



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Case 13 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

ROBERT GITHINJI MUKURE.....ACCUSED

R U L I N G

When this case came up for hearing before me on 7th April, 2008, **Mr. Mugambi**, learned counsel appearing for the accused indicated to the court that he had a preliminary objection to raise with regard to the prosecution of the accused. Counsel stated that his objection was premised on the purported violation of the accused's constitutional rights as enshrined in *section 72 (3) (b)* of the Constitution of Kenya. Counsel submitted that the accused was arrested on 21st January, 2006 and brought to court on 28th June, 2006. That was well beyond the stipulated period under the law. The accused's rights under *section 72 (3) (b)* were thus violated in that he was not brought to court for plea within the stipulated period. The charge facing the accused is capital. The accused ought therefore to have been presented in court within 14 days. He was brought to court however after 5 months. His trial is thus an illegality, counsel concluded his submissions.

In response, **Ms Orinda**, learned Principal State Counsel called one, **Chief Inspector Paul Kuria**, the Investigating Officer to the stand in order to explain the delay if at all. **C.I. Kuria** explained that the accused was arrested on 21st January, 2006. He immediately commenced investigations assisted by another police officer. Within 10 days they were through with the investigations. They then forwarded the file to the D.C.I.O on 2/2/06. It would appear that the investigations file was retained by the D.C.I.O for sometime for reasons which are not apparent nor clear. During that period **C.I. Kuria** could not arraign the accused in court. It was not until 15th March, 2006 that the D.C.I.O released the file to **C.I. Kuria** with instructions that he covers certain aspects of the case. Having taken care of the request, **C.I. Kuria** again re-submitted the file to D.C.I.O on 16th March, 2006. The file I will assume gathered dust in the D.C.I.O's office until sometimes in June, 2006 when he instructed **C.I. Kuria** to charge the accused with the offence. Whilst conceding that the delay in charging the accused was unreasonable, he nonetheless hastened to add that he had no say in the matter.

Under cross-examination by **Mr. Mugambi**, **C.I. Kuria** confirmed that he concluded investigations into the matter within 10 days of arrest of the accused and that by the time he forwarded the file to the D.C.I.O nothing was pending further investigations. He maintained that he could have taken the accused to court within time but for the constant movement of the investigations file from station to the D.C.I.O and then to the state counsel.

In his final submissions on the matter, **Mr. Mugambi** stated that the prosecution's explanation was insufficient. That **C.I. Kuria** had not explained the areas which required to be covered by further investigations. In support of his preliminary objection counsel relied on the following notorious authorities:-

1. **Albanus Mwasi Mutua V Republic, Cr.App.No.120 of 2004 (unreported)**
2. **Republic V Moses Nderitu Ndumia, CR. Case No.2 of 2007 (unreported)**
3. **Republic V Edga Lizaria, Cr. Case No.18 of 2007 (unreported)**
4. **Ann Njogu & Others V Republic, Misc.Cr.Appl.No.551 of 2007 (unreported)**

On his part, Mr. Orinda submitted that the explanation given for the delay was sufficient. That the constitution should not be interpreted so as to result in absurdity. It was not meant to aid people who otherwise had committed heinous offences.

Under *section 72 (3)* of the supreme law of the land, that is the Constitution of Kenya, the accused is 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 recently in the case of **Ann Njogu & 5 others V Republic, Misc.Cr.Appl. No.551 of 2007** (unreported) whose sentiments I totally agree with;

“... 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 applicants.....”

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

There is a long list of authorities in relation to the right of an accused person to be brought to court within a prescribed period.

The case of **Albanus Mwasia Mutua V Republic (2006) eKLR** stands out boldly. In this case the court of appeal held that the appellant’s constitutional rights guaranteed under *section 72 (3)* of the constitution had been grossly violated because he was taken before the trial magistrate some eight months from the date of his arrest and no explanation at all had been offered for that delay. The court made the following pertinent remarks:

“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. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional rights will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional rights of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under *section 72 (3) (b)* of the constitution also amounted to a violation of his rights under *section 77 (1)* of the constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”

