



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISC. CRIMINAL APPLICATION NO. 26 OF 2018

BETTY JEMUTAI KIMEIYWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[Miscellaneous Criminal Application for Revision from

Kabarnet Principal Magistrate's Court No. 34 of 2018

delivered on the 13th day of June, 2018

by Hon. N.M. Idagwa, RM]

RULING ON REVISION

The application before the court

1. In this case, the applicant was presented to court before the Resident Magistrate on 13th June, 2018 when, upon application by the DPP that the suspect be held in custody to allow time to carry on investigations, the court granted 7 days, with a mention for further directions on 20 June, 2018.

2. Aggrieved by the order for the holding in custody awaiting conclusion of the investigations, the applicant filed an application for revision which is the subject of this ruling. It was contended that the order of the lower court was unconstitutional in that the applicant was denied her Article 49 rights to particularly bail and to be informed of the charges facing her. It was urged that the requirement for presentation before the court under the 24 hour rule was not mere production before a court when the investigations were not complete and seek more time for investigations; arrest and presentation before the court should come after the conclusion of investigations; and that indeed, evidence acquired upon investigations following presentation before the court is unconstitutional.

3. The DPP pointed to the Affidavit sworn in support of the application for holding the suspect before the lower court which was served upon the applicant before the application was heard in that court and which set out the nature of the offence facing the applicant as murder contrary to section 203 as read with 204 of the Penal Code and gave as reasons for seeking the holding order the need to complete investigations by taking witness statements, obtaining call data on the applicant's cell phone, and securing a forensic report on cyber crime aspects of the case, among other procedures which, it was submitted, would require time to conclude before the applicant was formally charged with the said offence.

Rationalization of the right to be brought before the court within 24 hours and the right to bail

4. This revision application calls for rationalization of the provisions of the Constitution with respect to the Article 49 rights "*to be brought before a court*" under the 24-hour rule and "*to be released on bond or bail,*" under Article 49 (1) (f) and (h) of the Constitution, as follows:

"49. (1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

5. The applicant relied on the persuasive decision of the High Court in *Michael Rotich v. Republic* [2016] eKLR, Kimaru, J. considered the provision for 24 hour rule and held as follows:

"In compliance with Article 49(1)(f)(i) of the Constitution, the Applicant was brought before the court within 24 hours of his arrest. However, contrary to Article 49(g) of the Constitution, the Applicant was neither charged nor informed of the reasons for his continued detention. As stated earlier in this Ruling, the recent trend where a person is arrested and arraigned in court within 24 hours specifically for the prosecution to seek extension of time to continue to detain such person, without any charge or holding charge being preferred against such person is unconstitutional. The police have no authority in law to arrest and detain any person without sufficient grounds. Those grounds can only be sufficient if the police have prima facie evidence which can enable such person to be charged with a disclosed offence.

*The fact that the prosecution has a prima facie evidence of a disclosed offence can be presented in court in form of a holding charge setting out the particular offence. Such holding charge will enable an accused person to know of the reason for his arrest as provided under Article 49(1)(a) of the Constitution. It will not do for the prosecution to present a person who has been arrested in court and seek his continued detention without a charge or a holding charge being lodged in court. **It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court.** If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the Constitution was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have prima facie evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: the Constitution says so."*

6. With respect, while I agree with the need to respect the right to liberty of suspects, I am unable to agree that the police can only produce a suspect before the court when the investigations into the offence are complete and or when they present a holding charge awaiting a full charge when investigations are complete. A **holding** charge, which need not be accurate in its particulars as the investigations would be ongoing may indeed offend the very foundational principle of certainty of a charge which requires that a charge gives reasonable information on the offence charged under section 134 of the Criminal Procedure Code as follows:

"134. Offence to be specified in charge or information with necessary particulars

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

7. The provision bringing the accused before the court within 24 hours is not an **either or else** position where the prosecution is validated or invalidated by such presentation. Article 49 (1) (g) and (h) itself gives four scenarios on presentation of an arrested person before the court, namely, that the arrested person may-

i. **"be charged"**

ii. **"be informed of the reason for the detention continuing";**

iii. **"be released"; and**

iv. "be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

So that upon being brought before the court, an arrested person may be charged; or he may be informed of the reasons for detention being continued say to facilitate completion of investigations or his presentation for assessment of fitness to plead before plea is taken; or he may be released if the court for example found no reasonable grounds for his continued detention; or he may be released on bond pending formal charge and or trial. The Constitution does not say that the police may only arrest a person when there is **prima facie** evidence of an offence. It must, of course, require a probable cause for an arrest but not prima facie case in its technical acceptance of evidence upon which a court may convict, if no evidence is given on behalf of an accused person. See **Ramanlal Trambaklal Bhatt v. R** [1957] EA 332, where it was held that a *prima facie* case is '**one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence**'. A police officer cannot be required to make a sort of **judicial** determination of existence of **prima facie** case. That is the province of the trial court at the stage of consideration whether a case to answer is established against the accused. A reasonable suspicion of commission of the offence based on the available evidence would suffice to give a probable cause for an arrest.

Conclusion

8. There is no paradox or absurdity in the requirement of the 24 hour rule and the need for conclusive investigations into crime for the prosecution to obtain evidence to support the charge. The requirement is not calculated to defeat the Prosecution's ability to investigate and prosecute cases. The object of the 24 hour rule is to obviate prospects of **extra-judicial, pre-trial** detention by police authorities in contravention of the cardinal principles of the criminal process of fair trial and innocent-until-proven-guilty.

