



**Republic v Office of the Director of Public Prosecutions, Busia;  
Oswaga & 3 others (Exparte) (Miscellaneous Criminal Application  
E025 of 2023) [2024] KEHC 4236 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4236 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
MISCELLANEOUS CRIMINAL APPLICATION E025 OF 2023**

**WM MUSYOKA, J  
APRIL 26, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS,  
BUSIA ..... RESPONDENT**

**AND**

**MOUREEN OSWAGA ..... EXPARTE**

**MESHACK LOBUIN ..... EXPARTE**

**KELVIN EBENYO ..... EXPARTE**

**GEOFFREY OKELLO ..... EXPARTE**

**JUDGMENT**

1. These are Judicial Review proceedings, at the instance of the ex parte applicants, seeking termination of criminal proceedings in Busia CMCCRC No. E1432 of 2023, on grounds that they had been held in pre-arraignment custody for an extended period of time, of up to 23 days, contrary to Article 49 of the Constitution of Kenya, which requires production of an arrested person in court within 24 hours.
2. The fact that a person is not produced in court within the 24 hours does not vitiate the subsequent criminal prosecution, and the courts have held that the remedy for that does not lie with illegalizing a subsequent prosecution or trial, but in civil proceedings, for compensation in damages for false imprisonment. Such a violation, much as it is a constitutional issue, only gives rise to a civil remedy.
3. The position taken by the ex parte applicants accords with that held by the courts, in the pre-2010 period, in such cases as Albanus Mwasia Mutua v. Republic [2006] eKLR (Omolo, Githinji &



- Deverell, JJA), *Ann Njogu & 5 Others v. Republic* [2007] eKLR (OK Mutungi, J) and *Gerald Macharia Gitbuku v. Republic* [2008] eKLR (O’Kubasu, Onyango-Otieno & Deverell, JJA), that any violation, however slight, of the right of an arrested person to be brought to court within 24 hours, should lead to an automatic acquittal, in the absence of any reasonable explanation.
4. That position no longer holds. The prevailing law is as stated in *Julius Kamau Mbugua v. Republic* [2010] eKLR (Githinji, Waki & Visram, JJA), where it was held that there was no law, whether in the *Constitution* or legislation, that bars a trial court from presiding over a prosecution of an accused person, whose right under Article 49, relating to being held in pre-arraignment custody beyond 24 hours, had been violated. It was declared that an acquittal or discharge, on those grounds, would be a disproportionate, inappropriate and draconian remedy, which would compromise public security. *Julius Kamau Mbugua v. Republic* [2010] eKLR (Githinji, Waki & Visram, JJA) has been followed, with approval, in *Wistone Hamisi Chilago v. Republic* [2013] eKLR (Githinji, Makhandia & Sichale, JJA), *Fappyton Mutuku Nguu v. Republic* [2014] eKLR (Kihara Kariuki (PCA), Maraga & J. Mohammed, JJA), *Dennis Leskar Loishiye v. Republic* [2015] eKLR (Mwera, Sichale & J. Mohammed, JJA), *John Kimwele Mungengei v. Republic* [2017] eKLR (C. Kariuki, J,) and *MKK & another v. Republic* [2018] eKLR (Achode, J).
  5. In view of the above, the law is well settled, being held in pre-arraignment detention, beyond 24 hours, does not render a subsequent prosecution or trial a nullity or an illegality. That being the case, there can be no merit in these Judicial Review proceedings, and the orders sought, of certiorari and prohibition, are not available. Accordingly, the Motion, dated 27<sup>th</sup> November 2023, is hereby dismissed. The order granting stay of proceedings, made herein on 9<sup>th</sup> November 2023, is hereby discharged, leaving the respondent at liberty to proceed with the prosecution of the ex parte applicants, in Busia CMCCRC No. E1432 of 2023. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BUSIA ON THIS 26<sup>TH</sup> DAY OF APRIL 2024.**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the ex parte applicants.

