REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Case 88 of 2005

REPUBLIC ……..……..……...…….PROSECUTOR

-VERSUS-

FR. GUYO WAQO MALLEY)

MOHAMED MOLU BAGAJO)

ADEN IBRAHIM MOHAMMED)

MAHAT ALI HALAKE)……...……...….ACCUSED

ROBA BALLA BARICHI)

MOHAMED DIKA WARIO)

RULING ON PRELIMINARY OBJECTIONS TO TRIAL PROCEEDINGS

A. OBJECTIONS TO CONTINUATION OF THE TRIAL PROCESS

In the course of a long-running trial which began on 22nd May, 2006 and in the course of which 34 witnesses have already been heard, the six accused persons have come up with objections to the trial, and the said objections are described as "preliminary objections". Two separate, though largely concurrent such motions have been lodged, coinciding with the lines of representation: one by *M/s. Agina & Associates Advocates* representing the first accused, *Fr. Guyo Waqo Malley;* and the other by *M/s. Mbaluka & Co. Advocates* representing the 2nd, 3rd, 4th, 5th and 6th accused.

In the objection by 1st accused, three prayers are made:

(i) that, pending the hearing and determination of this

objection, the hearing of the case be suspended/stayed;

(ii) that, the case against 1st accused be terminated and the charge-information quashed;

(iii) that, 1st accused be set free.

The 1st accused alleges that the trial process constitutes a violation of his constitutional rights, because it rests upon unconstitutional foundations. He alleges that he had been, following his arrest and detention by the Police on 19th July, 2005 "subjected to systematic torture at various places until 19th August,

2005" when he was brought for the first time before the High Court. He alleges that during the said torture, he "suffered grievous bodily harm". The 1st accused alleges that he was, while in Police custody, subjected to a travesty of a confession "achieved by physical and mental torture".

The other five accused persons, in their objection, cited ss. 23 and 72(3) of the Constitution in support of their case that their fundamental rights have been breached and, consequently the whole trial was unfair and should be annulled. These applicants stated that they had been arrested and held in Police custody without trial for a period of some *25 days*, and that this exceeded the *fourteen-day* period specified in s. 72(3) (b) of the Constitution.

B. IS THERE A SPECIAL FORM FOR MAKING SUCH OBJECTIONS BASED ON THE CONSTITUTION?

At the very beginning, learned respondent's counsel, *Mr. Ondari* had objections to the point raised by all the applicants, from the standpoint of form; and his main argument was that the applicants should have moved the Court by *petition*, as provided in respect of claims of violation of constitutional rights.

Mr. Agina for 1st applicant, however, submitted that since the question has arisen in one Court, in a *single set of proceedings*, it was not a requirement of the law that a petition be lodged. Counsel referred to an earlier High Court decision on this point, *Republic v. Moses Nderitu Ndumia*, Nyeri High Court Crim. Case No. 2 of 2007, in which *Khamoni, J* had thus stated the law:

"*Where the High Court is exercising its non-referral, original jurisdiction in matters which would have been covered by subsections (1), (2) and (3) of section 67, or subsection (3) of section 84, but are not covered because proceedings were started in the High Court and the question as to the interpretation of the Constitution or the questions as to the enforcement of sections 70 to 83 (inclusive) arose when proceedings were going on in the High Court, the legally mandated composition of the High Court is the one already seised of the proceedings in which the question as to the interpretation of the Constitution or the question as to the enforcement of sections 70 to 83 (inclusive), as the case may be, has arisen."*

Learned counsel urged, quite persuasively in my view, that, not every alleged violation of constitutional safeguards called for the path of the constitutional *petition*, or for the establishment of a special *Constitutional Bench* to hear the matter. Since the High court was, in this instance, exercising a non-referral jurisdiction, counsel urged, the Judge seised of the matter was the one to dispose of the gravamen.

Learned counsel *Mr. Mbaluka* adopted the same line of reasoning; in his words:

"*The accused persons in the dock have raised an issue of violation of their constitutional rights. It is a High Court case; and the High Court has inherent original jurisdiction to hear any complaint of an abuse; indeed, the Court may of its own motion raise the point …..."*

My ruling on the point was as follows:

"In this long-running trial, the six accused persons are raising complaints on a constitutional point. Even before the application itself is heard, learned respondent's counsel, Mr. Ondari has raised a preliminary objection: that the applications in question are incompetent – because they are not coming as petitions, by virtue of subsidiary legislation which governs the lodgment of complaints of breaches of constitutional rights.

"But learned counsel Mr. Agina, with whom learned counsel Mr. Mbaluka agrees, cites a persuasive authority [Republic v. Moses Nderitu Ndumia]. The learned Judge in that case, analysed the kinds of complaint that may properly be brought before a Judge in the High Court, and concluded that there are referral matters – those to be referred to a Constitutional Bench – and therefore, those which would have to comply with the subsidiary legislation. But on the other hand, there are non-referral matters – those which may crop up at any time before a particular Court as it conducts its hearing. In the latter case, the Court seised of the matter is the one with jurisdiction to dispose of the matter, and does not require any

special application.

