



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 21 of 2007**  
REPUBLIC..... PROSECUTOR

v

**NJOMO KAMAU GACHER alias**  
**KAROGO.....ACCUSED**

**R U L I N G**

The court was moved by way of a Notice of Preliminary Objection which invoked the provisions of Section 72 (3) (b) and Section 77 (1) (2) (a) (b) and (c) of the Constitution of the Republic of Kenya.

It is the applicant's contention that his constitutional rights;

**“had been, are being and are likely to be violated by the prosecution.”**

The accused told the court that he was arrested on 23<sup>rd</sup> October 2006, but was not taken before any court of law until 21<sup>st</sup> March 2007. By his calculations, he was held in custody for 116 days, before being taken to court.

Therefore, as Section 72(3) (b) of the Constitution stipulates that an accused person who faces a criminal charge whose penalty upon conviction is the death sentence should be taken to court within 14 days of his arrest, the accused submitted that he had been held in custody for an extra 102 days.

As far as he is concerned the said delay of 102 days had not been explained.

His further submission was that even if there had been an explanation for the delay, the Constitution did not contain any provision that allowed such a delay.

This court was told that when it is faced with a situation in which the fundamental rights of an accused had been breached, the court would have no alternative but to put down its pen and declare the proceedings a nullity.

The accused submitted that any continuation of the case against him herein would be founded on an illegality. Therefore he argued that he ought to be acquitted and set free, in the interest of justice. As far as the accused was concerned, it is only by setting him free that the court would be upholding the Constitution.

In support of his submissions, the applicant's advocate, Mr. Kariu, cited the decision of

## **ALBANUS MWASIA MUTUA V. REPUBLIC CRIMINAL APPEAL NO. 120/04.**

In his understanding of that decision, the appellant was acquitted after the court declared the proceedings a nullity.

And, as that was a decision of the Court of Appeal, Mr. Kariu, advocate for the accused, reminded me that it was binding on a Judge of the Superior court. I was therefore urged to apply to this case, the findings made in that authority.

When called upon to answer to the issues raised, the learned state counsel, Miss R. Wafula, first conceded that there had been a delay in taking the accused before the court. However, it was her contention that that alone should not be a basis for the automatic acquittal of the accused.

As far as she was concerned an accused person who was taken before the courts after the lapse of the time allowed under Section 72(3) (b), should, if he feels aggrieved by the delay, seek compensation pursuant to section 72 (6) of the Constitution .

Secondly, the respondent submitted that the state stood in the place of the deceased person, to fight for his rights.

In that respect, the respondent submitted that pursuant to section 70(8) of the Constitution, the deceased had been entitled to his life. Therefore, the respondent believes that the life of the deceased should not have been deliberately taken away from him. This court was asked to take into account the provisions of Section 70(8) and section 71 (1) of the Constitution, when determining the application herein.

After the respondent concluded its submissions, the accused submitted that following the concession (by the state) that there was a delay in taking the accused before a court of law, the proceedings were a nullity.

The accused also said that section 72(6) of the Constitution was inapplicable to this case. His reason for that submission was that whereas section 72(6) talks of compensation being paid by a person, the state was not a person.

The understanding of the accused was that the court should adopt the meaning of the word "person" from the definition spelt out in **section 3 of Interpretation and General Provisions Act**. If that be done, the accused submitted that a "person" means a human being, as opposed to a legal person.

Furthermore, this court was invited to find that if a "person" was construed in such a manner as to include the state, then the accused would be compensating himself as the state encompasses both the accused and the complainant.

In the light of that final submission, the court did inquire from Mr. Kariu if the Constitution did specify that an accused person who had been taken before the court later than stipulated in the constitution should be acquitted. His answer was that the Constitution did not contain any provision which specifically stated that there should be an acquittal. However, in his view, the Court of Appeal had put life into sections 72(3) (b) and 77 of the Constitution.

I then sought to know from the accused how section 72(6) could be given life. His answer was to the effect that he was unaware of any decisions by the courts, which provided that the accused should be compensated.

In determining this application, I did first peruse the record before me. In the said record, I found the replying affidavit of **Police Constable Francis Mulwa**, which was sworn on 16<sup>th</sup>

March 2009. By the said replying affidavit, Pc Francis Mulwa attributed the delay in taking the accused before the court, to a delay which arose in obtaining the typed postmortem report.

