



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Misc. Application 869 of 2007**

**ROLEX KIPNGETHICH LABOSO.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original Criminal Case No. 688 of 2007 of the Chief Magistrate's Court at Nairobi by Mr Cherono - (SRM))*

**RULING**

The applicant ROLEX KIPNGETHICH LABOSO has complained that his right to liberty was grossly violated by the police when he was arrested on 11<sup>th</sup> April, 2007 and remanded in police custody for 14 days without being taken to court within 24 hours as stipulated under Section 72(3) of the Constitution. It is his contention that he was taken to court on 24<sup>th</sup> April, 2007 and so any prosecution arising out of the said arrest and detention is illegal, null and void. He therefore prays that the proceedings in Criminal Case No. 688 of 2007 (Chief Magistrate's Court Nairobi) be terminated and he be discharged.

In the affidavit supporting the applicant, it is deponed that the applicant was arrested in Eldoret by Banking Fraud Police and transferred to Nairobi on 12<sup>th</sup> April, 2007 where he was remanded and detained at Kileleshwa Police Station until 24<sup>th</sup> April when he was arraigned in court. He says he was detained for 14 days without being charged thus violating his Constitutional rights.

A copy of the charge sheet is annexed and marked RKL 1 and it shows the applicant was charged for two counts forgery contrary to section 349 Penal Code and two counts of stealing contrary to section 275 Penal Code. Certainly these are bailable offences which would require that applicant be taken to court within 24 hours. His counsel Mr Mulanya in his submissions basically reiterated the contents of the application and the affidavit. He then cited several decision on the issue of delay under section 72(3) (b) of the Constitution of Kenya beginning with the celebrated case of *Albanus Mwasia versus Republic Criminal Appeal 120 of 2004*.

In response Mr Makura the learned State Counsel opposed the application saying it is not every Constitutional violation which entitles an applicant to an acquittal as there is the remedy for compensation under section 72(6) of the Constitution where one has been unlawfully detained. He laments that quashing these charges will be too drastic, considering the colossal amount of money involved. Are there reasons, any explanation as to why there was delay in taking the applicant to court with the Constitutionally recognized period of 24 hours? No explanation has been offered.

To be fair to Mr Makura, he had tried his best to get an explanation over the delay. Indeed on 14<sup>th</sup> April, 2008, he had sought an adjournment so as to file a replying affidavit saying he needed to get in touch with Kileleshwa Police Station where the applicant was said to have been detained for more than 24 hours before being brought to court. His request was granted to 5<sup>th</sup> May, 2008, when yet again there was still no replying affidavit filed and Mr Makura sought an adjournment saying the officer who was to swear the replying affidavit had been away for a week preceding the 5<sup>th</sup> May, 2008. This application for adjournment was rejected.

Section 72(3) (b) of the Constitution provides that:-

*“A person who is arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is met released, shall be brought before a court within twenty four hours of his arrest or from the commencement of his detention .....the burden of prove that the person arrested or detained has been brought before a court as soon as reasonably practicable shall rest upon any person alleging that the provision of this subsection have been complied with.”*

Of course, the very same Constitution recognizes that there may be a reasonable explanation as to the cause of delay in taking an individual to court within the twenty four hours for a non capital offence such as the one applicant faces – indeed an explanation is deemed to be an exception to the general rule of section 72(3) (b) and to borrow the words of Ojwang J, in High Court Criminal --- Application 860 of 2007 Fan XI and others versus the Attorney General – such an explanation:-

- a. *must carry elements of objective reasoning.*
- b. *Must make sense in the light of the special circumstances of the case.*
- c. *Must be made bona fide and not merely as a technicality in and of the prosecution case.*
- d. *Should show such operational difficulty as may have prevented..... arraignment of the suspect in court.*
- e. *Show that the arresting authority did exercise genuine professional care in conducting the investigations preceding the arrest.*

In the present instance there isn't a scintilla of any reason for the delay and it does not help the State Counsel to seek refuge under Section 72(6) without first addressing the reasons for the delay.

I recognize that the sum involved in the charges preferred against the appellant are indeed colossal but in the absence of any explanation whatsoever then I find that the delay was improper and completely unjustified and consequently any continued proceedings arising from such violation of applicants rights are illegal. The charges brought against the appellant must therefore be terminated, which I hereby order so, and the applicant is discharged.

Delivered and dated this 6<sup>th</sup> day of June, 2008 at Nairobi.

**H.A.OMONDI**

**JUDGE.**