 1 of 2007

IN THE MATTER OF SECTION 84 (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

AND

**IN THE MATTER OF RULES 24 & 26 OF THE CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE
INDIVIDUAL)**

AND

IN THE MATTER OF HIGH COURT PRACTISE AND PROCEDURE RULES 2006

AND

IN THE MATTER OF CRIMINAL CASE NO.1744 OF 2007 AT KISII

BETWEEN

REPUBLIC PROSECUTOR

VERSUS

ISAYA AYIE ADENYO ACCUSED

RULING

This is a Constitutional reference brought at the instance of the accused pursuant to the provisions of **Section 72(3) and (5) of the Constitution of Kenya**. The accused was charged with stealing by agent contrary to **section 283 of the Penal Code**. The particulars of the offence are that between the 11th day of April, 2007 and the 31st July 2007 at Shah Guest House in Kisii Township, the accused stole cash Kshs.503,060/= which had been received by him for and on account of Mahesh Shah.

The accused was charged before the Chief Magistrate's Court at Kisii in **Criminal Case No.1744 of 2007**. On 27th August, 2007 he denied the charge and was released on a bond of Kshs.150,000/= plus one surety in like sum. The hearing was fixed on 5th October, 2007. On that day, the accused's advocate

informed the trial court that he intended to raise a Constitutional issue concerning arrest and detention of the accused in police cells for over 48 hours before he was arraigned in court.

The issues that were framed for this court's determination are as follows:

- (a) whether the arrest and detention of the accused person without charge for over 48 hours was constitutional.**
- (b) whether the accused person's fundamental rights and freedom were abrogated.**
- (c) Whether the criminal trial in light of arrest and detention without charge was constitutional.**
- (d) The legality and/or constitutionality of breach of section 72(3) and (5) of the Constitution.**

Before the trial court, the prosecution did not advance any reason for the delay in arraigning the accused in court. The provisions of **Section 72(3)(b)** of the **Constitution** are clear that a person arrested for an offence such as the one allegedly committed by the accused should be brought before a court within twenty-four hours of his arrest. Where that is not done, the burden of proving that the accused has been brought before a court as soon as is reasonably practicable rests upon any person alleging that the provisions of the sub-section have been complied with.

When the application came up before this court, Mr. Ochwangi for the accused stated that the accused was arrested on 21st August, 2007 and taken to court on 27th August, 2007. The six days' delay was a clear abuse of the provisions of **section 72(3)(b)** of the constitution, Mr. Ochwangi submitted. He urged this court to find as such.

Mr. Kemo, Principal State Counsel, explained that from the charge sheet, the accused was arrested on 21st August, 2007 and kept in police custody for two days then released on a cash bail of Kshs.20,000/= until the 27th of August, 2007 when he was taken to court for plea. Although the charge sheet does not show the exact date when the accused was granted that cash bail, the submissions by Mr. Oguttu who appeared for the accused when the plea was taken support Mr. Kemo's contention. Mr. Oguttu told the trial court that the accused "**was arrested on 21st August, 2007 and kept in custody for 2 days and released on cash bail**".

That being the case, the prosecution was duty bound to explain at the earliest opportunity the reason behind the delay but it did not do so. Failure to so explain, in my view, was admission that the accused was deliberately kept in unlawful custody for additional twenty-four hours. Why did the police refuse, fail and/or neglect to grant him the cash bail within the first twenty-four hours of his arrest or take him to court? No attempt was made at answering that question.

In **ALBANUS MWASIA MUTUA VS REPUBLIC**, Criminal Appeal No.119 of 2004 the Court of Appeal held 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".

In the above case, the appellant had been convicted and sentenced to death on a charge of attempted robbery with violence. During the hearing of the appeal, it was established that he had been held by the police for nearly eight months before he was arraigned in court. The court allowed the appeal, quashed the conviction and set aside the death sentence.

There is no laid down general principle that any delay beyond the stipulated period in arraigning an accused person in a court of law will lead to an automatic acquittal. What the law is against is unexplained delay in presenting an accused person before a Court of law. The time limit was deemed

very important to be specifically stated in the Constitution. In **ELIUD NJERU NYAGA VS REPUBLIC** Criminal appeal No.182 of 2006 the court stated:

“ ---- it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal ---. In Mutua’s case the prosecution had an opportunity to explain the cause of the delay but failed to offer an explanation.”

In **ANN NJOGU & 5 OTHERS VS REPUBLIC** Misc. Criminal application No.551 of 2007, Mutungi J, in acquitting the applicants due to unexplained delay in presenting them in court held:

“Under section 72(3) of the Supreme law of this country, the Constitution, the applicants should have been brought before the court by 12 noon, on 1/8/07. That was before the expiration of the 24 hours permitted by the Constitution. I dare add that 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 60th minute of the 24th 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 applicant.”

As already stated, in this case, neither the prosecutor before the trial court nor the Principal State Counsel before this court gave any explanation, good or otherwise, as to why the accused was not brought before the court within twenty-four hours of his arrest.

In the circumstances, I have to determine the issues raised by the accused as follows:

- (a) His arrest and detention, without charge for over 48 hours was unconstitutional.**
- (b) The accused’s fundamental rights and freedom were abrogated.**
- (c) The criminal trial of the accused in light of the said arrest and detention without charge is unconstitutional.**

This being a reference under rule 26 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice Rules, 2006, having determined the issues as framed by the trial court, I direct that this ruling be transmitted to the trial court for its appropriate further action.

DATED, SIGNED and DELIVERED at KISII this 29th day of April, 2008.

D. MUSINGA

JUDGE