"Both learned counsel Mr. Agina and Mr. Mbaluka have submitted that this Court, on the foregoing principle, and by virtue of its inherent jurisdiction to redress abuse of constitutional rights, is the right forum where the instant question should be ventilated.

"Both counsel have cited the Court of Appeal decision in Ndede v. Republic [1991] KLR 567, as affirming that the High Court could even act suo motu in addressing a violation of rights which emerges in the course of hearing – and thus no special petition is called for.

"This reasoning, as a matter of law, is, in my opinion indefeasible. This Court is now seised of the whole trial; and any complaint emerging in the course of this trial is to be disposed of, as the only logical and practical course, by this Court; and no petition is required for the purpose.

"I therefore overrule the respondent's objection, and permit the accused persons to make their applications".

C. THE CONSTITUTION AND THE LAW OF CONFESSIONS

Mr. Agina stated that the 1st applicant had been arrested on 19th July, 2005 but not brought before the Court until 19th August, 2005, and that during the period of detention this applicant had been subjected to physical and mental torture contrary to the terms of s. 74 of the Constitution. It was contended that it is as the applicant underwent torture, that he was taken before a Magistrate, *Mr. Weldon Korir*, for the purpose of recording a confession. The said confession, it was urged, lay outside the legal process, for being "a violation of the separation of powers; for *Korir* was a Magistrate and not a Police investigating officer". Counsel submitted that the 30-day detention of 1st applicant was in breach of s. 72 (3) (b) of the Constitution.

Mr. Agina submitted that, by the terms of s. 3 of the Judicature Act (Cap. 8, Laws of Kenya), all proceedings in the Courts are required to run in accordance with the Constitution and the common law, but that the proceedings in the trial of 1st applicant, had not complied with this requirement.

Referring to the *Ndede* case [1991] KLR 567, learned counsel asked that the trial proceedings be terminated – for it was not the obligation of the accused to *raise* the objection; it was for the prosecution to *explain* the delay in initiating trial; and it was for the Court to *notice and query* the alleged improprieties at the very beginning.

Not only was *Mr. Agina* raising objections founded on provisions of the Constitution, it was clear he was also endeavouring to stop the prosecution from *adducing certain evidence*. That evidence had its origins in *confession*; and counsel was contending that no valid confession had taken place, and therefore, even if trial were to continue, the confession evidence should be rejected. In this respect *Mr. Agina* cited s. 25A of the Evidence Act (Cap. 80, Laws of Kenya).

Section 25A of the Evidence Act thus provides:

"*(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice."*

Although on the face of it a confession, quite clearly, may be made before a *Magistrate*, *Mr. Agina* denied that that is a correct statement of *law*; he was of the view that *the law* on the point is to be extrapolated and determined through a process of *interpretation*; and by his interpretation, s. 25A of the Evidence Act was subject to two broad norms – (i) the Constitution; (ii) the *separation of powers*; he urged that s. 25A would negate the Constitution and the separation of powers, by "turning the Magistrate into a prosecution

officer."

Clearly, an important aspect of the instant application rests on certain novel ideas about the terms of s. 25A of the Evidence Act, and about the role which that section bestows upon a *Magistrate* in relation to confessions. So sharply did counsel object to the role of the Magistrate in relation to confessions, he urged that a confessional statement should instead have been taken by *senior police officers*. *Mr. Agina* built this contention around s. 29 of the Evidence Act, which thus provides:

"*No confession made to a police officer shall be proved against a person accused of any offence unless such officer is –*

(a) of or above the rank of, or a rank equivalent to, inspector;

or

(b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer."

If the law would not, as learned counsel submits, allow a Magistrate to take a confession, could *the prosecution*, in the circumstances of this case, have used *s. 29 of the Evidence Act*, as is being proposed?

Probably *not*, because s. 25A (2) thus stipulates:

"*The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of confession in all instances where the confession is not made in court."*

My attention was not drawn to any such *confession-taking rules* having been made; and that would leave only *s. 25A (1)* as the provision regulating the making of confessions; and it then follows that, in practice, confessions must, in Kenya today, be made only *before a Judge or a Magistrate.*

What kind of confession may be thus taken before a Judge or Magistrate? This is not at all clear from the terms of the statute. But I need to advert to this point, since learned counsel brought to my attention the persuasive authority in *Republic v. Malim Komora Godana & Another*, Malindi High Court Crim. Case No. 4 of 2006. My learned brother, *Ouko, J* in that case stated as follows:

