



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CRIMINAL CASE 68 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

BERNARD KUNGU KARIUKIACCUSED

R U L I N G

It is common ground that the accused was arrested on 19th July 2008, which was a Saturday. It is also common ground that the accused was first taken before a court on 5th August 2008.

By the calculations of the accused, he ought to have been taken before a court of law, by 1st August 2008, a Friday; failing which he should have been taken to court on 4th August 2008, a Monday.

But the calculations of the respondent indicate that the accused was held in police custody for not more than 14 working days.

In the event that the accused was held in custody for more than 14 days, and if the respondent did not offer an explanation to satisfy the court that the accused was nonetheless taken to court as soon as was reasonably practicable, the constitutional rights of the accused would have been violated.

The Constitution does not limit to “working days” the period within which an accused should be taken to court. Section 72(3) (b) of the Constitution simply talks of days, not working days.

Secondly, in calculating the number of days, the provisions of Section 57(a) of the **Interpretation and General Provisions Act** stipulate that;

“In computing time for the purposes of a written law, unless the contrary intention appears –

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done.”

In this instance, the thing that was done was the arrest of the accused person on 19th July 2008. Therefore, that is the only day to be excluded from the calculations of the 14 days. There is no legal basis

for excluding Sunday 20th July 2008, as suggested by the respondent herein.

Pursuant to Section 57 (b);

“If the last day of the period is a Sunday or a public holiday or all official non-working days (which days are in this Section referred to as excluded days), the period shall include the next following day, not being an excluded day.”

Clearly therefore, Sundays, public holidays or any other excluded days, are only to be ignored if they fall on the last day of the period. All other Sundays, public holidays or other excluded days will be counted if they fall within the period, as opposed to falling on the last day of the period. The rationale of excluding the said days when they fall on the last day of the period, is that on those days, it would be impossible for the act or thing to be done, as the places at which the same could be done, would be in operational. For instance, courts do not sit on Saturdays, Sundays or Public Holidays. Therefore, to demand that accused persons be taken before the court on any of those days would serve no purpose as the courts would not be operational.

As the accused herein was arrested on 19th July 2008, it follows that he should have been taken to court by 2nd August 2008, which was a Saturday.

Therefore, pursuant to the provisions of Section 57(b) of the **Interpretations and General Provisions Act**, the accused should have been taken to court by Monday, 4th August 2008.

By taking the accused to court on 5th August 2008, the respondent was late by one day.

Contrary to the assertion of the accused, that delay does not automatically constitute a violation of his constitutional rights.

In **DOMINIC MUTIE MWALIMU CRIMINAL APPEAL NO. 217 OF 2005**, the Court of Appeal said;

“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 has 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 twenty-four hours on the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution.”

In this case the Investigating Officer has filed a Replying Affidavit, in which he spelt out the details of the steps he undertook. He said that the accused was arrested on 19th July 2008.

On the same day, the Investigating Officer booked for the post mortem to be done at the City Mortuary. The said post mortem examination was carried out on 21st July 2008.

Three days later, the Investigating Officer sent the exhibits to the Government Analyst. The said exhibits were collected from the Government Analyst on 28th July 2008.

The Investigating Officer then compiled his report, which he sent to the Director of Public Prosecutions on 5th August, 2008.

Immediately after receiving instructions from the Director of Public Prosecution, the Investigating Officer took the accused to court.

Having given due consideration to the explanation tendered, I find that the accused was taken to court

as soon as was reasonably practicable. Therefore, his constitutional rights have not been infringed.

But even assuming that the delay of one day had not been satisfactorily explained, I would not have discontinued the criminal proceedings against the accused. Instead, I would have adopted the position taken by the Court of Appeal in **PAUL MURUNGA V. REPUBLIC CRIMINAL APPEAL NO. 35 OF 2006**, wherein the court said;

“So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court might well countenance a delay of say one or two days as not being inordinate and leave the matter at that.”

In the result, the preliminary objection herein is overruled. I order that the trial of the accused should proceed.

Dated, Signed and Delivered at Nairobi this 5th day of October, 2009.

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FRED A. OCHIENG

JUDGE