REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION 52 OF 2008

MAKOKHA IMBIAKHA :::::::::::::::::::::::::::::::::::: APPLICANT

V E R S U S

REPUBLIC :: RESPONDENT

R U L I N G

The applicant seeks a declaration that his incarceration for a period that was in excess of that which is allowed under the Constitution of the Republic of Kenya, constitutes an infringement of his constitutional rights to liberty.

He asks this court to declare that because his constitutional rights had been infringed, he would not get a fair trial.

Therefore, he asks this court to set him at liberty forthwith.

When the matter came up before the court on 9th October 2008, the court directed that the charges of murder, which had been preferred against the applicant, be terminated forthwith. I also ordered that the applicant be set at liberty forthwith, unless he was otherwise lawfully held.

Having secured the liberty of the applicant, I reserved my reasons until now.

The uncontroverted facts are, firstly, that the applicant was arrested on 21st March 2008. The police told him that he was being arrested because, one **JARED MULUPI**, whom the applicant had allegedly assaulted earlier, had now passed away.

The applicant was held in custody at the Kabras Police Station for 2 months.

It was not until his advocate filed a "*Habeas Corpus application*" that the applicant was brought to court for the first time. That was on 27th May 2008, and he was charged with murder.

However, the applicant decided to file a petition to challenge the legality of his long detention in the police cells. And whilst still pursuing his constitutional rights, the applicant asked that the plea be deferred.

By the 9th of October 2008, when the application came up for hearing, the state had not filed any replying affidavit. And, the learned senior state counsel, Mr. D. Karuri, candidly admitted that the police had not given him any valid explanation for the delay in bringing the applicant to court.

It was because the state did not even attempt to offer an explanation for the delay that this court decided to set the applicant free forthwith.

In **ELIUD NJERU NYAGA Vs. REPUBLIC, CRIMINAL APPEAL NO.182 OF 2006,** the Court of Appeal said, inter alia;

"***While we would reiterate the position that under the fair-trial provisions of the constitution, an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences, yet it would be unreasonable to hold that any delay must amount***

to a constitutional breach and must result in an automatic acquittal."

I have deemed it necessary to make reference to that decision because the applicant herein had also asked this court to declare that because of the delay in bringing him before the court, he would not get a fair trial.

Just as the Court of Appeal stated, not all delays constitute a constitutional breach, which would result in an automatic acquittal. But then it is clear that it is only when the state gives a reasonable explanation, and satisfies the court that the accused person had been brought to court as soon as reasonably practicable, that the court would hold that there was no constitutional breach.

In my considered view, that has always been the position. I say so because even in the celebrated decision of **ALBANUS MWASIA MUTUA Vs. REPUBLIC, CRIMINAL APPEAL NO.120 OF 2004**, the Court of Appeal held as follows;

"***The jurisprudence which emerges from the cases we have cited in the judgement appears to be that an unexplained violation of a constitutional right will normally result in an acquittal…….***"

In this case, the applicant had been in custody for a period of 7 months, by the time this application came up for hearing. That length of time is comparable to that in the case of ALBANUS M. MUTUA, in which the Court of Appeal held that the appellant was unlikely to have his trial held within a reasonable time.

I am not only bound by that decision but I find myself persuaded about its accuracy and sense of justice..

In **GERALD MACHARIA GITHUKU V. REPUBLIC, CRIMINAL APPEAL NO.119 OF 2004**, the Court of appeal said that;

"***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.***"

Therefore, it is clear that regardless of the nature of the offence with which an accused person has been charged, his constitutional rights must be respected.

In the circumstances, although the applicant was charged with murder, having held that the state had violated his constitutional rights, and also that no explanation at all was offered for the long delay before the applicant was brought to court, I find and hold that he is entitled to an acquittal.

Therefore the criminal charges against him shall be terminated forthwith, and the applicant shall be

set at liberty, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Kakamega, this 3rd day of December 2008.

FRED A OCHIENG

J U D G E