**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Criminal Misc. Appli. 15 of 2008**

**NOAH NJOGU MBUGUA……..……..……..… APPLICANT**

**VERSUS**

**REPUBLIC ……. RESPONDENT**

**RULING**

1. This is an application premised on Section 72 (3) (b) and Section 77 (1) of the Constitution. The Applicant, Noah Njogu Mbugua was the accused person in **Machakos CM'S Court Criminal Case No. 71/2004** where he faced three (3) counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. After his conviction and sentence to death, he filed an appeal to this court and after a two-judge bench heard the appeal, they allowed it but ordered a retrial. The judgment was given on 14/5/2007 but the Applicant's Case is that he pleaded to the charges afresh on 17/9/2007, some 123 days after the order for a retrial was given. Other matters raised in the Affidavit sworn filed on 11/2/2008 are irrelevant. It is his case in any event that he was held unlawfully and should now be set free as his continued detention is unconstitutional.

2. I have seen the Replying Affidavit sworn by Mr Moses O'Mirera, learned Principal State Counsel in which he depones that the Applicant was lawfully in custody and is not entitled to the orders of release that he now prematurely seeks.

3. I will begin by setting out the law on the issue before me as I understand it. Section 72 (3) (b) of the Constitution provides as follows:-

"**(3) A person who is arrested or detained-**

**3 (a) ……**

**3. (b) upon reasonable suspicion of his 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."**

4. Further thereto, recently the Court of Appeal in **Daniel Nyanza & 9 Others versus Republic Cr. Appeal No.134/2005,** stated as follows:-

"**This Court has, in several decisions, made it clear that where an appellant is held in custody for a period beyond the period provided by law which in this case is fourteen days from the date of his apprehension (see section 72(3) (b) of the Constitution of Kenya) without acceptable explanation for such delay, the court would consider such extra period as being a period under which the person is under unlawful custody and in such circumstances, his constitutional rights will have been violated or breached, entitling him to be released by the court notwithstanding that the case against him may very well be strong. In the case of Albanus Mwasia Mutua vs.Republic – Criminal Appeal No. 120 of 2004, this Court after citing several past authorities on similar situations concluded thus:-**

"***At the end of the day, it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the appellant by detaining him in their custody for a whole eight months and that, apart from violating his rights under section 72 (3) (b) of the Constitution also amounted to a violation of his rights under section 77 (1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his rights to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."***

**5. The above principles were adopted by this Court in the most recent decision in the case of Paul Mwangi vs. Republic – Criminal Appeal No. 35 of 2006 where the Court indicated what explanations a court might consider in respect of a delay to avail an accused person to court within the period prescribed under section 72 (3) (b) of the Constitution. Having done, so, and considering the period of delay in that particular case, it stated:**

"***So long as the explanation proferred is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the Court in Mutua's case."***

**6. Thus, the law as to the treatment the courts will give to cases where section 72 (3) (b) of the Constitution are violated without acceptable and reasonable explanation is now well settled. That, however, depends on such violation being established. The facts must exist to show that the police have detained a person in unlawful custody before the courts can act on the allegation. Such facts would be readily available in the record before the court in case of first or second appeal or would be adduced in evidence in case of the trial court. Courts of law do not act in a vacuum nor would a court of law act on half-baked evidence. In the cases we have cited above, there was, in the record, clear undisputed evidence of such violation and the period of the delay to take the appellants to court as well established."**

**7.** The court in the Nyanza case found that "there is no proper evidence on the complaint and that the **appellants cannot get the benefit of the alleged violation of that provision as no evidence of such violation is discernable from the record."**

8. I have read the record of the trial court and I note as follows:-

i. Although the order for a retrial was made on 14/5/2007, the file was placed before H.A. Omondi, CM (as she then was) and the prosecutor informed the court that the Applicant was not brought to court because the prison vehicle had broken down. The matter was placed for mention on 25/5/2007, and on that day, again the Applicant was absent but he was duly produced on 8/6/2007. In the meantime, the case had nonetheless been fixed for hearing on 30/7/2007. On that day, the court could not begin the hearing as the same magistrate had heard the case before the retrial. It was fixed for hearing on 17/9/2007 but on that day, the Applicant sought the disqualification of the prosecutor I.P Karigitho because he had prosecuted the previous trial. It was denied and his case begun with PW1, Michael Borson testifying. The Applicant actively participated in the trial until the present Application. Is he entitled to the orders he seeks? I think not.

9. The Applicant was in custody because the High Court had so ordered on 14/5/2007. On 15/5/2007, he could not be produced but was produced on 8/6/2007; some 22 days after he was ordered to be re-arraigned in court. The order of production was made by a lawful court after the file was placed before it on 15/5/2007 and 25/5/2007. In such a situation, it cannot be said that the Applicant was unlawfully held. Unlawfully would mean that the trial court acted against a known law and that is not the complaint before me. The complaint is that the police or the prison authorities acted unlawfully but I have said that the trial court did make the order after being satisfied that the applicant could not be brought to court for legitimate reasons including the breakdown of the transport vehicle from Kamiti Prison where the Applicant was being held. That explanation being on record cannot now be faulted by this court.

10. The Applicant's complaint is baseless and is overruled. He shall continue his trial to its logical conclusion.

11. Orders accordingly.

Dated and delivered at Machakos this **23rd** day of **September** 200**8**.

**ISAAC LENAOLA**

**JUDGE**

In the Presence of: Applicant in person

Mr Wang'ondu for Republic

**ISAAC LENAOLA**

JUDGE