



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE**

**Miscellaneous Criminal Appeal 1 of 2009**

**NAHASHON NYONGESA WAWIRE**

**GILBERT SIFUNA MAKOKHA.....APPLICANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

The applicants herein are charged with robbery with violence contrary to section 296(2) of the Penal Code. The case is still pending for trial.

By a Miscellaneous criminal application pursuant to section 72 of the Constitution of the Republic of Kenya, the applicants raised a constitutional issue to the effect that their rights were violated by the police in detaining them for 29 days without proffering charges.

On the one hand, it was contended by accused No. 1 that he was arrested on 7<sup>th</sup> April 2007, detained at Narakholo Police Post in Kakamega from where he was transferred to Nyayo Police Post on 7<sup>th</sup> April 2007 and was received at 11.30am. Subsequently he was escorted to Kitale Police Station at 6.36pm the same day. He was finally charged on 4<sup>th</sup> May, 2007 with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

On the other hand, it was contended by the 2<sup>nd</sup> accused that he was arrested on 6<sup>th</sup> April 2007 and held at Nyayo Patrol Base. On the same day he was received at Kitale Police Station. Subsequently, he was charged on 4<sup>th</sup> May 2007 with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

On 15<sup>th</sup> December 2008 the subordinate court formed the following questions for the determination of the High Court.

(1) Does the state have any reasonable explanation for the pre-detention of the accused persons contrary to section 72 (3) (b) of the constitution?

(2) What is the consequence if answer to (1) above is yes or no?

It is a well known principle in the administration of justice that each case has to be determined on the basis of its special facts and circumstances. In the regard, I call in aid the binding authority of **DOMNIC MUTIE MWALIMU Vs REPUBLIC, (C.A.) NO. 217 OF 2005** – the following passage in particular.

**“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. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of s. 72(3)..... is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the.....provision the court must act on Evidence.”**

Pursuant to the allegations of the applicants the prosecution was called upon to give their explanation. The investigating officer, PC Tarzen, offered an explanation that they were still tracing the complainant to write a statement on the basis of which the police could prefer a charge.

The applicants case, as I understand it, is that they were detained beyond the 14 days during which they could have been detained prior to being charged. That the explanation given by the prosecution in justifying the delay is not reasonable. The delay was thus unlawful hence in breach of the applicants constitutional, trial rights.

In my considered view, the Constitution itself has a provision in section 72(6) for possible

compensation for breach of accused's trial rights. Accordingly, I am of the view that the court has a discretion as to what remedy to allow, where there is breach.

Being of that persuasion, I have carefully perused the record. It is clear to me that applicants were detained for a period beyond 14 days period before being charged in court with a capital offence. The explanation, as I understand it, is that the police were looking for the complainant to write a statement to form a basis of the charge. Given that some complainants were injured, that explanation does appear to me to be unreasonable given all the facts and circumstances of this case as can be discerned from the record.

I hold that in the circumstances of this case, that does not amount to violation of applicants constitutional trial rights embodied in section 72(3) of the Constitution of the Republic of Kenya. Even if it were so, which is denied, the applicants are not without a remedy in law – section 72(6). The applicants are at liberty to make application to the High Court for compensation courtesy of section 72(6) of the Constitution of the Republic of Kenya.

That being my view of the matter, I now answer the questions posed as follows:

(1)The state had proffered a reasonable explanation for the pre-detention of the two accused persons beyond the twenty four (24) hour period courtesy of section 72(3) (b) of the Constitution of the Republic of Kenya.

(2)Even if it were so, which is denied, the applicants are not without a remedy. They are at liberty to make an application to the High Court for compensation courtesy of section 72(6) of the Constitution of the Republic of Kenya.

In the meanwhile the trial file shall forthwith be returned to the trial court, so that the said court continues with the trial as enjoined by the Criminal Procedure Code.

It is so ordered.

Dated and delivered at KITALE this 2<sup>ND</sup> .day of JULY2009.

**N.R.O. OMBIJA**

**JUDGE**

**Mr Mutuku for Republic**

**Both accused - present**