



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

Criminal Misc.appli.14,15 & 16 of 2008

ERICK MOKAYA MOCHOGE APPLICANTS

BEAFON MABUKA NYANGAU

FALDAS AGETA ONDUKO

VERSUS

REPUBLIC RESPONDENT

RULING

The applicants, Erick Mokaya Mochoge, Beafon Mabuka Nyangau and Faldas Ageta Onduko filed an application by way of notice of motion. The applications were brought under **Section 72(1), 77(1) and 84** of the **Constitution** and the Rules made there under. They urged this court to terminate a Criminal Case against them at Nyamira, Senior Resident Magistrate's Criminal Case no.404 of 2007. They argued that their Constitutional rights had been violated because they had been held at Nyamira Police Station for more than 24 hours. According to an affidavit sworn by their advocate, George Joseph Mogaka Masese, the applicants were arrested on 7th June, 2007, and were taken to Nyamira Senior Resident Magistrate's Court on 13th June, 2007 where they were charged with robbery contrary to **section 291(1)** (sic) of the Penal Code. (I believe the advocate intended to cite **Section 296(1)** of the **Penal Code**). He further stated that the applicants' constitutional rights had deliberately been breached.

Acting Inspector **Jane Mufoya**, the investigating officer in that case, swore a replying affidavit and stated that the complaint that was lodged against the applicants was of capital robbery and rape on the 3rd day of June, 2007. She annexed to her affidavit an extract of the Investigation Diary.

However, upon completion of investigations, she opted to charge the applicants with simple robbery and had them arraigned in court on 13th June, 2007, seven days from the date of their arrest. The investigations were completed on the sixth day after their arrest. She therefore denied that the applicants' constitutional rights had been violated since they could lawfully have been held in police custody for 14 days if they were to be charged with capital robbery contrary to Section 296(2) of the Penal Code.

In his submissions, Mr. Masese for the applicants cited the case of ANN NJOGU & 5 OTHERS VS REPUBLIC, Misc Criminal application No.55 of 2007 and ALBANUS MWASIA MUTUA VS. REPUBLIC, Criminal Appeal No.120 of 2004. He urged the court to find that their constitutional rights had been violated and order their release.

Mr. Kemo, Principal State Counsel, submitted that the affidavit sworn by the investigating officer gave sufficient explanation as to why the applicants were not arraigned in court within 24 hours after their arrest. He urged the court to dismiss the application.

Section 72(3)(b) of the **Constitution** requires that a person who has been arrested upon reasonable suspicion of having committed or being about to commit a criminal offence be brought before a court as soon as is reasonably practicable.

Where a person has been arrested for an offence that is not punishable by death, he should be brought before a court within twenty – four hours of his arrest. Where that is not done, the burden of proving that the person has been brought before a court as soon as is reasonably practicable rests upon the prosecution.

The above constitutional provision recognizes that there may be instances in which an accused person may not be arraigned before a court of law within the stipulated period of time. In the cases that were cited by Mr. Masese, the courts found that the explanations advanced for the delay in charging the accused persons insufficient and discharged them.

The extract of the investigation diary that was annexed to the affidavit sworn by the investigating officer revealed that the complainant was raped and violently robbed by three men, among them the applicants. When they were arrested on 7th of June, 2007, they were placed in the cells for the offence of rape. The investigation diary showed that other particulars were to follow. The police continued with their investigations and it was decided that they be charged with robbery contrary to section 296(1) of the Penal Code. Those investigations went on for a period of six days. In my view, the explanation given by the investigating officer is sufficient. When the police are dealing with a complaint that may lead to an accused person being charged with a non-bailable offence like murder or robbery with violence, I believe the degree of responsibility expected of them in their investigations is much higher than when they are dealing with alleged commission of a bailable offence. If it turned out that the applicants were to be charged for robbery with violence contrary to section 296(2) of the Penal Code, the police could have lawfully held them for upto fourteen days as they completed their investigations. I do not think that the police can be faulted in this matter.

Whereas a court of law should never condone flagrant abuse or breach of an accused person's constitutional rights, in considering cases of alleged breach of those rights that relate to delay in arraigning accused persons before a court of law, my view is that a court ought to examine closely the factors that are advanced by the police as having caused or contributed to the delay. In some instances the police work under very difficult circumstances. In a country where the police/citizen ratio is so low, where investigative facilities like motor vehicles, computers, forensic laboratories, etc, are wanting, yet crime rate is on the increase, the police have to exert themselves to the full to beat the constitutional time limit of arraigning accused persons in a court of law and occasionally there may be some delay. That was in the mind of the makers of our Constitution and that is why the Constitution provides 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.”***

More often than not, instances of inordinate delay will be frowned upon by the court and may result in discharge of an accused person because of breach of his constitutional right. But even where that delay is seemingly inordinate, as long as there is a genuine and sufficient explanation for it, the court will most likely pardon such delay. Not every delay in bringing a person before court amounts to a constitutional breach of an accused's right thereby entitling him to a discharge, see ELIUD NJERU NYAGA VS. REPUBLIC, Criminal Appeal No.182 of 2006.

However, where there is any delay beyond the period set under **section 72(3)(b)** of the **Constitution**, the prosecution is under a legal duty to offer an explanation to the court, even before the court or the accused raises the issue.

In this case I am not persuaded that the applicants' constitutional rights were breached and I dismiss the applications.

DATED, SIGNED and DELIVERED at **KISII** this **11th** day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Masese for the applicants

Mr. Kemo for the Respondent

D. MUSINGA

JUDGE