

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Case 11 of 2006

REPUBLIC.....PROSECUTOR

VERSUS

MARGARET WAMBUI MWANGI.....ACCUSED

RULING

When this case came up for hearing before me on 7th April, 2008, **Mr. Mugo**, learned counsel appearing for the accused intimated to the court that he had a preliminary objection to raise with regard to the competence or otherwise of the proceedings so far. Counsel stated that his objection was founded on the alleged breach of *section 72 (3)* of the Constitution of Kenya

the police following the inordinate delay in arraigning the accused in court following his arrest.

Counsel submitted that it is the law that anybody charged with a capital offence should be brought before court within 14 days. That the accused herein was arrested on 12th November, 2005 and brought to court on 8th June, 2006. That was well beyond the stipulated period of 14 days. In lieu of a reasonable explanation from the state as to why it had contravened the express provisions of the constitution, counsel prayed that this court terminates the proceedings and acquits the accused.

In response, Ms Orinda, learned Principal State Counsel called one, Inspector Joseph Kitheka, the Investigating Officer to the witness stand in abid to explain the delay if at all. I.P. Joseph Kitheka explained on oath that the accused was arrested on 13th November, 2005 for her own security as members of the public wanted to lynch her. He immediately commenced investigations. On 13th November, 2005, some exhibits were taken to Government Chemist and results availed to him in January, 2006. On 17th January, 2006, he recommended

that the accused be taken to court. However, the D.C.I.O for reasons which were not clear to him, declined to take the accused to court. Instead the accused was taken back to the police station. However the D.C.I.O retained the investigation file. Soon thereafter the Investigating Officer was transferred to another police station. Under Cross-examination by **Mr. Mugo**, the investigating Officer conceded that he did not know when the accused was arraigned in court and could not explain why the accused was not brought to court timeously. According to him by 9th January, 2006, the police file was ready and the accused ought to have been brought to court then.

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 in **Ann Njogu's case Misc.Cr.App.No.551 of 2007** whose sentiments I totally agree with 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 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. On 7th July 2006 in the case of **Albanus Mwasia Mutua V Republic (2006) eKLR** 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 the delay. The court acquitted itself thus:-

"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 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 this appeal, the police violated the constitutional

right 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 their judgment, the judges of appeal **Omolo, Githinji** and **Deverell JJA** (with Githinji JA dissenting) made reference to various case law concerning violations of fair trial provisions including **Ndede V Republic (1991) KLR 567** where the appellant had been arrested without a warrant on 29th September 1987 and was held in detention, incommunicado, until 30th October, 1987 when he was brought before a magistrate. The period of delay was just over thirty days and **Ndede** was not charged with an offence carrying the death penalty. He pleaded guilty for the offence charged and was 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 which bars appeals from persons who have been convicted on their own pleas of guilt. 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 **Mr. Ndede's** conviction, 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 charged against him. The court in the **Albanus** case observed that

"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 entitled to an acquittal.” was

It is worth noting that an accused 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 **Gerald Macharia Githuku V Republic (2007) eKLR**. This case in my view stands out as a remarkably bold defence of due process and the constitutional right of an arrested 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 brought this second 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 constitutional rights. Even though the 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.

What happened in the instant case? There is no doubt at all that the accused was
arrested
on the night of 13th November, 2005. The investigations according to the investigating
officer
were commenced and concluded by 9th January, 2006 yet the accused was not brought
before
court until 8th June, 2006. The Investigating Officer was unable to explain what
occasioned
the delay. All that he proffered was that on 17th January, 2006 he had recommended to
the
D.C.I.O that the accused be brought to court. However the D.C.I.O it would appear
was not
prepared to go long with the recommendation. He therefore took upon himself to retain
the
investigations file as the accused was rotting in the police cells. There is absolutely no
reason
given for the delay in bringing the accused to court between 9th January, 2006 and 8th
June,
2006. Indeed even by 9th January, 2006, the police were still guilty for inordinate
delay in
arraigning the accused in court as provided for under our constitution.

The law of the land has to be obeyed particularly 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 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.

I think the Investigating Officer as well as the D.C.I.O were just lax, did not treat this
case with the seriousness it deserved and had no qualms trampling upon the accused
constitutional rights more so fair trial provisions enshrined in the Constitution of
Kenya.

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 house
Nyayo 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. Neither does it matter that the evidence against the accused is
overwhelming and watertight. 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.....”**

And in the recent case of **Paul Mwangi Murungu V Republic NKR CR.APP.No.35
of
2006,** the court of appeal observed:-

**“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.”

There has been absolutely no explanation proffered by the prosecution for the delay of
close

to seven (7) months in charging the accused in court.

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, and no reasonable explanation having been given for the breach, his continued prosecution I hold is illegal and a violation of his constitutional rights. Accordingly I acquit the accused of the charge and order for his immediate release, unless he is otherwise lawfully held.

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

M.S.A.

MAKHANDIA

JUDGE