"*So confessions envisaged under section 25A can be taken before a Court presided over by a judge or magistrate – or even a Kadhi. What kind of confession can be taken by a Court? Only judicial as opposed to extra-judicial confessions can be received by [a] Court. Judicial confessions are those which are made in Court in the due course of judicial proceedings, where a suspect makes an unequivocal plea of guilty to a charge under the protecting caution and oversight of the judge or magistrate. The reception of a confession in this manner renders it unnecessary to call witnesses in support of the charge."*

The learned Judge went on to say:

"*…..it is inconceivable for judges or magistrates to be involved in receiving extra-judicial confessions made otherwise than in proceedings before them. The Court cannot abandon its constitutional mandate of an independent and impartial arbiter to descend [into] an arena where that independence and impartiality may be blurred.*

"*To ask magistrates to record confessions of suspects in matters yet to be taken to Court is to ask them to be part of the police investigation team. The inevitable consequence would not only create a clear conflict of roles but also be against public policy ……*

"*In conclusion and to the extent that section 25A of the Evidence Act does not require the Court to record extra-judicial confessions, I find that section 25A is not unconstitutional. Let the police investigate, and*

Courts adjudicate."

The Evidence Act thus defines confession – s. 25:

"*A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."*

The foregoing definition does not fully clarify certain aspects of a confession: is it made *in Court* or *outside?* Does it relate to the *complete charge*, or to *specific elements* in the charge? Before whom, is a confession made?

The law of confessions is a distinct part of Kenya's *common law heritage* which is, besides, provided for in *statute law*. From the changes to that law sought to be introduced by *s. 25A* of the Evidence Act, and from the uncertainty which resulted, as is well highlighted in the *Maalim Komora Godana* case, it is plain to me that the legislative function on the subject was *not* well conducted, and it will be necessary to call upon the State Law Office to return to that terrain. In the meantime, the judicial process must continue, and a practical approach must be adopted in relation to the law of *confessions.*

I have noted from *Black's Law Dictionary*, 8th ed (2004) that –

(i) a confession is a criminal suspect's oral or written acknowledgement of guilt, *often* including details of the crime;

(ii) a confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or some essential part of it;

(iii) a confession can be made *in Court* or *out of Court;*

(iv) an *extra-judicial confession* is one made out of Court, and not as part of the judicial examination;

(v) an extra-judicial confession must be *corroborated* by some other proof of the offence in question – otherwise it is insufficient to warrant a conviction;

(vi) an *implied confession* is a confession in which the accused does not plead guilty, but invokes the mercy of the Court and asks for a light sentence;

(vii) an *indirect confession* is a confession inferred from the defendant's conduct;

(viii) a *judicial confession* is a *plea of guilty* or some other manifestation of guilt in Court or in a judicial proceeding.

It is clear from authority that the law of confessions serves to introduce into the stock of the evidence adduced, in a criminal case, *avowals freely given by the suspect*, avowals which come in conditions of human dignity, and which, by their voluntary nature, carry ingredients of *veracity*. Thus *Lord Hailsham* thus remarked in the English case, *Wong Kam-ming v. R* [1980] A.C. 247:

"*[The essence of the discretion under the Judges' Rules] is not only because of the potential unreliability of [involuntary confessional statements], but also, and perhaps mainly, because in a civilized society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions."*

When the State Law Office reverts to the foregoing principles and comes up with more carefully-considered draftsmanship, it may find that the controversial form in which s. 25A of the Evidence Act has been cast, is entirely inappropriate.

Learned counsel devoted much attention to the subject of confessions, and cited a decision of the Court of Appeal, *Karukenya & 4 others v. Republic* [1987] KLR 458, for the proposition that "extra-judicial confessions by one accused cannot be corroborated by a similar confession of another accused" (p. 459).

The confessional statement, *Mr. Agina* contended, "comes through torture and also by way of the record of a Magistrate, an incompetent person; a Magistrate is not a Police officer." Counsel submitted that it was the duty of the Court to examine closely the circumstances in which a confession has been obtained.

D. ALLEGATIONS OF TORTURE AND DELAYED PROSECUTION

Mr. Agina urged that his client had been tortured by Police officers known to 1st accused, while he was in custody; and he called in aid an authority to exemplify torture: *Dominic Arony Amolo v. Attorney-General* Nbi High Ct Misc. Application No. 494 of 2003; this case held that being kept in one room for 23 hours a day amounted to torture, and that being held in solitary confinement too, was torture. Counsel contended that the 1st applicant had been subjected to torture: he had been insulted, and told off for alleged breaking of his celibacy vows; he had been assaulted by way of insertions into his bowels. Counsel presented these as *facts*, and urged that "that wasn't a way of finding out about the death of [the deceased]; it has vitiated the purpose of this case; they use this case to sanitize an illegal process."

