



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Misc 7 of 2008

1. ELIJAH MBONDO MUSYOKI

2. ALFONCE MUTUA MUTETI

3. MUSYOKA JOSEPH MUSAU APPLICANTS

VERSUS

REPUBLICRESPONDENT

RULING ON A PRELIMINARY POINT

1. The questions that I am required to determine in this Ruling are these:-

- i. whether the incarceration of the accused persons for 16 days at the police station before being arraigned before the court for plea was an infringement of their fundamental right as guaranteed under Section 72 (3) of (b) of the Constitution.
- ii. whether the said violation of the accused's fundamental right warrants the trial to be declared a nullity ab initio.

2. To put matters into perspective, all the Applicants are the accused persons in **Machakos CM's Court Criminal Case Number 764 of 2002** where they were charged with two counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged that the offences were committed on the night of 17th/18th November 2002 and on the first count, they allegedly violently robbed Elizabeth Nundu Ndeto of cash Kshs.2,060/=, two pangas and an umbrella all valued at Kshs.2,480/= and on the second count, that they allegedly violently robbed Elizabeth Mwikali Kivuva of cash Kshs.7,000/=.

3. From the charge sheet, the Applicants were arrested on 18/11/2002 and taken to court on 4/12/2002. Section 72 (3) (b) of the Constitution which has been relied on provides as follows:-

“A person who is arrested or detained –

a)

b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal

offence,

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

4. The Applicants have pointed me to the fact that since they were taken to court after 16 days, the delay of 2 days rendered their subsequent incarceration and proceedings in the lower court a nullity. In support of that proposition and in applying for their immediate release they rely on the decisions in:

i. Gerald Macharia Githuku vs R Cr. Appeal No. 119/2004;

ii. Ndede vs R (1991) KLR 567

and

iii. Albanus Mwasia Mutua vs R Cr. Appeal No. 120/2004.

5. Learned Principal State Counsel, Mr O’Mirera’s response to the issue at hand is that whereas it was true that the Applicants were taken to court two days late, the interests of justice would require that they should pursue other options known to law and not the present proceedings.

6. To understand the duty imposed on the Republic in a matter such as this one, I must revert to Section 72 (3) (b) of the Constitution. That section as elsewhere above reproduced states that **“the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.” (emphasis added)**

7. In the present case, learned state counsel gave an interesting explanation that it was not possible to bring the Applicants to court within 14 days because there was a weekend in the intervening period. All I can say is that 1/12/2002 was a Sunday and being the 14th day since their arrest, the Applicants ought to have been taken to court on Monday, 2/12/2002. They were instead taken to court on 4/12/2007 and not one word has been said about why they were kept at Kangundo Police Station for an extra 48 hours. In such a situation, can it be said that the applicants were taken to court **“as soon (was) reasonably practicable?”** In Ndede vs R (supra), it was held that the trial magistrate should not have commenced proceedings without enquiring as to the reason why Ndede was taken to court 103 days after he was arrested. His subsequent conviction was quashed. Similarly, in the case of Gerald Macharia (supra) the conviction was quashed although Macharia was taken to court 3 days after the lapse of the 14 day constitutional period. In the latter case, the Court of Appeal stated as follows:-

“We have come to the conclusion, after a careful weighing of these two considerations in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.”

8. In a case such as this, the words **“reasonably practicable”** would have their ordinary meaning and the question whether an action is so, requires **“no more than the making of a value judgment in the**

light of all the facts” – see Gandron J in **Slivak vs Luigi (Australia Pty Ltd (2001) 205 CLR 304 at P. 322-323** and as quoted with approval in **R vs Michael Nguyua & Another, H.C.Cr. 51/2007**. If that be so, in the instant case, there is no absolutely no attempt by the Republic at discharging its burden of proof and there is little that this court can do in the circumstances. In saying this, I am well aware that the Applicants are facing capital charges and the case facing them is partly heard. The difficulty that this court faces was well captured in the **Albanus Mutua** case where the Court of Appeal stated as follows:-

“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.”

9. Having carefully reflected on the application before me and notwithstanding the charges facing the Applicants, once it is admitted, without explanation, that they were kept in custody beyond 14 days before they were brought to court, I can only term their continued detention a violation of their constitutional rights and will uphold their objection in that regard. The proceedings against them being a nullity, they shall be ordered to be released unless they are otherwise lawfully held.

10. Orders accordingly.

Dated and delivered at Machakos this **20th** day of **May** 2008.

ISAAC LENAOLA

JUDGE

In the presence of: **Mr Wang’ondu for Republic**

Applicants in person

ISAAC LENAOLA

JUDGE