



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Criminal Revision 10 of 2008

VINCENT ODHIAMBO APPELLANT

- Versus -

**REPUBLIC
RESPONDENT**

RULING

The applicant in this case was charged in the Chief Magistrate’s Court at Mombasa with robbery with violence contrary to section 296(2) of the Penal Code. He was arrested without a warrant on 16th September, 2007, and taken to court for the first time on 15th October, 2007. That was a span of some 29 days. He now complains that his constitutional rights under section 72 (3) of the Constitution of Kenya were violated.

Section 72 (3) of the Constitution reads as follows –

“A person who is arrested or detained –

- (a) for the purpose of bringing him before a court in execution of the order of a court; or
- (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.”

In this case, the applicant was held for 29 days before he was brought to court. The burden of proving that this was the earliest reasonably practicable time that the applicant could have been brought to court rests entirely upon the prosecution. The only issue is whether this burden has been discharged.

Mr. Onserio for the State argued that the applicant was given a bond but could not raise the amount. He found a surety a day after being charged in court. He therefore submitted that the Police acted properly in accordance with section 123 of the Criminal Procedure Code. This was a serious offence for which he could not have been given a free bond.

After considering the statements of the accused and the arguments and submissions of the learned State Counsel, I am not satisfied that the explanation by the Police is reasonable. Mr. Onserio credits the Police for acting in accordance with the requirements of section 123 of the Criminal Procedure Code, whereby the applicant was offered a Police bond for Kshs. 200,000/=. With respect, the offence for which the applicant was arrested is punishable by death, and consequently it is not bailable. Since it is not bailable, not even by the court, the question of the applicant having failed to raise the amount required for the bond is neither here nor there. The police had no business giving the applicant any bond. The attempt to do so was also contrary to section 36 of the Criminal Procedure Code. They should have taken him to court within 14 days. This explanation does not add any value to the police inaction. I find that it is not a reasonable explanation, and the Police have not demonstrated any reason why they did not take the applicant to court within 14 days. I therefore find that the applicants constitutional rights were violated as alleged.

Having so found, the next issue what follows from there. The often quoted case of ALBANUS MWASIA v. REPUBLIC Cr. Appeal No. 120 of 2004, requires that the applicant be acquitted. Mr. Onserio referred the court to SAMWUEL NDUNGU KAMAU v. REPUBLIC Cr. App. No. 223 of 2006, (UR) and submitted that it is therein implied that if a person is to be released, he must be released on the basis of innocence. I must admit that I am not able to read that inference from the language of that judgment. In any case, everyone is presumed innocent until proved guilty before a court of competent jurisdiction.

I agree with learned counsel, however, that section 72(6) of the Constitution provides for compensation. I also agree that there does not seem to be an unequivocal provision in the Constitution that a person whose constitutional rights are violated should be acquitted. Indeed, left on my own, I would take the road to compensation except, perhaps, in those instances where the period of delay is manifestly excessive. However, the doctrine of stare decisis dictates that I follow the directives of the Court of Appeal. With that in mind, in ALBANUS MWASIA v. REPUBLIC (supra) the Court of Appeal observed that the jurisprudence emerging from the cases is that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge.

For these reasons, I answer the issues raised by the Chief Magistrate as follows:-

1. The keeping of the accused in custody from 16/9/2007 to 15/10/2007 was a violation of his constitutional right.
2. The explanation offered for the violation is not reasonable.
3. The remedy is to acquit the accused.

The Chief Magistrate is accordingly guided.

Dated and delivered at Mombasa this 10th day of June, 2008.

L. NJAGI

JUDGE