

HOT POTATO!
by Njeri Thuku

Welcome to the Hot Potato Section of the newsletter!

This is the section of the newsletter that discusses topical issues. For this first edition I have chosen to cover the rights of the Accused and the dilemma facing magistrates.

What are magistrates to do when an Accused comes before them and says, "My constitutional rights have been violated; I was held by the police in custody longer than the prescribed period."

The Court of Appeal sitting in Nakuru in **Criminal Appeal No. 35 of 2006 between Paul Mwangi Murunga and Republic** in a judgment delivered on 22nd February 2008 shed some light on this issue. In this case, the Accused was arrested for robbery with violence but presented in court 10 days after the date of arrest.

The Court held that where an Accused does not raise the fact that he was in custody for a long period, then the court must do so and secondly the prosecution is obliged to explain the delay. At page 7 the Court of Appeal said:

"We do not accept the proposition that the burden is upon an Accused person to complain to a magistrate or a judge about the unlawful detention in the custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know or ought to know whether the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. 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 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."

The Accused was acquitted.

The Court of Appeal sitting in Kisumu re-affirmed its position in the recent decision in **Martin Omollo Odongo v Republic** delivered on 19th June 2009. Here the Accused claimed that his rights had been violated. However, the Court of Appeal dismissed the claim on violation by stating that the explanation given for delay was sufficient. This case was reported in the Daily Nation Monday September 14, 2009:

"While dismissing the appeal, the court emphasized the fact that the distance involved transporting the Appellant (from Mombasa where he was arrested to Rachuonyo) and the fact that the month of December has many holidays could occasion a justifiable delay such as in the case of the Appellant."

Thus it seems that as magistrates, we are to look carefully at the charges sheet to note any discrepancy with law to see if there is a delay between the date of arrest and the date the Accused is brought to court. It is imperative that where there is apparent violation or delay in bringing the Accused, the Court must inquire into the delay and seek an explanation from the police. Where the explanation is acceptable the court should make a finding and proceed with hearing. The option left to the Accused is to appeal against the appropriate application to the High Court.

Where the explanation is not acceptable, which means there is apparent violation of the Accused's fundamental rights, then the matter should be referred to the High Court for determination of that point. This is to be done using Form F – The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual) High Court Practice and Procedure Rules, 2006. In the reference, the Court should set out the question(s) for determination of the alleged contravention. It should set out the specific issues contended by each party. It should briefly set out the opinion of the subordinate court on the question raised and briefly set out the facts necessary to enable the High Court to properly decide the questions raised.

Where an application is being made directly to the High Court by the Accused alleging contravention of his constitutional rights, the trial court shall continue with the hearing of the case until the High Court orders stay. Stay is not automatic for any reference.

The practice of forwarding the case file whenever an application alleging contravention is made to the High Court has no legal basis. The file can only be forwarded when it is called by the High Court.

So far so good or is it?

Justice Ojwang in **Misc Criminal Application No. 722 of 2007 Evanson K. Chege versus Republic** seems to have widened the parameters on what should be done when an Accused claims his/her rights have been violated. In his decision delivered on 26th January 2009, he said at page 4:

"Learned Counsel Ms. Githui has urged that there exists an attribution-chain to legal validity, which starts with delayed arraignments in Court rendering the charge null; a null charge rendering the trial process null; a null trial process rendering the eventual verdict itself null – so that the moment it is established that arraignment in Court was delayed, then it follows perforce that the Applicant is to be prematurely acquitted, without proceeding further to the stage of preliminary submissions on the merits of the criminal case. The juristic basis for this proposed syllogism has not been cogently presented before this Court. I have found difficulty with the said syllogism, besides, as it is highly theoretic, and would rule out practical and real scenarios, such as the facts and circumstances of case; it would also take away the judicial discretion. If the Courts had a legal obligation to apply the syllogism, their task would be all too easy; but the ideal of justice is unlikely to be found in the easiest options. The Constitution itself has a provision in s. 72(6) for possible compensation for breaches of trial rights; and the inference which I must draw is that the Court has a discretion as to what remedy to allow, where an Accused person has been detained in custody for an unduly long period, before being arraigned".

He concludes at page 6 by saying:

"From the facts in record, however, it is clear that the Applicant was detained for several days beyond the twenty-four period, before being charged in court; and as no explanation was given for the delay in commencing prosecution, I hold that there was a violation of the Applicant's trial-rights as provided in s. 72(3)(b) of the Constitution. I hereby declare that the Applicant thus suffered in his safeguarded right; and that the Applicant may make an application before the High Court for compensation by virtues of sections 72 (6) of the Constitution. The trial file shall forthwith be returned for to the trial Court, for continuation with the trial proceedings."

It will be interesting to see if this decision goes on appeal how the Court of Appeal will make its judgment. I only bring it to Member's attention to inform them of the developments within the law on the issue of constitutional rights of the Accused.

It seems that there are differing views from the Court of Appeal and the High Court. The Court of Appeal says when the Accused's rights are violated the charge should be quashed and the Accused acquitted. The High Court says where the Accused's rights have been violated, he should seek compensation.

Where do the trial courts go?