As the postmortem examination was carried out on 27<sup>th</sup> October 2006, (which date Pc Mulwa erroneously indicated as 27<sup>th</sup> October 2007), I find that the explanation tendered was not plausible nor reasonable.

Secondly, although the accused said that he was first taken to court on 21<sup>st</sup> March 2007, the court records show that the accused was brought before Apondi J. on 13<sup>th</sup> March 2007.

Notwithstanding the error as to the date cited by the accused, the fact remains that there was a delay between 23<sup>rd</sup> October 2006 and 13<sup>th</sup> March 2007. By my calculations, there was a delay of about 120 days.

Because of the length of the delay, I do not think that it was reasonable to attribute it simply to a delay in getting the postmortem report typed.

Having concluded that the explanation offered by the state was not reasonable, it follows therefore that the state failed to satisfy me that the accused was taken before a court of law as soon as was reasonably practicable.

In the event, the state has failed to discharge the onus placed upon it by the provisions of section 72(3) (b) of the Constitution. In the light of that failure, I have no option but to hold, as I hereby now do, that the constitutional rights of the accused were violated by the state. In particular, it is the police who held the accused in custody for much longer than is allowed by the Constitution.

The next question is whether I should now proceed to declare the proceedings a nullity.

The applicant did not persuade me with his reasoning, to the effect that the case was founded on an illegality. I say so because the arrest and the initial detention of the accused in police custody was perfectly lawful.

Thereafter, once the detention exceeded 14 days, the same became objectionable. However, even at that stage, the state still had an opportunity to try and satisfy the court that the accused had been taken to court as soon as was reasonably practicable. It is only when the state failed to satisfy the court in that regard, that this court made a finding that the constitutional rights of the accused had been infringed.

Notwithstanding that finding, the court was not addressed on the legality or otherwise of the charge or the information. Yet, pursuant to the provisions of section 274 of the Criminal Procedure.

***“The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court sees cause otherwise to order, and the information shall be read over to him by the Registrar or other officer of the court, and explained if need be by that officer or interpreted by the interpreter of the court, and the accused person shall be required to plead instantly thereto, unless, where the accused is entitled to service of a copy of the information, he objects to the want of service, and the court finds that he has not been duly served therewith”***

In my understanding, criminal proceedings are founded upon a charge or an information. It is to that charge or information that the accused pleads either “guilty” or “not guilty”. And after the trial, the accused may be acquitted of the charge or he may be convicted on either the offence he had been charged with or for an offence which was minor to that he was charged with, if the

prosecution proved facts which disclosed all the particulars of that lesser offence.

An accused person does not have to be detained in police custody before charges can be preferred against him. And even after he had been charged, he does not have to remain in custody during his trial, unless the offence for which he had been charged was not bailable. Therefore, I cannot understand why an irregular, unlawful or unconstitutional detention of the accused would have the effect of automatically annulling either the charge or information, or proceedings which flow from an otherwise regular and lawful charge or information.

Section 77(1) (b) stipulates that an accused person shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he has been charged.

As the trial proceedings do, in my understanding, only commence when the accused person is charged, and because trials are conducted by independent and impartial courts established by law, it would be improper to declare such proceedings a nullity on the strength of the actions or omissions of police officers or other state agents who have no authority over the trial.

Although the accused herein did submit that that is what the Court of Appeal stated in the case of **ALBANUS MWASIA MUTUA Vs. REPUBLIC** (Supra), he was unable to pinpoint any such holding in that authority. I too failed to trace any finding therein to the effect that proceedings would be rendered a nullity as soon as there was a finding that the constitutional rights of an accused had been violated.

Of course, by virtue of being a court that is ranked higher than the superior court, the Court of Appeal's decisions are binding on the High Court. For the sake of orderliness in the manner in which judicial officers adjudicate over cases before them, there can be no two ways about that. Also, it is the only way that society can have confidence in the certainty of legal jurisprudence as espoused by the highest court in the land. That too would help enhance the orderly manner in which people go about their affairs, as they would know that in the event that certain things were either done or omitted, the consequences of such actions or omissions were predictable.

In that regard, I have already stated that there is nowhere in the legal authorities made available to me, in which the Court of Appeal has held that if an accused person was detained for longer than is permissible under the Constitution, the proceedings would be rendered a nullity.

