



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Case 18 of 2007

REPUBLIC.....PROSECUTOR

VERSUS

SALIM KALINGA MWATELA.....ACCUSED

RULING

The accused has by his notice dated 26th June 2008 applied to this court to dismiss the charge facing him pursuant to Section 72 (3) (b) of the Constitution of Kenya. The grounds for the application are as follows:-

- 1) That upon his arrest by the police on the 13th August 2007, the latter failed to arraign him before court within fourteen (14) days of his arrest or from the commencement of his detention which fell on or before the 27th August 2007. He was presented to court on 3rd September 2007 some seven (7) days after the statutory period.
- 2) That the prosecution is obliged where there has not been a strict compliance within Section 72 (3) of the Constitution to offer an explanation to the court for the delay in bringing the accused to court even if the accused has not raised the matter. The prosecution has failed, refused and/or neglected to offer a valid, lawful and/or satisfactory explanation to the court for the said delay in bringing the accused to court.
- 3) That the police unlawfully detained the accused for more than the statutory period for the sole purpose of extracting a forced confession from him to admit the alleged offence.
- 4) That the unlawful detention of the accused amounted to violation of his constitutional right under Section 72 (3) of the Constitution of Kenya and he has thereby been deprived of his liberty and right to a speedy trial within a reasonable time.

The response of the Republic is by way of a replying affidavit, sworn by Chief Inspector Samuel Waweru on 8th September 2008. He has deponed that he is the Officer-In-Charge of Taru Police Station and has information relevant to the issues raised by the accused. He has further deponed that the accused was arrested on 13th August 2007 at Makindu at around 6.30 p.m. by PC Oyoo and PC Kaluku, who at the time, had no police vehicle and therefore used public transport to transport the accused to Taru on 14th August 2007 a distance of between 250 – 300 km from Makindu.

It is also deponed that on arrival at Taru Police Station, the accused made a statement under inquiry which statement amounted to a confession whereupon the assistance of a Magistrate was sought. Chief

Inspector Waweru swears that the nearest Magistrate's court is at Voi town which is 90 kms away from Taru and could not be accessed because the station vehicle was then being used at Kinango Police Station which is 60 kms from Taru. He then depones that the said vehicle was availed on 16th August 2007 when the accused was taken to Voi Law Courts where he recorded a confession before Voi Senior Resident Magistrate: Hon. Joyce Gandani.

The said Chief Inspector has further sworn that there was delay in accessing the service of Dr. Mwang'ombe the Government psychiatrist who would only be available on Wednesday at Voi. In that regard, the accused was first taken to Voi on 16th August 2007 but had to wait until the next Wednesday, on 22nd August 2007, to be examined by the said psychiatrist whose report was availed one week later, on 27th August 2007, and was collected by PC Kaluka who used public transport because the station vehicle had broken down. The said Chief Inspector has further deponed that the station vehicle was not repaired immediately due to lack of funds to obtain spare parts from Mombasa. That the funds were made available on 29th August 2007 and the spare parts purchased on 30th August 2007. The Chief Inspector then depones that when the vehicle was repaired, the accused was brought to court on 31st August 2007.

In those premises, the Republic is of the view that the accused was brought to court as soon as was practicably possible and his constitutional rights were not infringed. In his oral submission in court, counsel for the accused discredited Chief Inspector Waweru's explanation for the delay and argued that the police could have used other means to bring the accused to court earlier. Having failed to do so, counsel argued, Section 72 (3) of the Constitution was breached and the accused's constitutional rights thereby violated.

Section 72 (3) of the Constitution reads as follows:-

“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 Court of Appeal has interpreted the above provisions as allowing suspects to be held after the time frames given in the section have lapsed, save that there has to be an explanation for any delay. In **Dominic Mutie Mwalimu – v – Republic [C.A No. 217 of 2005] (UR)**, the Learned Judges rendered themselves as follows:-

“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.

The Section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offences or fourteen days for capital offences 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 charged with a non-capital offence 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 have 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 court within the time stipulated by the Constitution.” (emphasis supplied)

The Court of Appeal has also held that what may be considered as reasonable basis for delay will depend on the peculiar facts and circumstances of each case. In the case of **Albanus Mwasia Mutua – v – Republic: [CR. APPEAL NO. 120 of 2004 (UR)]**, the Court suggested some examples of what might amount to an acceptable explanation for the delay. Those examples were restated in **Paul Mwangi Murunga – v – Republic: CR. APPEAL NO. 35 of 2006 (UR)** as follows:-

“It may be that upon arrest and on being taken to the police station the accused person fell ill, was taken to hospital and was admitted and kept there in excess of the period allowed. Or it may be that the accused person was arrested on Friday evening and as our courts do not work on weekends and it being not possible to release the accused on bail, he is brought to court on the next working day. Or it may be that the Court-house is far from the police station and the station vehicle broke down or had no fuel.”

In this case, the accused, should have been arraigned in court on or before the 27th August 2007. Chief Inspector Waweru swears that the accused was brought to court on 31st August 2007 which reveals a three (3) days delay. The record however shows that the accused was brought before Hon. Maraga J. for the first time on 3rd September 2007. But the same record also shows that Mr. Ondari, the Learned Assistant Deputy Public Prosecutor filed Information against the accused person on 30th August 2007. Be that as it may, the accused has not filed a further or supplementary affidavit to rebut the averments made by Chief Inspector Waweru in his replying affidavit.

Having considered all the circumstances surrounding this case, I find and hold that the Republic has satisfactorily explained the delay in bringing the accused before the court. In coming to that conclusion, I have weighed the competing duties and rights involved. The High Court has a duty to protect and enforce fundamental rights guaranteed under the Constitution. In discharging that Constitutional obligation the High Court cannot disregard its equally important duty to the society at large. The Court of Appeal in the Albanus Mwasia Mutua case (supra) put it this way:-

“On the one hand it is the duty of the Courts to ensure that crime, where it is proved, is appropriately punished. This is for the protection of society; on the other hand it is equally the duty of the Courts to uphold the rights of persons charged with criminal offences particularly the human rights guaranteed to them under the Constitution.”

As the explanation proffered by the Republic is, as stated above, reasonable in the special circumstances of this case, I am constrained to decline the accused’s preliminary objection filed on 25th June 2008. This case should now be fixed for hearing in the usual manner.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Egunza for the Accused and Onserio for the Republic.

F. AZANGALALA

JUDGE

27TH OCTOBER 2008