In the judgment, the judges of appeal **Omolo, Githinji** and **Deverell JJA** with **Githinji JA** dissenting made reference to several case law concerning violations of fair trial provisions including **Ndede V Republic (1991) KLR 567** where the appellant had been arrested on 29th September 1987 and held incommunicado, until 30th October, 1987 when he was brought before a magistrate. The period of delay was just over thirty days and **Mr. Ndede** was not charged with an offence carrying the death penalty. He pleaded guilty to the charges preferred and was convicted on his own plea of guilty and sentenced to long prison terms. He appealed to the High court against the conviction and sentence but the appeal against the conviction was struck out as being incompetent by virtue of *section 348* of the Criminal Procedure Code. The sentences were however, reduced. **Mr. Ndede** next appealed to the court of appeal and the court, consisting of the late **Mr. Justice Gachuhi, J.A.** the late **Mr. Justice Masime, J.A.** and **Mr. Justice Omolo, Ag. J.A.** (as he then was) held that *section 348* of the Criminal Procedure Code was not an absolute bar to appeals from persons convicted on their own plea of guilty and that as there was no explanation offered for the delay of some thirty days before **Mr. Ndede** was brought to court, the trial magistrate ought not to have accepted **Mr. Ndede’s** plea of guilty. **Mr. Ndede’s** appeal was allowed and his conviction quashed. It did not matter that before convicting **Mr. Ndede**, the Deputy Public Prosecutor had stated the facts in support of the charges, that **Mr. Ndede** had admitted those facts and the facts themselves had disclosed the offences preferred against him. The court in the **Albanus** case observed that the;

“Quashing of the convictions must have been on the basis that Ndede’s constitutional rights given to him by *section 72 (3) (b)* of the constitution had been violated and he was entitled to an acquittal.”

It is worth noting however that an accused person is not automatically entitled to an acquittal where the prosecution has not been given a chance to offer an explanation for failing to bring him to court on time. A year after delivering the **Albanus** decision the court of appeal in **Eliud Njeru Nyaga V Republic (2007) eKLR** stated:-

“while we would reiterate the position that under the fair trial provisions of the constitution, an accused person must be brought to court within twenty four hours for non capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must

result in automatic acquittal.”

The court noted that in the **Albanus** case the prosecution had had the opportunity to explain the cause of the delay but failed to offer an explanation. See also **Ronald Manyonge Chepkui V Republic (2007) eKLR.**

Once again the court of appeal in April 2007 deliberated on the question of the accused being brought to court within a given period of time in the case of **Gerald Macharia Githuku V Republic (2007) eKLR.** This case I must say, stands out as a remarkably bold defence of due process and the constitutional rights of an accused person. Its point of departure from previous jurisprudence on the subject is the subordination of the proven guilt of a violent robber to the constitutionality of his treatment by law enforcement authorities after his arrest.

The appellant in this case was arraigned before the Nairobi chief Magistrate’s court on a charge of robbery with violence, which carries a mandatory sentence of death. The date of his arrest was stated in the charge sheet to have been January 13, 1995 while the date of his first arraignment in court was stated as January 30, 1995, that is 17 days latter.

The appellant was tried, convicted and sentenced to death. After his first appeal to the High court was dismissed, he preferred second appeal to the court of appeal in which his counsel argued that the High court had erred in convicting and sentencing him when his constitutional rights had been violated.

Appeal Judges **E.O. O’Kubasu, J.W. Onyango Otieno** and **W.S. Deverell JJA** were unanimous in the defence of the accused’s constitutional rights. Even though a mere delay of three days in bringing the appellant to court did not cause him any substantial prejudice and although the evidence showed that he was guilty as charged, nevertheless the failure by the prosecution to abide by the requirements of the constitution could not be disregarded. The prosecution, the judges found, on whom the burden of proof rested, had failed to satisfy the court that the appellant, who was charged with a capital offence, had been brought before the court as soon as was reasonably practicable.

More recently and in the case **Paul Mwangi Murungu V. Republic Criminal Appeal No.35 of 2006** (unreported) the court of appeal went on to assert that:-

“We do not accept the proposition that the burden is upon an accused person to complain to a Magistrate or a Judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the 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.”

It does appear from the authorities cited, that the violation of the accused’s fair trial provisions enshrined in our constitution cannot longer be taken lightly. The constitutional rights of a citizen are sacrosanct cannot be subordinated to the whims and desires of unconcerned police officers.

Much as the learned Principal State Counsel’s submissions are compelling and attractive, I am nonetheless inclined to go along with the submissions of **Mr. Mugambi**. The explanation offered by **C.I. Kuria** for the delay is insufficient. The delay in my view was not occasioned by **C.I Kuria** but the D.C.I.O. The D.C.I.O’s explanation has not been forthcoming. In total D.C.I.O retained the police file for over 5 months for no apparent reason. **C.I. Kuria** acquitted himself in the matter very well for he had concluded his investigations within 10 days of arrest of the accused and according to him there was nothing left pending investigations. I think the D.C.I.O was one of those police officers who belong to the school of yore where the rights of a suspect or accused mattered little. The law of the land has to be obeyed particularly by those entrusted to enforce it. As I have constantly stated, 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 before 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 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.

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 challenge such conduct. 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 supreme law of the land 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. It matters little that the evidence against the accused is simply overwhelming. 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 once 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 lawful held.

Dated, signed and delivered at Nyeri this 19th day of April, 2008.

M.S.A. MAKHANDIA

JUDGE