Meanwhile, whether or not the state is a "person" in law, would not be material at this stage. I say so because Section 72(6) of the Constitution provides that it is the person who unlawfully arrested or detained the accused, who would be obliged to pay compensation to the accused. At present, there is no basis in law, for the accused to assume that if he were to be paid compensation, it is the state which will be ordered to do so.

In any event, I do not subscribe to the view that if it is the state which were to be ordered to pay compensation, the accused would be paying himself. First, the accused person cannot be equated to the state nor can the accused and the estate of the deceased be deemed to constitute the state. The state is much much bigger than the accused and the deceased.

If it were to be held that whenever the state was ordered to compensate someone, that person would be compensating himself, that would imply that the civil claims mounted against the state, for compensation arising either out of tort or contract, would all be self-defeatist. However, in reality people do sue the state regularly, and many do obtain compensation: but none has to pay himself, when he is awarded compensation.

Therefore, it is still possible, in my considered view, for the accused person to obtain compensation from the person who detained him for a period that was longer than acceptable

under the Constitution.

That being the position, if the accused were to be acquitted at this stage, and if he then went ahead to also successfully lodge a claim for compensation, he would have been doubly successful.

In contrast, the family of the victim and the society would have been deprived of an opportunity to prove the guilt of the accused. At the same time, the very society, of which the victim's family was a part, may be compelled to compensate the accused.

If such developments did take place, it would be a great injustice, in my humble view.

When I asked the learned advocate for the accused person to tell me where in the Constitution, it was provided that a person whose constitutional rights had been violated should be acquitted, Mr. Kariu conceded that there was no such a provision in the Constitution.

Therefore, when the accused person emphasized that the court should enforce the provisions of the Constitution, I asked him when section 72(6) would be applicable.

The answer was that the accused was unaware of any cases in which that Section has been applied.

In **REPUBLIC V PAUL NJEHA KANUGU, CRIMINAL CASE NO. 96/05**, Apondi J. had occasion to state as follows;

***“Justice, fairness and logic dictate that this case be decided on the entire evidence on record. I do believe that the circumstances of this case justifies handsome and adequate compensation for the violation of the rights of the accused under Section 72(6) of the Constitution. By the end of the day, this court completely concurs with the basic principle of law that an accused must be considered innocent till proved otherwise. I do wish to give the accused a chance to defend himself against the allegations made by the prosecution.”***

Of course, that case had reached the stage when all the prosecution witnesses had already testified. That fact did undoubtedly influence the decision of the learned Judge. However, that fact does not in any manner diminish the fact that although the constitutional rights of the accused had been infringed, the trial was not rendered a nullity nor was the accused acquitted. Instead, the court did suggest to the accused that he should proceed to pursue compensation.

Would such compensation only become payable if the proceedings before the court were illegal, as suggested by the accused?

In my considered view, the provisions of section 72(6) of the Constitution speak for themselves. They do not contain any requirement that proceedings be declared either illegal or null and void, before compensation can become payable. The section provides as follows;

***“A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”***

In effect, for an accused person to become entitled to compensation, he only needs to prove that his arrest or detention was unlawful.

But would not the award of compensation be a furtherance of the illegality of the detention of the accused, if the proceedings were not determined?

To my mind, the award of compensation would provide the accused person with the only

remedy to which the Constitution says he is entitled to. If he were to be awarded compensation, whilst the proceedings were also terminated, the accused would be getting double remedies for one violation; whilst the family of the victim and also the society in Kenya would have been deprived of an opportunity to prove the alleged guilt of the accused. Not only will the society have had the rug pulled-out from under its feet, but it would also be required to pay compensation to the accused. As the family of the deceased was a part of the society, that implies that both the family and the society in general, would suffer double jeopardy.

My sense of justice tells me that if the accused's rights are violated, he ought to be compensated. However, he should then continue to stand trial as the enjoyment of his rights and freedoms are subject to the rights and freedoms of other persons as well as to public interest. That is what is stipulated in section 70 of the Constitution.

In the event, I find and hold that the accused's constitutional rights under section 72(3) (b) have been violated.

However, I decline to declare the proceedings either illegal or null and void. The prosecution is therefore at liberty to lead evidence in support of the information which they filed herein.

Meanwhile, the accused may, in separate proceedings, pursue his entitlement to compensation for the unlawful detention.

**Dated, Signed and Delivered at Nairobi, this 7th day of July 2009.**

**FRED A. OCHIENG**

**JUDGE**