Mr. Agina urged that there was no explanation for the delayed arraignment of 1st applicant in Court; for all the requirements for charging him were ready "before the 14 days elapsed." Counsel, relying on the Court of Appeal decision in *Ndede v. Republic* [1991] KLR 567, urged that if there was good cause for the prolonged detention of 1st applicant at the beginning, this should have been stated in Court during plea-taking; and it was urged that the Police had not acted under s. 37 of the Criminal Procedure Code (Cap. 75, Laws of Kenya) by making an apprehension report before a Magistrate's Court. Counsel urged that for *16 days*, 1st appellant had been illegally held. It was counsel's contention that the Court of Appeal decision, *Albanus Mwasia Mutua v. Republic* Crim. App. No. 120 of 2004, was authority requiring the premature acquittal of 1st applicant, when once it was ascertained that the applicant was held in custody for more than 14 days before being brought before the Court.

Learned counsel *Mr. Mbaluka* adopted *Mr. Agina's* submissions, with respect to the rest of the applicants. He remarked that 2nd accused had stated that, this accused had been held in custody for longer than 14 days before being charged in Court, and that he had been tortured, denied medical attention, and held incommunicado by Police officers. Counsel stated that the 3rd accused had been detained for 28 days and while thus held, had been tortured and injured. Counsel said, of 4th accused, that he too had been tortured, in an attempt to extract information from him. He said, of 5th accused, that he too had been tortured, and held by Police officers for 18 days before being arraigned in Court. Counsel said the 6th accused too, had been tortured and, in consequence, lost his capacity to hear.

Learned counsel invoked the Court of Appeal decision, *Gerald Macharia Githuku v. Republic*, Crim. App. No. 119 of 2004 in which a delay of *three days* before charging the accused in Court, was a factor in his acquittal. The pertinent paragraph in the judgment may be set out here:

"*We have come to the conclusion after a careful weighing of these two considerations [in respect of the accused's trial rights, on the one hand, and the public interest in the control of crime, on the other hand] in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 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.*

"*In reaching this conclusion we have also been mindful of the fact that the appellant has now been in custody for in excess of 12 years and that his two co-accused have died while in custody.*"

It is not immediately apparent that counsel paid regard to the *special circumstances* in which the Court reached its decision in the *Githuku* case: the facts and circumstances of each case must be taken into account; the appellant had remained in custody for a dozen years; the appellant's co-accused had already died while serving sentence. But learned counsel's perception of that case was: " *Once constitutional rights are breached, it is immaterial that there was evidence [against the accused].*"

E. OBJECTIONS AND EVIDENCE

Although both counsel for the applicants made clear-cut propositions, to propel their objections, the Court has been rather concerned about the evidentiary foundations of their cases. *No depositions* were attached to 1st applicant's original Notice of Preliminary Objection dated and filed on 5th March, 2008 which carries very broad, general grounds only. Subsequently, on 11th March 2008 the 1st applicant filed "further grounds of preliminary objection on points of law", and, although these contain statements of *fact*, they lack an *evidentiary basis* in recognized form. So, when 1st applicant presents sensitive allegations of torture and abuse by the detaining authority, he fails to provide a reliable basis for a specific *judicial finding*, in aid of his objections.

The remaining applicants, however, have gone beyond the general objection-grounds to *evidence*, in the form of a short affidavit by 2nd accused only. The difficulty this presents, again, is that allegations of torture have been made in respect of *each* applicant, yet only 2nd applicant makes depositions; and the Court would have to consider that such depositions are not intended to relate to other applicants.

I have considered the supporting affidavit sworn by 2nd applicant on 1st April, 2008; and I find that much of it has steered clear of evidentiary material which, by and large, is the proper foundation for a judicial decision. The 2nd applicant has held himself out as witness in respect of the alleged sufferings of four *other* applicants; he avers:

"That I do confirm that my co-accused persons herein the 3rd, 4th, 5th and 6th accused persons …..have expressly authorized me to swear this supporting affidavit also on their behalf."

Even if the said affidavit's content were restricted in its application to *2nd applicant*, it still has the shortfall that it does not bring out the concrete *factual details* that could enable the Court to properly address the *legal issues* framed as part of the gravamen.

The 2nd accused depones:

(i) *that my fellow co-accused persons ….. were equally kept in custody for over 26 days ….. before being arraigned in Court;*

(ii) that my co-accused persons ….. were equally blatantly breached and violated unjustifiably by the Kenya Police;

(iii) that what is deponed to hereinabove is true to the best of my knowledge and [belief] save where …..

The rest of the paragraphs of the affidavit are essentially *arguments* of law; and the effect is that the affidavit has *not* illuminated to the Court the compelling, veritable facts which would form the basis for the making of valid, conscientious orders, in response to the complaints stated.

F. EXPLAINING THE DELAY IN BRINGING THE ACCUSED TO COURT

The prosecution, by contrast, has filed a detailed replying affidavit, sworn by *Mohammed Amin*, the Rift Valley Provincial Criminal Investigations Officer, who had been one of the officers investigating the killing of the deceased.

