



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Criminal Case 1173 of 2008

1. THADDEUS MAYAKA)
 2. MOSIRIA GEOFFREY)
 3. MATOKE BOAZ)
 4. MAKORI BOAZ)APPLICANTS/ACCUSED
 5. MONYENYE TYSON)
 6. OMBATI JOB MAKORO)
 7. BOSIRE TIMOTHY)
 8. ONGOSI ERICK)
- AND**
- THE REPUBLIC RESPONDENT**

RULING

The applicants are students at Cardinal Otunga High School, Kisii. On 16th June, 2008 they were charged with arson contrary to **section 332** of the **Penal Code**. The particulars of the offence were that on the 3rd day of May 2008 at the said school, they wilfully and unlawfully set fire to a building namely Sagini Dormitory, the property of the above school.

Before the plea could be taken, Mr. Kerosi Ondieki, the applicants' advocate, informed the trial magistrate that he intended to raise an issue regarding violation of the applicants' constitutional rights. He urged the trial court to refer the matter to this court for determination as to whether there had been violation of the applicants' constitutional rights. The trial court acceded to the said plea and the learned magistrate proceeded to frame the questions for determination by this court. In the meantime, each of the applicants was released on a bond of Kshs.50,000/=.

Before this court, Mr. Ondieki stated that the applicants were arrested on 12th June, 2008 but they were not taken to court until 16th June, 2008. He thus submitted that the provisions of **section 72(3)** of the **Constitution** which mandated the police to arraign the applicants in court within twenty-four hours of their arrest were violated. He further argued that the applicants were minors yet the police placed them in cells together with adults contrary to the provisions of the law. He attached to his affidavit the applicants' birth certificates and/or baptismal certificates. However, the said documents revealed that only two of the applicants are minors. Counsel urged the court to acquit the applicants in view of the aforesaid reasons.

Mr. Kemo, Senior Principal State Counsel, opposed the said application. He relied on two affidavits sworn by Nyariki Zachary, the Principal, Cardinal Otunga High School and Shadrack Juma, the District Criminal Investigations Officer (D.C.I.O), Kisii. The affidavits revealed that on 3rd May, 2008, a dormitory at the said school was set ablaze by some unknown people. The incident was reported to the police. The school's Board of Governors met and resolved that students and support staff be interviewed in an effort to determine who the culprits were. As a result, the applicants were named as prime suspects.

They were arrested on the Thursday of 12th June 2008 at about 4.30 p.m. and booked in police cells at Kisii police station on the same day at about 5.20 p.m. The D.C.I.O deposed that the statutory period of twenty-four hours lapsed at 5.20 p.m. on the Friday of 13th June, 2008. The 14th and 15th of June 2008 fell on a weekend when courts are not open. The applicants were taken to court on 16th June 2008.

Mr. Kemo submitted that the delay in arraigning the applicants in court was not inordinate and urged the court to disallow their application.

It is not in dispute that the applicants were held in police custody for more than twenty-four before they were taken to court. What now falls for determination by this court is whether such delay violated the applicants' constitutional rights in the circumstances of this case.

Section 72(3) of the Constitution provides that:

“A person who is arrested or detained –

- (a) -----
- (b) *upon reasonable suspicion of him 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.”

The above quoted subsection requires a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence to be brought before a court as soon as is reasonably practicable. Where he is not so arraigned in court, the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests upon he who alleges that the Constitution has been complied with.

In **DOMINIC MUTIE MWALIMU VS REPUBLIC**, Criminal Appeal No.217 of 2005, the Court of Appeal held as follows:

“In our view, the mere fact that an accused person is brought to court either after twenty-four hours or fourteen days, as the case may be, stipulated in the Constitution does not, ipso facto, prove a breach of the constitution. The wording of section 72(3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been breach of the above provision the court must act on evidence.”

Applying the aforesaid holding, I find that the police gave a satisfactory explanation as to why the applicants could not be arraigned in court within twenty-four hours of their arrest.

By the time the statutory period expired the courts were closed for the weekend and the police took the applicants to court on the next working day, Monday the 16th June, 2008. It is not for the court to question why the police did not release the applicants on police bond on Saturday 15th. It has to be borne in mind that during that period, June/July 2008 there were many student riots, almost country wide, in which many school properties were destroyed, some students injured and at least one killed. These were issues which were in the public domain and I believe the police had to take that into consideration in deciding whether to release the applicants on bond or not.

All in all, I find that there is no sufficient material to enable this court reach a conclusion that the applicants’ constitutional rights as aforesaid were violated.

I dismiss this reference and direct that the trial before the subordinate proceeds expeditiously.

DATED, SIGNED and DELIVERED at KISII this 22nd day of September, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Kemo, Senior Principal State Counsel for the Republic

Mr. Kerosi Ondieki for the Applicants.

Applicants

D. MUSINGA

JUDGE