



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**Criminal Case 15 of 2008**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**CHARLES OMARIBA OROKO & 23 OTHERS ..... ACCUSED**

**RULING**

The applicant and 23 others were jointly charged with 12 counts of murder which are said to have been committed on the night of 20<sup>th</sup> and 21<sup>st</sup> May, 2008 at Kegogi Location in Central Kisii District within Nyanza Province. The applicants were arrested on 27<sup>th</sup> and 28<sup>th</sup> May, 2008. On 27<sup>th</sup> June, 2008 they were taken before the subordinate court (deputy registrar) for mention of the case and it was ordered that their pleas be taken on 14<sup>th</sup> July, 2008. In the mean time the applicants were remanded in Prison custody.

When the matter came up for plea, Mr. Obure for the applicants informed the court that on 11<sup>th</sup> July, 2008 he had, on behalf of the applicants, filed what he termed as “*a notice of Preliminary Objection on points of law.*)” The notice reads as follows:

“**TAKE NOTICE** that the Accused herein shall raise a Preliminary Objection on points of law and that put forth (sic) the following grounds:-

1. That prosecution is guilty of violating the Constitutional rights of the accused whom they incarcerated for a period longer than as provided stipulated (sic) by law. This without reasonable cause and/or justification thereby breaching the constitutional rights of the accused persons.
2. That the intended prosecution of the Accused is clearly an afterthought and is solely a play to the public gallery in view of the publicity of and antecedents of this matter.

**REASONS WHEREFORE** the accused pray that the information against them be quashed and they be set at liberty.”

The procedure adopted by the applicants herein is wrong. The Constitution of Kenya (supervisory jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 stipulates the manner in which such an application ought to be made. Where contravention of any fundamental rights and freedoms under Sections 70 to 83 of the Constitution is alleged, an application should be made by way of a petition supported by an affidavit. But where a Constitutional issue arises in a matter that is already being heard before the High Court, the court may treat such an issue as a Preliminary point and proceed to hear and determine the same. An applicant who is alleging that his fundamental rights and freedoms have been infringed upon should not commence

proceedings by filing a notice of Preliminary Objection.

Be that as it may, I will overlook the aforesaid procedural impropriety and deal with the merits of the application.

By the time the said Preliminary Objection came up for hearing, the Attorney-General had not filed any affidavit to explain the alleged delay in arraigning the applicants in Court.

However, the District Criminal Investigation Officer, Central Division, Chief Inspector Shadrack Juma, was summoned by the court to explain the delay. He explained that a very bizarre incident occurred on the night of 20<sup>th</sup> May, 2008 where a group of people which was allegedly hunting down witches and sorcerers at Kegogi location, Mitembe and Gakero-sub locations, burnt several houses and as a result killed twelve members of the public. Following the said incident, the police arrested several suspects.

The police began to look for witnesses but it was not easy to get them because many of the prospective ones had been scared away from their houses. Eventually some were traced. Regarding the suspects who were arrested, the police explained that they had to take them to Nyanza Provincial General Hospital at Kisumu for mental assessment as there was no Psychiatrist at Kisii District Hospital. There was a problem of transportation and the suspects had to be taken to Kisumu in two lots. The first lot was taken on 16<sup>th</sup> June, 2008 and the second one on 25<sup>th</sup> June, 2008.

Inspector Juma further stated that preparation of witness statements took a long time because the witnesses were many and he has only one secretary whom he depends upon to type the statements. For all the aforesaid reasons, he urged the court to find that the police had brought the applicants to court as soon as was reasonably practicable.

Mr. Obure submitted that the police had failed to proffer a reasonable explanation for their delay in arraigning the applicants before a court of law. He urged the court to find that their constitutional rights had been violated and proceed to acquit them of the charges that they were facing.

I have considered all the submissions on record. It is not in dispute that the applicants were not taken to court within fourteen days of their arrest as prescribed under Section 72(3) of the Constitution. The said section provides as follows:

*“A person who is arrested or detained*

*(a) for the purpose of bringing him before a court in execution of the order of a court; or*

*(b) upon reasonable suspicion of 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 provisions of the law have been the subject of many decisions including ALBANUS MWASIA MUTUA VS REPUBLIC, Criminal Appeal no.120 of 2004 which was cited by the applicants' counsel. In that decision, the Court of Appeal held that:

*“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.”*

The court did not make a generalized finding that every instance of delay in arraigning an accused person

in a court amounts to violation of his constitutional right which ought to lead to his acquittal. The operative words in the above quotation are “*unexplained violation of a constitutional right.*” Where there has been such delay, it is the duty of the police to demonstrate that they took an accused to court as soon as was reasonably practicable in the circumstances of each case.

In FRANCIS OGEKA MOCHAMA VS THE ATTORNEY-GENERAL, Criminal Case No.21 of 2005 at Kisii, this court cited with approval FAN XI & OTHERS VS THE ATTORNEY-GENERAL, Misc. Criminal Application No.860 of 2007 where Ojwang, J, set out the kind of explanations that he considered acceptable in terms of Section 72(3) of the Constitution. They are:

- “(i) *The explanation must carry elements of objective reasoning.*
- (ii) *The explanation must make sense, in the light of the special circumstances of the case.*
- (iii) *The explanation must be made bona fide, and not merely as a technicality in aid of the prosecution case.*
- (iv) *The explanation should show such operational difficulty as may have prevented timeous arraignment of the suspect in court.*
- (v) *The explanation should show clearly that the arresting authority did exercise genuine professional care in conducting the investigation preceding the arrest.”*

This court now has to determine whether the explanation given by Chief Inspector Juma is satisfactory or otherwise.

It is not contested that the incidents that caused twelve people to lose their lives were most bizarre and caused great terror in the villages where the victims’ homes were torched. Almost all the possible witnesses, being family members of the deceased persons, were forced to flee from their homes to save their lives. The police had to look for them for purposes of recording their statements. That is a necessary step in compiling a file in a murder case.

The police also explained the practical difficulties that they encountered in having to transport the applicants to Nyanza Provincial General Hospital at Kisumu for mental assessment. That was due to the fact that there was no Psychiatrist at Kisii District Hospital. That was not a challenge that could be easily surmounted by the police. It is common knowledge that the police do not have adequate means of transport at their disposal and at times that hampers their efficiency. Shortage of secretarial staff to type numerous witness statements was also cited as having contributed to the delay in bringing the applicants before court.

In my view, the police were not dealing with an ordinary criminal incident that had occasioned loss of life, they were dealing with a situation where a mass of people decided to visit terror upon a number of villages by killing and/or burning suspected witches and sorcerers in their homes, incidents which sent shock waves not only in this area but throughout the country. In such situation, the court, being cognizant of its role of protecting all rights and liberties, private and public as guaranteed by the Constitution of Kenya, be they of crime suspects or of the general public, must strike an acceptable balance. In interpreting the provisions of Section 72(3) (b) of the Constitution, this court has considered the explanation for the delay as given by the police in light of the circumstances of the case.

Having so done; I hold that the police brought the applicants to court as soon as was reasonably practicable. In the circumstances, there was no deliberate breach of the applicants’ constitutional rights. The preliminary objection raised by the applicants is dismissed.

DATED, SIGNED and DELIVERED at KISII this 8<sup>th</sup> day of October, 2008.

**D. MUSINGA**

**JUDGE**

Delivered in the open court in the presence of:

Mr. Obure for the Accused persons

Mr. Kemo, Senior Principal State Counsel for the Republic.

**D. MUSINGA.**

**JUDGE.**