The deponent admits that there was delay in bringing the six accused persons before the Court, but states that there was good cause to explain such delay: the accused persons were arrested on different dates, at different, far-flung parts of the country, some of these being more than 600Km away from Nairobi, and entailing "poor means of transport"; arrest could not be effected at the same time, for the accused persons had fled in different directions after learning that the Police were following in their trails; from earlier arrests and interrogations, the Police then found new clues leading to more arrests; it was not appropriate to charge the accused persons by instalments, and it was necessary to arrest all, before proceeding to lay charges; it took time to place together the evidence to serve as a basis for arraigning the suspects in Court; this explains the 12 days beyond the minimum 14 days of holding the suspects, before bringing them before the Court; investigations began at Isiolo on 14th July, 2005; 1st accused was arrested on 19th July, 2005, and from the interrogation, leads were found which brought the arrest of 2nd accused, on 22nd July, 2005; from further interrogation, it was possible to arrest 4th accused on 23rd July, 2005; on 25th July, 2005 1st accused recorded his statement carrying further and better particulars, and this helped with the process of investigation, and led to the arrest of 3rd accused; a suspect, *Isaak Abdi Mohammed* had to be taken to a Magistrate's Court to render a confession; on 29th July, 2005 the Investigating Officer acted by virtue of s. 36 of the Criminal Procedure Code, notified the nearest Court of the arrest of all the suspects, and made an apprehension report; on 1st August, 2005 the 2nd accused offered to make a confession, and was taken before the Senior Resident Magistrate's Court at Isiolo, where his statement was recorded; on 2nd August, 2005 five of the suspects were taken to a medical facility for psychiatric examination; On 2nd August, 2005 Police officers were able to trace 5th accused, who had fled North, towards the Kenyan-Ethiopian border; on 3rd August, 2005, the 5th accused was escorted to the Senior Resident Magistrate's Court at Mandera, where he recorded a confession; on 6th August, 2005 the 5th accused was escorted to Isiolo where he led the investigating team to the location of hidden arms; on 7th August, 2005 the 6th accused was arrested; on 7th August, 2005 the 1st, 2nd, 3rd, 4th and 5th accused persons were taken to hospital for the taking of blood samples; on 8th August, 2005 the 5th and 6th accused persons were taken to Isiolo District Hospital for psychiatric examination; on 15th August, 2005 the 6th accused was escorted to Isiolo Senior Resident Magistrate's Court where he had a confession recorded; on 16th August, 2005 all the accused were escorted to Makuyu Police Station from Isiolo, *en route* to the High Court in Nairobi; on 18th August, 2005 the Investigating Officer received the duly-signed information sheet from the Director of Public Prosecutions; on 19th August, 2005 the accused persons were arraigned before the High Court.

It is deponed that the details of the preparations to prosecute, as set out in the foregoing paragraph, were so complex as to provide justification for a delay of 12 days, before arraigning the accused persons in Court. The 12 days, the deponent states, are "excusable and not an inordinately lengthy period, taking into account the vast distances we had to criss-cross in the rough terrains of the northern part of Kenya."

Learned counsel *Mr. Ondari* for the respondent addressed the applicants' three basic claims: (i) that the rights of the accused protected by ss. 72(3) (b) and 77(1) and (2) of the Constitution had been violated; (ii) that the confessions of some of the applicants had been obtained by torture; (ii) that the said confession be disallowed.

Mr. Ondari urged that case authorities do not speak in one voice, regarding the detention of a suspect beyond the time-period specified in s. 72(3) (b) of the Constitution; and that even were it to be held that there had been a breach of the trial-rights set out on that provision, it did not follow that the acquittal of a suspect must ensue – as s. 72(6) of the Constitution carries provisions for compensation for detention beyond the stated length of time. Whether or not an acquittal may be ordered, in such circumstances, counsel urged, depends on the weight of the evidence adduced in Court.

Counsel also urged the novel point that were it to be the case that the applicants were held by the Police unlawfully, in the terms of s. 72(3) (b) of the Constitution, the proper course of action would have been to seek a writ of *Habeas corpus* by virtue of s. 84 of the Constitution, and s. 389 of the Criminal Procedure Code (Cap 75, Laws of Kenya). But counsel also submitted that, even were such a path of grievance followed by the applicants, it did not follow that they would be released at this stage, as the respondent might have reasonable explanation for the delay in bringing them before the Court.

G. APPLICATION OF CONSTITUTIONAL SAFEGUARDS IN THE TRIAL PROCESS

Mr. Ondari submitted that the release of an accused person on the basis of s. 72 (3) (b) of the Constitution cannot be based simply on technicalities, especially where the respondent had reasonable explanation for the delay. He urged that the Court should consider the nature of the evidence, and whether such evidence was cogent; in the words of counsel: " it's not just a matter of looking at the date of arraignment in Court; the Court has to look at the circumstances obtaining."

