

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CONSTITUTIONAL REFERENCE 7 OF 2009

SALIM MUTAI KIPKORIR.....APPLICANT

AND

REPUBLIC.....RESPONDENT

RULING

The applicant has moved this court under **section 84(3) and 72(3) of the Constitution** praying that this court finds that his rights under section 72(3) of the Constitution have been infringed by the State. He complains that having been arrested on 9th October 2007 and charged with the offence of store breaking and committing a felony, contrary to section 306 of the Penal Code, which is a bailable offence, he was held in police custody for nine days without being arraigned in court. He claims that he was first taken to court on 18th October 2007. The questions sought to be determined under this reference, which was filed pursuant to a ruling of the Honourable Principal Magistrate Mr. Kingori on 27th February 2009 are;

1. *Whether the accused was held (in police custody) for nine days without being arraigned in court.*
2. *Whether the explanation by the prosecution that the complainant and the accused were negotiating a (settlement) is an acceptable explanation for the delay in arraigning the accused before court.*
3. *Whether the accused's constitutional rights under section 72(3) of the Constitution were violated.*

The applicant contends that he ought to have been taken to court within 24 hours of his arrest. He asked that this court should find that his rights under section 72(3) were indeed infringed in that he was held in incarceration for an unreasonably long period without any justifiable reason.

The State represented by the learned State Counsel Mr. Mugambi conceded the petition when submitting in reply thereto on 26th June 2009. He stated that he had not obtained sufficient reasons to support the holding of the applicant in custody for more than nine days as stated in his petition.

As recorded in the file forwarded to this court along with the reference it appears quite clearly that the petitioner's case was first mentioned before the Principal Magistrate on 8th October 2008 under a skeleton file. The learned trial magistrate ordered that the prosecution do supply the court with a copy of the charge while directing the registry to trace the original court file. The matter was stood over on 22nd October 2008 when the prosecution submitted that it did not have the Police file, causing the matter to be stood over again to the 28th October 2008. The prosecution informed the court during that mention that the police file was not available, which meant that a copy of the charge sheet could not be made available to court. The petitioner, who was then present protested, stating that the prosecution had had enough time to either trace the file or apply for a reconstruction.

On 11th November 2008 the matter was mentioned before the Chief Magistrate the Hon. W. Juma, who

ordered that the prosecution do produce the charge sheet for the case to proceed. Still the police file was said to be missing even on subsequent mentions before the Chief Magistrate, causing the learned Chief Magistrate to issue summons for the O.C.S. Nakuru to attend court and explain. When IP John Awour attended court for the O.C.S., he submitted that he had traced the police file in the prosecutions office where it had been held for two weeks. The court accepted the explanation and proceeded to take the applicant's plea. He pleaded not guilty.

It is not disputed that the applicant was arrested on 9th October 2007. It also admitted that he was held in police custody for nine days without being charged in court. In the absence of the original file which would enable this court to consider the reasons offered by the prosecution for holding the appellant for that period without him being arraigned in court or even explain the gap I am satisfied that no reasonable explanation has been tendered by the prosecution in order for the State to discharge its obligation under section 72(3) of the Constitution which I have no hesitation in finding has been violated in respect of the applicant. The facts and circumstances herein clearly show that the applicant's right to a fair trial has been greatly compromised. For that reason I find that the petition ought to succeed and I hereby allow the same, taking into consideration also that it took over one (1) year to take the applicant's plea. Accordingly the charge is dismissed and the petitioner is hereby set free. He shall be released from custody forthwith.

Dated, signed and delivered at Nakuru this 2nd day of July 2009

M. G. MUGO

JUDGE