REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Revision 1 of 2008

SAMUEL OMUKUBA ONGARO..... APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

R U L I N G

On 14/11/2007 **SAMUEL OMUKUBA ONGALO** was arraigned in court on three counts, being Robbery with violence contrary to **section 296 (2)** of the Penal Code; Rape contrary to **section 3 (1) (a)** of the Sexual Offences Act, or in the alternative Indecent Act with an adult contrary to **section 11 (6)** of the Sexual Offences Act; and Defilement contrary to **section 8 (1)** as read with **section 8 (3)** of the Sexual Offences Act, or in the alternative Indecent Act with a child contrary to **section 11 (1)** of the Sexual Offences Act.

The record of the proceedings before the trial court shows that immediately upon his being produced in court, the accused lodged a complaint, asserting that his constitutional rights had been infringed.

The learned trial magistrate deferred the plea, so as to allow her the opportunity to peruse the record of the proceedings before the Mumias court which had handled earlier charges against the accused, which charges were then withdrawn by the prosecution. The trial court also issued summons to the O.C.S. Butere Police Station to explain where the accused person had been held during the period preceding his production before that court.

After receiving explanations from two police officers based at Butere Police Station and Khwisero Police Post respectively, the trial court formed a considered opinion in the following terms:

"***1. It appears the accused has a meritorious application over violation of his constitutional rights as enshrined in s. 72 (3) and 77 of the Constitution of Kenya.***

2. This court has no jurisdiction to handle constitutional issues and will therefore refer these issues to the High Court Judge for determination under R.25 of part III of the Constitution of Kenya (Supervisory jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court practice and Procedure Rules 2006."

After reaching that conclusion, the learned trial magistrate formulated the following question for determination by the High Court;

"***Have the accused's rights been violated U/S 72 (3) and 77 of the Constitution having been held in***

various police stations before and after being charged and discharged in court for long periods hence failure to try him within reasonable period as required by s. 77 of the Constitution?"

When prosecuting the application before me, the accused said that he was arrested on 10/7/2007. **He** was then held in custody at the Khwisero Police Station for 7 days before being taken to court at Mumias.

On 18/8/2007 when the case came up for hearing, the trial court is said to have discharged the accused under **section 87 (a)** of the Criminal Procedure Code.

The accused said that he was returned to the Butere Police Station, where he stayed for 7 days before he was returned to the court at Mumias. That court is said to have declined to take on the case of the accused, prompting the police to book him at the Butere Police Station, where he stayed for 8 days.

The accused says that he was then taken before the magistrate's court at Kakamega, where he eventually made the complaint which resulted in the matter being placed before the High Court.

It is noteworthy that the dates and durations cited by the accused are not in conformity with those stated in the summary given to this court by the trial court. According to the trial court, the accused was arrested on 2/6/2007, and was then taken before the magistrate's court at Mumias, on 6/6/2007. That is a period of 4 days, as opposed to the 7 days which the accused alleged to have been in custody before being taken to court.

The trial court also notified me that the accused was re-arrested and charged afresh, following a discharge under **section 87 (a)** of the Criminal Procedure Code.

Again, there is a discrepancy between the duration when the accused was held in custody. He said that it was 7 days, but the trial court, (which stated that it had perused the requisite records), said that it was 5 days.

However, it is clear that on that occasion, when the accused was presented before the magistrate's court at Mumias, the prosecution sought to have his case consolidated with another case. It is common ground that the learned magistrate presiding over the other case at Mumias declined to consolidate the two cases because the other case was already part-heard. Apparently, two witnesses had already testified in that other case.

As a consequence of the Mumias court rejecting the attempt by the prosecution to consolidate the cases, the prosecution once again withdrew the case. However, the accused was re-arrested and detained in custody, before he was arraigned before the learned Senior Principal Magistrate's court at Kakamega.

From those facts, I am now required to determine the question which was formulated by the trial court.