Learned counsel urged that the several decisions of the superior courts, on the application of s. 72 (3) (b) of the Constitution, were not entirely consistent – and so there is no clear precedent which they set up; and hence, " this Court should not follow decisions not consistent with the circumstances prevailing."

Mr. Ondari urged that the bare fact there was delay in bringing the suspect before the Court does not necessarily lead to an acquittal; what is required, in those circumstances, is a reasonable explanation of the delay. Counsel cited the persuasive authority in *Republic v. Daniel Wanyoike Mbugua*, Nbi High Ct Cr. Case No. 91 of 2004 *(Apondi, J)*, in which the following passage appears:

"*The key words ……..…are "unexplained violation of a constitutional right." In this case, the prosecution has candidly and graciously conceded that the accused was kept in custody for 50 days. However, they went ahead and gave a reasonable and cogent explanation of what actually transpired."*

Mr Ondari. submitted that *Mr. Mohammed Amin*, in his replying affidavit, had given cogent and reasonable explanation for the delay in bringing the applicants herein before the Court. He noted from the depositions that the geographical terrain to be covered in tracing witnesses, in the instant case, was most difficult, and necessarily occasioned delays.

Counsel relied on the persuasive authority in *Republic v. Hussein (No. 2)* [1990] KLR 425 *(Abdulla, J)* in which the following passage appears (P. 435):

"……*the phrase "as soon as reasonably practicable" must be considered in its wider connotations. It would be unreasonable to give too strict or narrow an interpretation to the phrase, especially when analyzing the same with regard to the [the] detention of a person reasonably suspected of murder or treason pending due police inquiry as to [the] sufficiency or otherwise of the evidence" (at p. 435).*

H. THE NATURE OF CONFESSIONS

With regard to confession, learned counsel submitted that the Court could not address the question adequately at this stage, as there are specific rules governing confessions which had not been addressed in the applications. The main control on the admissibility of confessions, it was urged, is the *Judges' Rules* – and the same had not been the basis of the objections raised by the applicants. Section 25A of the Evidence act which relates to confessions, only states *how* they may be taken, but does not *abolish* them as a source of evidence that may be adduced by the prosecution (ss. 27 and 29 of the Evidence Act).

The question is likely to remain open to forensic canvassing, whether a valid confession under the Evidence Act (Cap 80, Laws of Kenya) is only one which is made before *the very Court* hearing the relevant criminal case. Such is the opinion expressed, as already noted, by *Mr. Justice Ouko* in *Republic v. Maalim Komora Godana & Another*, Malindi High court Crim. Case No. 4 of 2006. It is apparent, however, in the light of the facts of the instant case, that the question must ultimately be resolved by

legislation, although in the short-term an appellate Court decision would give appropriate direction.

In the instant matter, learned counsel *Mr. Ondari* urged that "the reasoning that a confession must be before the trial Court is not tenable, in law; for if it must be made before *this* Court, then it can only be a *plea of guilty*, but not a confession; if the accused pleads guilty, the Court will not inquire from him how he did it; the Court will only record the plea of guilty; and that is not a confession; if in a trial, there is a change, it is a change of *plea*, but not a change of *confession*; confession presupposes the pre-trial stage."

As already noted in this ruling there are authoritative sources which indicate that a confession could be made *in the course* of judicial proceedings; but it is apparent to me, from *Cross and Tapper on Evidence*, 11th ed(Colin Tapper) (Oxford, Oxford U.P., 2007) (esp. at p. 673), that confessions are mainly seen as *statements adverse to the maker, made outside the process of trial, which may be adduced in evidence against the maker*, when the maker is being prosecuted, on the basis that the same had been *voluntarily given* and is relevant to any matter in issue during the trial proceedings.

Such a position cannot be readily reconciled with the position taken by the Court in the *Maalim Komora Godana* case.

Learned counsel has contested the applicants' contention that the Magistrates' Courts could not validly take confessional statements from accused persons, on grounds linked to the constitutional principle of the *separation of powers*. In the words of counsel: "*Is this Court being asked to nullify a provision of law made by Parliament, on the basis that it does not recognize separation of powers. It is not possible."*

Mr. Ondari urged, contrary to the applicants' position, that it was not the case the Magistrates' Courts, by taking confessional statements, were descending into the Executive's arena of investigation. What the applicants are proposing, learned counsel urged, is contrary to the *intent of Parliament*; because the role of confessions is clearly provided for in law, and the amendment to the Evidence Act which, in 2003 introduced s. 25A of the Act, did not *abolish* confessions. Counsel urged that the admissibility or otherwise of confessions was only subject to the *Judges' Rules* – and the matter can only be canvassed during the *substantive proceedings*. Pertinent facts in respect of the confessions in question, and so far as the same touch on the Judges' Rules, counsel submitted, are not placed before the Court at this stage – and hence the applicants' objections on his ground are premature.