9. Of course, the circumstances in which a crime has been committed may require immediate arrest of the suspect to prevent further crime, to prevent her escape or to protect the evidence or witnesses, and the nature of a serious crime, such as murder, may reasonably require more time to investigate. In the face of the 24 hour rule/requirement, the prudent thing to do is to delay the **arrest** until the investigations are complete and all prosecution evidence has been collected, except where the suspect is a flight risk or likely to escape, or other risk to the successful prosecution of the offence such as interference with the evidence or witnesses exists.

10. The Police have the constitutional and statutory power under Articles 243-245 of the Constitution and section 58 of the National Police Service Act to arrest a person **reasonably** suspected of having committed a crime. Section 58 is in the following terms:

"58. Power to arrest without a warrant

Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person—

*(a) who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon **reasonable ground** that such assault has been committed;*

(b) who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;

*(c) whom the police officer suspects on **reasonable grounds** of having committed a cognizable offence;*

*(d) who commits a breach of the peace in the presence of the police officer; (e) in whose possession is found anything which may reasonably be suspected to be stolen property or who may **reasonably be suspected** of having committed an offence with reference to that thing;*

*(f) whom the police officer suspects upon **reasonable grounds** of being a deserter from the armed forces or any other disciplined service;*

*(g) whom the police officer suspects upon **reasonable grounds** of having committed or being about to commit a felony; or*

*(h) whom the police officer has **reasonable cause** to believe a warrant of arrest has been issued."*

11. The powers of arrest are expressly made subject to Article 49 of the Constitution regarding the rights of an arrested person and, therefore, upon arrest, the person may be dealt with in accordance with the provisions of Article 49 (1) (g) and (h) by charging, detention, release and release on bond as discussed above.

12. Ultimately, the test for validity of arrest is the reasonable grounds for suspicion; not "**prima facie**" evidence test of judicial inquiry.

The right to bail

13. Accordingly, when the Prosecution presents a suspect for purposes of seeking her holding in custody to facilitate conclusion of the investigations, the Prosecution must demonstrate in their application to court that, in accordance with the Article 49 (1) (g) and (h) of the Constitution, there is justifiable reasons for continued detention of the arrested person and that there are compelling reasons for refusal of bail.

14. I do not find that the Police offered good reasons for the continued detention of the arrested person because the matters they used to justify the detention being aspects of the investigations **by taking witness statements, obtaining call data on the applicant's cell phone, and securing a forensic report on cyber crime aspects of the case** are all things that could have been accomplished even with the person

all being out of custody.

15. The Prosecution therefore, needed to demonstrate compelling reasons for refusal of pending charge before the court and in this case offered the following reasons for holding the applicant in an Affidavit sworn by the Investigating Officer in support of the application before the Magistrate's Court:

“REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE’S COURT AT KABARNET

MISCELLANEOUS CRIMINAL APPLICATION

NO 34 OF 2018

DIRECTORATE OF CRIMINAL INVESTIGATIONSAPPLICANT

VERSUS

BETTY JEMUTAI KIMEIYWA..... SUSPECT

AFFIDAVIT

I No.66275 CPL PHILIP NDETO of DCI Baringo Central in the Republic of Kenya, do make oath and state as follows:-

1. *THAT: I am an investigator with Directorate of Criminal Investigation of sound mind and competent to swear this affidavit.*
2. *That: I am investigating a case of Murder contrary to Section 203 as read with section 204 of the Pena Code.*
3. *That: The suspect is believed to have murdered one SPEHEN KIPRUTO KIPRONO on the morning of 3rd June 2018 at Kaprogonya village within Baringo County.*
4. *That: the investigations are not yet complete.*
5. *That: I pray this Honourable Court to remand the suspect at Kabarnet Police Station for 14 days to enable me complete investigations which include:*
 - a. *To record statements of relevant witnesses,*
 - b. *To obtain calling data from Safaricom Limited of mobile phone of both the accused*
 - c. *To obtain Forensic Report from Cyber Crime Unit DCI Headquarters Nairobi*
 - d. *To escort the suspect to the Psychiatrist for mental checkup at Moi Referral Hospital Eldoret and*
 - e. *To obtain report/Photographs from Scene of Crime Personnel in Nakuru.*
6. *That: I also pray this honourable court to issue me with a Court Order to the MOH Moi Referral Hospital to facilitate the psychiatric examination.*
7. *That: the fact deponed herein is true and within my knowledge.*

Sworn at Kabarnet Law Courts on 13th June, 2018.”

16. As the Court is aware that the applicant has now been charged with murder contrary to section 203 as read with 204 of the Penal Code in HCCR. Case No.9 of 2018, and the same grounds may be urged in response to bail application by the applicant on taking plea in the said case, the Court, will not in this ruling make any finding as to whether the said grounds reflect a compelling reason or reasons for refusal of bail.

Orders

17. Accordingly, for the reasons set out above, the applicant’s request for release on bail pending trial shall be considered in the context of the court file in KBT. H.C. Criminal Case No. 9 of 2018, **R v. Betty Jemutai Kimeiywa** coming up before the Court later today.

DATED AND DELIVERED THIS 21ST DAY OF JUNE, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Mathea for the Applicant.

Ms. Kitilit for the DPP.