First, it is important to bear in mind the fact that pursuant to **section 72 (3)** of the Constitution, any person who is arrested or detained upon reasonable suspicion of his having committed, or being about to commit a criminal offence, ought to be brought before the court as soon as is reasonably practicable. The constitutional requirement is that the person should be produced in court within 24 hours of his arrest or from the commencement of his detention. However, if the person is reasonably suspected to have committed or to be about to commit an offence punishable by death, the state has upto 14 days to produce him in court.

In the event that the person is not produced in court within the time stipulated, the burden of proving that the person was brought before the court as soon as reasonably practicable shall rest upon the person alleging that the provisions of **section 72 (3)** of the Constitution had been complied with.

It is thus necessary to ascertain the nature of the offence with which the accused was charged. And as the accused has not indicated that the charges which he had faced earlier, but which were then withdrawn,

were dissimilar to those he was currently facing, I will, for the purposes of determining the issue before me, presume that the accused had previously faced charges similar to those he is facing currently.

That being the position, the accused was facing one count of a capital offence and two other counts. Therefore, the State was obliged to produce the accused in court within 14 days of his arrest.

As I understand it, at no time was the accused ever produced in court after the lapse of more than 14 days from the date of his arrest or re-arrest.

On the first occasion, the accused was taken to court within 7 (or 4) days of his arrest. That was well within the period of 14 days stipulated in **section 72 (3)** of the Constitution.

The accused was then discharged under **section 87 (a)** of the Criminal Procedure Code. Such a discharge is not a bar to the accused being charged anew. Therefore, on a strict interpretation of the law, the state did not violate any of the legal rights of the accused when they had him re-arrested and charged afresh.

On the second occasion, the accused was brought to court within 7 (or 5) days from the date of arrest. Taken on its own, that period of time was, again, well within the period provided for in the Constitution.

Taken cumulatively, and on the basis of the periods of time stated by the trial court, the accused was still produced in court within 9 days from the date of his first arrest. In those circumstances, there was no need yet to call upon the state to prove that the accused was brought before the court as soon as was reasonably practicable.

Having complied with the provisions of the Constitution, the state would thereafter only have been expected to take such steps as were in their power to ensure that the accused was afforded a fair hearing within a reasonable time.

In this instance, the state did produce the accused before the court. However, the court rejected the attempt by the prosecution to have the case of the accused consolidated with another case. The decision by the court was within its discretion, and the prosecution had no control over it.

Following the rejection of the attempt at the consolidation of the cases, the state withdrew the charges against the accused. The accused has not complained about the decision to withdraw the charges, and I believe that that is an acknowledgement that the prosecution had the right to do so, in those circumstances.

The accused was then re-arrested and held in custody for 7 days, before being taken to the magistrate's court at Kakamega.

By the time of the accused being brought to court on the third occasion, he had been in custody for a total of 16 days, if the period is calculated cumulatively.

In my considered opinion, it would not be right for this court to ignore the facts that the accused had already been taken to court on two occasions already, during the period of the 16 days. Strictly speaking, therefore, one would be wrong to assume that the accused had only been brought before a court after 16 days, from the date of his arrest.

However, I believe that it is nonetheless important to emphasize that had the police simply held the accused in custody for a period exceeding that prescribed in **section 72 (3)** of the Constitution, or had the police taken him to court then withdrawn the charges before preferring new charges, this court would have been entitled to add up the cumulative period when seeking to ascertain if the prescribed duration had been exceeded.

In this case, although the accused has been held in custody in different police stations, I find and hold that his constitutional right to be produced in court within the period prescribed in **section 72 (3)** of the

Constitution has not been violated.

I also find that, in the circumstances of this case, the constitutional rights of the accused, to a fair hearing within a reasonable time has not been violated.

Therefore, it is now hereby directed that the trial of the accused should proceed, and that the same shall be accorded priority by the trial court, in accordance with the provisions of **Section 77** of the Constitution.

It is so ordered.

Dated, Signed and Delivered at Kakamega this 6th day of May, 2008.

FRED A. OCHIENG

J U D G E