I. DELAYED ARRAIGNMENT IN COURT: WHEN SHOULD THE QUESTION BE RAISED?

Learned counsel submitted that the complaint made about delays in arraigning the applicants in Court, was coming too late in the day. The Court of Appeal, in the very recent case of *Dominic Mutie Mwalimu v. Republic*, Criminal appeal. No. 217 of 2005 had thus stated the relevant principle:

"*In deciding whether there has been a breach of [s. 72(3) of the Constitution] … the Court must act on evidence. Additionally, a careful reading of section 84(1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity."*

Counsel urged that the foregoing principle had not been observed by the objectors, considering that as many as 34 prosecution witnesses have already been heard.

J. ALLEGATIONS OF TORTURE

As regards the objector' claims that they suffered torture at the hands of the Police, *Mr. Ondari* submitted that the claims had no factual basis; there was no detail to elaborate the circumstances attending the alleged ills; and there was no evidence given to authenticate the allegations. On health situations claimed to have been harmed by the Police, counsel urged, medical personnel would be called as witnesses; and it is to them that the objectors should pose questions, so the truth may out.

Mr. Ondari urged that the prosecution has always been ready to call witnesses, so that the trial may be

concluded expeditiously; and he urged the Court to give directions for the trial to proceed.

Learned counsel *Mr. Agina*, in his response, maintained that the instant objections had come at the appropriate time and were not belated – because this is the trial Court. In counsel's view the objectors had complied with the principle stated in *Dominic Mutie Mwalimu v. Republic*, regarding the time of moving the Court.

K. RESOLVING THE ISSUES

The question for decision is whether this Court, after going through the motions of trial for more than two years, in the course of which more than 30 witnesses have been examined, cross-examined and re-examined, should grant the prayers by the six accused persons, that the proceedings be terminated as a nullity, and the objectors be set free at this stage in the trial. I will return to the grounds raised by the objectors, and determine each one of them before stating the overall outcome.

(a) *Delay in Arraigning the Accused Persons in Court*

The respondent concedes having held the objectors for some 12 days over and above the time-prescriptions in s. 72(3) (b) of the Constitution, before having them arraigned in Court; and for that reason they ask to be acquitted prematurely, on the grounds that their constitutional rights were violated.

Although the objectors' counsel have cited a large number of case-authorities which they submit, reinforce their claims, they have generally not taken account of many other cases, the essential point of which is stated in the very recent Court of Appeal decision in *Dominic Mutie Mwalimu v. Republic (op. cit.).* That decision consolidates key pointers which had always lain in earlier decisions of the Court of Appeal which, however, had *not* been fully acknowledged by counsel who regularly appear before the superior courts. Although quite repeatedly counsel would cite decisions such as *Albanus Mwasia Mutua v. Republic*, Crim. App. No. 120 of 2004; *Gerald Macharia Githuku v. Republic,* Crim. App. No. 119 of 2004;*Eliud Njeru Nyaga v. Republic,* Crim. App. No. 182 of 2006; *David Waiganjo Wainaina v. Republic,* Crim. Appeal No. 113 of 2005; *Morris Ngacha Njuguna & 3 others v. Republic*, Crim. Appeal No. 232 of 2006 – they would draw from these cases only the composite principle, that detentions before arraignment in Court should not be for periods of time longer than 14 days, in cases involving capital offences, and 24 hours, in cases entailing lesser offences. It was not always urged by counsel before the Courts, that such was only a *general rule*, but with exceptions. The exceptions relate to the circumstances of each individual case, as the same may be judiciously assessed by the Court, in relation to *bona fide* explanations of delay such as may be given by the detaining authority.

On the basis of the *Mutie Mwalimu* case, this Court has considered the *evidence* placed before it, in relation to the objections raised. The Court has, in this respect, taken *judicial notice* of the difficult terrain of the Northern part of Kenya, and of the difficulty of transport and communication in those far-flung parts of the country; and the Court considers the explanation of delay in prosecuting the objectors, as given in the depositions, quite reasonable *in the circumstances*. The said delay in arraigning the objectors in Court, therefore, is held not to offend the terms of s. 72 (3) (b) of the Constitution – and so, this is not a ground for annulment of trial proceedings.

(b) *Are the Objections too belated to be entertained?*

In the *Mutie Mwalimu* case, the Court of Appeal stated that any objection to trial proceedings, in relation to the provisions of s. 72 (3) (b) of the Constitution, ought to come forth at an *early stage* and not after the passage of a long period of time. To this point, I have myself given attention, and I have appreciated the rationale which is contemplated. This was in *Ponnuthurai Balakumar v. Republic*, Nbi High Ct. Misc. Crim. Application No. 218 of 2008, and the relevant passage thus reads:

"*It is desirable, as a practice, that complaints of the kind involved in the application should be expressed at the very beginning, so that the trial machinery is not engaged in vain …..*"

