REPUBLIC OF KENYA
KENYA LAW
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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Misc.Crim. Appli 13 of 2008

JACKSON ASATI OWOUR :: APPLICANT

VERSUS

REPUBLIC:: RESPONDENT

R U L I N G

The applicant has moved this court by way of a Notice of Motion, which is expressed as having been made pursuant to sections 72 (1) AND 77 (1) of the Constitution of Kenya, as read together with section 14 (1) of the Police Act.

It is his case that the decision by the police to detain him in custody, for a period exceeding 14 days from the date of his arrest, was a contravention of his rights.

He therefore asks this court to order that the proceedings against him should stop, as the same were illegal, null and void.

The applicant's contention was that there was no legal provision which allows prosecution outside the stipulated time. Therefore, I was asked to declare that the applicant's continued stay in custody was illegal.

In support of the application, the applicant cited the decision of the Court of Appeal in *GERALD MACHARIA GITHUKU V. REPUBLIC, CRIMINAL APPEAL NO. 119 OF 2004.*

It is common ground that the applicant was arrested on 28th July 2007 and also that he was first taken to court on 16th August 2007. By the applicant's calculations, that meant that he was taken to court some 19 days after his arrest, which would imply that there was a delay of some 5 days.

In answer to the application, the learned State Counsel, Mr. Karuri, explained that at the time of arrest, the applicant was suspected to have committed the offence of robbery with violence.

It was said that during the incident in question, one Johnstone Likoye was stabbed to death, whilst one, Stephen Aseka was shot dead. It was also said that there were three other victims, as follows:-

(i) Jackson Eshiwani broke an arm and a leg; and he was admitted in hospital for 2 weeks. He

was discharged on 12/8/2007.

(ii) Gladys Eshiwani suffered a broken arm and a cut on the head. She too was discharged from hospital on 12/8/2007.

(iii) Abigail Auma was shot in the pelvis and stomach. She was hospitalized, and the police had hoped that she would be discharged, as per the doctor's advice, on 15/8/2007.

The state did wait for Jackson Eshiwani and Gladys Eshiwani to be discharged so that they could then attend Identification parades.

Indeed, on 13/8/2007 those two persons attended the parades, whilst their limbs were still in plaster of Paris. Despite their conditions, they did positively identify the applicant, so said the learned State Counsel.

As Abigail Auma had been due to be discharged on 15/8/2007, the police had hoped that she too would attend an Identification parade, with a view to ascertaining if she did identify the applicant.

However, when Abigail Auma was not discharged on that date, the police took the applicant to court notwithstanding the fact that that potential witness had not attended any Identification parade to try and identify him.

As far as the learned State Counsel was concerned, the reasons for the delay in bringing the applicant before court were reasonable, as the police could not risk charging the applicant with insufficient evidence.

However, the applicant submits that the police could have charged him, and had his plea taken, even if they still needed to do more investigations.

Pursuant to the provisions of section 72 (3) of the Constitution of the Republic of Kenya;

"*A person who is arrested or detained –*

(a) for the purpose of bringing him before a court in the execution of the order of the 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 as 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 the light of that provision the Court of Appeal held as follows in the case of *ALBANUS MWASIA MUTUA VS REPUBLIC, CRIMINAL APPEAL NO. 120 OF 2004;*

"*The jurisprudence which emerges from the cases we have cited in the judgement appears to be that an unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the evidence which may be adduced to support the charge."*

In that case, the Court of Appeal allowed the appeal and acquitted the appellant because the police had deprived the appellant of his right to liberty for a whole 8 months.

But in the case of GITHUKU VS REPUBLIC, the delay was for only 3 days. Nevertheless, the Court of

Appeal allowed his appeal. It therefore follows that it is not simply a question as to the duration when a person has been in custody beyond the prescribed duration.

In the case of GITHUKU VS REPUBLIC (above-cited) the Court of Appeal observed as follows:

"*Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden vested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.*"

To my mind, it is the failure by the Republic to satisfy the court that the appellant had been brought to court as soon as was reasonably practicable, that informed the decision of the Court of Appeal.

In this case, the learned State Counsel has tendered a detailed explanation for the delay in bringing the applicant to court within 14 days.

Basically, it was because the victims of the robbery with violence had sustained serious injuries, and had been hospitalized.

Although the applicant believes that he should have been charged even before investigations were completed, I hold a contrary view. To prefer charges on the basis of insufficient evidence is ill-advised. That is even more so when the essential evidence appertains to the identification of the person so charged.

In the circumstances of this case I find that the state has provided the court with good enough reasons for the delay in bringing the applicant to court. Therefore the state has satisfied me that the applicant was brought to court as soon as was reasonably practicable.

Accordingly, the constitutional rights of the applicant have not been violated. The application is therefore dismissed.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 4th day of June, 2008.

FRED A. OCHIECH

J U D G E