

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 54 of 2004

REPUBLICPROSECUTOR

VERSUS

KABWESHA COSMAS SAMPA alias

CLAUDE WILSON alias JASON SAMPAACCUSED

RULING

Kabwasha Cosmas Sampa alias Claude Wilson alias Jason Sampa, the accused person herein, raised a Preliminary Objection under Section 72(3) (b) of the Constitution of Kenya. The Preliminary Objection is contained in a notice dated 17th December 2007. The prosecution filed a replying and a further replying affidavits of George Ojuka Obara. The accused also filed a replying affidavit to respond to the affidavits filed by the state.

In the aforesaid notice, the accused applied for the charges facing him to be dismissed under Section 72(3) (b) of the constitution. The main complaint raised is that the accused was held in police custody before being taken to court for twenty five (25) days about eleven (11) days beyond the period limited by the constitution. It is the submission of Mr. Maseki learned advocate for the accused that the prosecution has failed to give a satisfactory explanation to justify the delay. It is argued that the accused person was detained beyond constitutional period for the sole purpose of extracting a forced confession from him. Mr. Monda learned Senior State Counsel opposed the application by relying on the replying and further replying affidavits of George Ojuka Obara. It is admitted that the accused was held beyond the period set by the constitution. The delay is said to have been occasioned by several factors. First, it is said that the accused was supposed to have been arraigned in court on 12th December 2004 a Sunday which was not an official working day. It is also claimed that the police motor vehicle broke down on 14th December 2004 and was successfully repaired by 5.00 p.m. on 17th December 2004. The police were only able to take the accused to court on 20th December 2004 as 18th and 19th December 2004 fell on a weekend. In his replying affidavit, the accused denied the allegation that the station motor vehicle broke down. He claimed that between 2.12.2004 and 20.12.2004 he was shuttled between Diani Police Station and Port Police Station using motor vehicle Registration Number G.K.A595F. The investigating officer, George Ojuka Obara in his further replying affidavit denied the allegation that the accused was ever detained in port police station.

I have considered the oral submissions of Mr. Maseki, the learned defence counsel and those of Mr. Monda the learned Senior State Counsel. I have also carefully perused the grounds set out on the notice of Preliminary Objection plus the affidavits filed for and against the objection. The accused person is before this court on the information of the Attorney General dated 17.12.2004 facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 13th day of November 2004, at Maweni Village, Diani Location in Kwale District within the Coast Province murdered Mary Taffa. The record shows that the accused was arrested on 26/11/2004 and taken before court on 20th December 2004. This being a capital offence, the accused was required by the constitution under S.72 (3) (b) to be taken to court within 14 days or as is reasonably practicable from the date of arrest. It is not in dispute that the accused was taken to court after a delay of 11 days beyond the period fixed by the constitution. The prosecution has given the reasons for the delay with a view of persuading this court not to dismiss the charge. It is clear from the provisions of section 72(3)(b) of the constitution

that a charge may not necessarily be dismissed on account of delay to take an accused to court outside the period set so long as there is an acceptable and reasonable explanation given to justify the delay. It means that where there is no explanation for the delay, the charge must be declared null and void hence available for dismissal. In **Criminal Appeal No. 217 of 2005 Dominic Mutie Mwalimu =vs= Republic (Unreported)** the Court of Appeal expressed itself as follows:

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“The alleged breach of a constitutional right is based on S.72 (3) (b) of the constitution which provides:

“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 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”. (Emphasis ours).

A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours).

The section further provides that where such a person is not taken to court within either the twenty-four hours for a non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court *as soon as is reasonably practicable* rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person is charged with a non-capital offence is brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court *as soon as is reasonably practicable* notwithstanding, that he was not brought to within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the 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 a breach of the above provision the court must act on evidence.”

I will apply the above principles set by the court of Appeal in this case. In the application before this court, it has been stated that there was a mechanical breakdown of the motor vehicle serving Diani Police station and that when the motor vehicle was in good mechanical condition the available days fell on a national holiday and a weekend which days are not official working days in Kenya. The accused denied the allegation regarding the breakdown of the station motor vehicle. I have no reason to doubt the averments made on oath by George Ojuka Obara, the investigating officer in this case. I believe his story. I find the explanation for the delay to be reasonable, acceptable and truthful. Further the delay is not inordinate or intentional. I cannot read any mischief or malice in the delay. I will countenance the same and find that the accused’s constitutional rights were not fundamentally breached. I dismiss the Preliminary Objection and direct the case to proceed for hearing to its conclusion.

Dated and delivered at Mombasa this 19th day of September 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Maseki for the Accused and in the presence of Mr. Monda, Learned Senior State Counsel.