I may add to the foregoing principle, especially in the light of the facts of the instant case. By the Constitution (see ss. 60 and 123(8), and by the Judicature Act (Cap. 8, Laws of Kenya), this Court has been set up and entrusted with the public responsibility of hearing and determining justiciable complaints placed before it in accordance with the law. When this Court is seised of a matter, and it devotes public facilities and public time to the disposal of the same, the Court is in the motions of a fundamental *constitutional obligation*. It will not be proper to seek the countermanding of that constitutional role only after the Court has already heard *34 witnesses*, in a case that, quite clearly, is of grave importance to the citizens of this country, without commensurate justification. So in the instant matter, a complaint based on s. 72(3) (b) of the Constitution should have been raised at *an early stage*. Where it would appear that separate and conflicting claims are being attributed to the Constitution, it will be the responsibility of the Court to exercise its *judicial discretion* in interpretation, and to determine which of the claims is or is not to be upheld. And in the instant case, this Court would not allow stoppage to, or delay in the conduct of the ongoing trial as prayed by the six accused persons, on the basis of s. 72 (3) (b) of the Constitution.

The setting in the trial process, just as in the instant objections proceedings, must aim ultimately at according the judicial process an *opportunity* to give just outcomes. Whereas, as already noted, the foundations of the objections are not built around dependable *evidence*, the main cause has been providing, and will continue to provide an opportunity for full-scale evidence, in the form of examination-in-chief tested by cross-examination, and the outcome, with a proper analysis of the evidence, cannot but be a *fair* determination. This Court determines it to be the right course, in the circumstances, that the accused persons should undergo the full trial, and have justice delivered unto them through that process, in place of the shortened procedure which they have sought, but which lacks the ingredients for producing a just result.

(c) Constitutional-rights claims to have an Evidentiary Basis

The objectors have founded their application on torture-claims; and that, clearly, falls within the terms of s. 74 of the Constitution which relates to protection from *inhuman treatment*. Although it is known that all the objectors have been in the hands of the Police authorities, it cannot be taken on bare assertion, that they were subjected to torture, in the absence of concrete *evidence* set out under solemn, prescribed procedure. Without evidence of such quality, the Court has no basis for making *judicial determinations*, and issuing final orders for obligatory compliance.

The objectors did *not* provide such evidence, even though they asked this Court to hold that their rights had been violated, and then on that basis, to acquit them prematurely. I find that there is no basis for making such orders.

(d) Does Confession raise a Constitutional Question which shows the Objectors' Trial Rights to have been breached?

As already noted in this ruling, *confession* is a recognized aspect of the law of evidence in force in Kenya. Section 25A of the Evidence Act, however, has *varied the common law of evidence*, by requiring that for a confession to be admissible in evidence it should have been taken *before a Magistrate or a Judge*. Confession, by definition, *can* involve only a certain set of facts which do not constitute the totality of the offence charged; but it *could* also entail the totality of the offence charged.

For practical purposes reflected in Kenyan judicial experience, a confession made in Court, just as learned counsel *Mr. Ondari* urged, would be a *plea of guilty*, if it was in respect of the totality of the offence charged; but if it was only in respect of a certain limited fact in the charge, then it would be referred to as an *admission*, and the Court would be entitled to take it into account, in the assessment of evidence.

Confession, therefore, in the context of the law in force in Kenya, must be held to refer only to statements made *outside the Court where the trial of the maker is taking place*. And by s. 25A of the Evidence Act, such a confession has to be made *before a Magistrate or a Judge*. A Magistrate or Judge who records a confessional statement, I think, is acting *in accordance with the legislation in place*; he or she is not acting contrary to the constitution, or to any governing oath of office. I must hold, in the circumstances,

that a confessional statement so taken is valid evidence, subject only to the application of *Judges' Rules* by the Court *trying* the maker of the statement. It follows, in my opinion, that there is no constitutional or other law or principle in place which can be said to *annul* the confessional statement so taken, so long as confession still remains part of Kenya's law of evidence.

I will hold, in the light of my earlier finding that the objections herein lack evidentiary support, that no constitutional rights of the accused persons were violated when confessional statements were taken from them, before Magistrates in accordance with s. 25A of the Evidence Act (Cap. 80, Laws of Kenya).

L. ORDERS

I have given careful thought to the objectors' prayers; I have come to the conclusion that the same are to be dismissed; I hereby dismiss them, and make orders as follows:

1. Trial of the main cause shall proceed with frequency and on the basis of priority, in accordance with dates to be announced in Court.

2. The Deputy Registrar shall, by due protocol, provide to the State Law Office a certified copy of this ruling, to facilitate a more careful consideration, with a view to redrafting, of Section 25A of the Evidence Act (Cap. 80, Laws of Kenya).

3. The accused persons shall continue to be remanded in custody.

DATED and DELIVERED at Nairobi this 26th day of November, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court clerk: Huka

For the 1st Accused: Mr. Agina

For the 2nd – 6th Accused: Mr. Mbaluka

For Respondent: Mr. Ondari