



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appli. 76 of 2008

ALFRED M. CHOLA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant has moved the court by his Notice of Motion dated 11th July 2008, under the provisions of Sections 72 (1) (3) and 77 of the Constitution and Section 123 of the Criminal Procedure Code (Cap 75 Laws of Kenya) and all other enabling provisions of the Law for the following main relief.

(c) That the entire proceedings in Criminal Case Number 384 of

2006 at Voi: Republic – v – Alfred Mwachimu Chola be

revoked and nullified and the accused/applicant be released.

The primary grounds founding the application are expressed as follows:-

- 1) That the accused/applicant was arrested by the police on 4th April 2006 and taken to Voi Court on 7th April 2006 after spending three (3) days in custody.
- 2) That the accused was charged with an offence of stealing by clerks contrary to Section 28 of the Penal Code for which offence according to Section 77 (3) of the Constitution the applicant ought to have been taken to court within 24 hours.
- 3) That the accused/applicant was never bonded while in custody neither did the police seek leave to extend time to hold the applicant but rather detained him in police cells for the three (3) days and in the circumstances violated the applicant's constitutional and fundamental rights.
- 4) That the accused tried to raise objection to his trial before the Voi trial Magistrate but was denied audience.
- 5) That unless this application is allowed the applicant is likely to suffer loss and damage and his constitutional rights will continue to be violated.

The application is supported by an affidavit sworn by the applicant in which the above grounds are recited. The Republic did not respond to the applicant's affidavit by way of a replying affidavit or Grounds of

Opposition. That is despite counsel for the Republic seeking and obtaining adjournment more than once to file a response to the application. The Learned State counsel chose to respond orally: that the application has been brought rather too late in the day when the prosecution has lost the opportunity to recall the Investigating Officer. Counsel further submitted that the delay involved of three (3) days is not inordinate and urged that the motion on notice should be dismissed.

I have considered the application, the supporting affidavit and the submissions made to me. Having done so, I take the following view of the matter. The authorities establish that it is permissible to bring a suspect to court after the period prescribed in Section 72 (3) of the Constitution save that there is to be an explanation for the delay. Starting with the case of Albanus Mwasia Mutua – v – Republic [CR. APPEAL NO. 120 of 2004]

(UR) the Court of Appeal suggested some examples of what may amount to acceptable explanation for the delay. The Learned Judges of Appeal rendered themselves as follows:-

“It could be that he fell ill during the fourteen days the police were entitled to hold him in custody, that he was admitted in hospital and was detained in hospital..... as a result of which the police were unable to produce him in court. It could also be that the appellant

had been presented to the court earlier but his case was terminated for one reason or the other, and was discharged and was subsequently recharged afresh; Constitutionally, the burden was on the police to explain the delay.”

In that case, the court was considering a delay of eight month which was held to be inordinate and unexplained.

In Gerald Macharia Githuku – v – Republic [2007] e KLR the Court of Appeal considered a delay of three (3) days to arraign the appellant before the court. The Learned Judges stated as follows:-

“.....although the delay of three days in bringing the appellant to court seventeen days after his arrest instead of fourteen days in accordance with Section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant and although on the evidence we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of Section 72 (3) of the Constitution should be disregarded. 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 rested to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.”

And in Paul Mwangi Murunga – v – Republic CR. APPEAL NO. 38 of 2006 (UR) the Court of Appeal considered an unexplained delay of ten days as too long. The court further observed that “so long as the explanation proffered 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.”

On the authorities therefore, where there has been a delay to bring a suspect before court and no explanation is offered, breach of Section 72 (3) of the Constitution is established. In this case there is an admitted delay of three (3) days. No explanation has been proffered by the Republic. In such circumstances, the provisions of Section 72 (3) of the Constitution cannot be disregarded. As the Court of Appeal stated in the Albanus Mwasia Mutua’s case, “....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.”

In the premises, I find and hold that by detaining the applicant in their custody for three (3) days beyond the constitutionally prescribed period, the police violated his rights under Section 72 (3) (b) of the Constitution.

Having come to that conclusion, I declare that the prosecution of the applicant is null and void and should not continue as the same is founded on an illegality. It is hereby terminated.

Order accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS 13TH DAY OF OCTOBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Applicant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

13TH OCTOBER 2008