



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

Criminal Case 55 of 2009

REPUBLIC.....PROSECUTOR

VERSUS

VICTOR KENNEDY GICHURU.....ACCUSED

R U L I N G

The state has filed a Notice of Motion pursuant to section 72 (2) (b) of the Constitution. By the said application, the state seeks a declaration that although the accused person was brought to court ten (10) days later than he ought to have been, he was nonetheless brought to court as soon as was reasonably practicable.

It is the contention of the state that they have provided the court with a reasonable and justifiable explanation for the delay.

The explanation which was offered by POLICE INSPECTOR ABRAHAM NDEGWA, who was the Investigating Officer, was that the accused was arrested by members of the public, on 22nd May 2009. The arrest is said to have been made because the accused was suspected to have committed an arson, which led to the death of two children, who were burnt inside the house which the accused is said to have torched.

According to Inspector Ndegwa, the accused had been severely assaulted by members of the public, as a consequence of which the accused suffered serious injuries. The members of the public thereafter escorted the accused to the Kasarani Police Station, where the police re-arrested him.

It is the position of the Investigating Officer that he did present the accused before the court as soon as his condition stabilized.

It is common ground that the accused was first taken to court on 15th June 2009. By my calculations, that meant that the accused had been held in custody for 24 days before he was taken to court.

Pursuant to section 72 (3) (b) of the Constitution, the accused, who is charged with a capital offence, ought to have been brought to court within 14 days of his arrest.

In his view, because the police held him for ten (10) more days, they had violated his constitutional rights.

The accused did concede, on oath, that he was assaulted by members of the public. As a result of the said assault, the accused says that he suffered serious injuries.

Since some of his injuries were visible, and because the members of the public admitted to the arresting police officers that they had assaulted him, the accused faults the police for failing to arrest those who had assaulted him.

The accused also complained that although he asked the arresting police officer to take him to hospital, as he was in a lot of pain, the said officer declined or failed to do so.

Between 22nd May 2009, when the accused was arrested, upto 3rd June 2009, he was not taken to hospital, even though he was in a lot of pain. In his view, he had been in need of urgent medical attention.

However, it was not until 3rd June 2009, when the Police Surgeon, Dr. Kamau, directed the police to take the accused for an X-ray. The accused had been taken to Dr. Kamau for mental assessment, but the doctor said that the accused first required treatment for his physical injuries.

The accused contends that the state has failed to explain why they did not take him to court between 22nd May 2009 and 3rd June 2009.

As far as he is concerned, the state was only explaining the period between 4th June 2009 and 15th June 2009.

Factually, the accused is right to state, as he has done, that the explanation tendered by the state was for the period from 4th to 15th June 2009.

The first question is whether or not the state was obliged to explain why they did not take the accused to court on or before 3rd June 2009.

In my considered opinion, the state was under no obligation to explain that period of time because the said period fell within the 14 days during which the state could lawfully produce the accused in court.

It is only when an accused person is taken to court later than the period permitted under the Constitution that there then arises an obligation, on the part of the person who had delayed in taking him to court, to explain that the accused was nevertheless taken to court as soon as was reasonably practicable.

By his own admission, the accused was undergoing treatment between 3rd and 15th June 2009. And the Investigating Officer has stated, on oath, that as soon as the accused's condition was stable, he was presented to court.

In the circumstances, I am satisfied that the accused was brought to court as soon as was reasonably practicable in the prevailing circumstances.

Notwithstanding my said finding, I feel obliged to comment on the fact that it is the prosecution which has moved the court in this instance. In other words, the state did not wait for the accused person to first make an allegation that his constitutional rights had been infringed.

The question that arises is whether the state ought to anticipate that an accused would raise the issue, and then pre-empt it by seeking a declaration that the accused was brought to court as soon as was reasonably practicable.

In DANIEL KIOKO MBUVA Vs REPUBLIC, CRIMINAL APPEAL NO. 65/2008, the Court of Appeal said;

“We have stated it before and we wish to reiterate here that under section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution

does not offer any explanation, then the court, as the ultimate enforcer of the provisions of the Constitution must raise the issue.”

That implies that it was open to the prosecution to offer an explanation in anticipation of a complaint by the accused person.

Incidentally, in the DANIEL KIOKO MBUVA case, the accused had been in custody for over 40 days before being taken to court. But the Court of Appeal still dismissed the appeal because the state had proved that the appellant was taken to court as soon as was reasonably practicable.

Meanwhile, in DOMINIC MUTIE MWALIMU, CRIMINAL APPEAL NO. 217 of 2005, the Court of Appeal had said:

“In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84(1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue, which allegation has to be raised within the earliest opportunity..”

In that case, the appellant had failed to lodge any complaint before the trial court, about the alleged delay in bringing him before a court of law. In those circumstances, the Court of Appeal expressed itself thus:

“Needless to say, the prosecution was not called upon to show that the appellant was brought to court as soon as was reasonably practicable.”

In other cases the Court of Appeal has gone further to state that if an accused person is represented by an advocate, but he fails to raise a complaint about an alleged violation of his constitutional rights, during the time he was on trial, he would be deemed to have waived his right to raise the issue at the stage of an appeal. See JAMES GITHUI WAITHAKA & ANOTHER V REPUBLIC, CRIMINAL APPEAL NO. 115/2007; and also JAMES AMOS OWINO Vs REPUBLIC, (KISUMU) CRIMINAL APPEAL NO. 450 of 2007

As the question of locus was not raised by the parties before me, I have commented on the same only as a way of illustrating that although it was unusual for the state to seek an unsolicited explanation for the delay in bringing an accused person to court, the action was not irregular.

In the result, the application by the state is granted. I find and hold that the accused was brought to court as soon as was reasonably practicable. Therefore, I direct that the trial against him should proceed to its logical conclusion.

Dated, Signed and Delivered at Nairobi, this 3rd day of November, 2009

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FRED A. OCHIENG

JUDGE