REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC CRIMINAL APPLICATION NO. 19 OF 2014

MICHAEL KUNGU KIGIA…….APPLICANT

VS

DIRECTOR OF PUBLIC PROSECUTIONS……RESPONDENT

RULING.

The Notice of Motion dated 10th June 2014, is brought pursuant to Article 49 (1) f (i) (ii) of the Constitution of Kenya, 2010. It is a petition but filed as a miscellaneous application. The Applicant Michael Kungu Kigia has sought the following orders;

1. That this matter be certified of utmost urgent and be heard first instance for orders that chief magistrate court be ordered not to proceed with the criminal case No. 598 of 2011 until this matter is heard and finally determined as my fundamental rights and constitutional rights have been violated as in enshrined in our constitution of Kenya 2010.

2. That after determination and finalization of this matter in paragraph 1, this Honourable court do issue a court order to dismiss criminal case No. 598 of 2011 preferred against the accused as the law was not complied with as Article 49 (1) f (i) (ii) is violated as accused was brought before honourable court on 22/07/2011 instead of 28/03/2011 and no reasonable ground issued.

3. Cost be provided for.

In support of his application, the applicant filed a supporting affidavit dated 10/6/2014, Replying Affidavit dated 17/7/2014 and a further supplementary affidavit dated 28/1/2015. The applicant listed several grounds which are not very clear. What I tried to make out of the grounds is that the Applicant was arrested on 25th March, 2011 by O.C.S Meru Police Station for an offence under section 278 A of Penal Code, he was never charged before any court within twenty four hours; that he was not arraigned in court on 28/3/2011 as expected but was charged on 22/7/2011; that on 27th March, 2011 he was released on police bond of Kshs. 5,000/- to attend court on 30/3/2011; that he was detained for 2712 hours contrary to the law; that he was re-arrested on 22/7/2011 taken to court and released on bond of Ksh.300,000/- but without refund of Ksh.5000/- bail; that the applicant was forced to be reporting to Police Station from 28/3/2011 till 22/7/2011 without a court order and was condemned for all that period, thus violating his fundamental rights as enshrined in the Constitution of Kenya 2010 Article 22, 23, 27, 29 (a) (b) (c) (d) (e) (f) 35 (1) (a) (b) 2 and 49 (1) f (i) (ii) and chapter one 2 (1) (2) (3); that this

Honourable court has an obligation to safeguard its integrity as contained in Article 10 and should order the prosecution to withdraw the criminal case. The applicant sought to rely on a case reported in the Daily Nation on 13.6.2011 of **Purity Kanana Kinoti V. Republic 2011 KLR** in which the court of Appeal said that once one's rights were breached under section 72 (Retired Constitution) he was entitled to damages under section 72(6) of the Constitution see also **Julius Kamau Mbugua V. Republic CRA 50 of 2008 (2011) KLR.**

When the Application came up for hearing on 16th June 2014, Lesiit J declined to certify the same as urgent and directed the Applicant to serve the respondent within thirty days. However, later on 23/7/2011, the court stayed the proceedings in Criminal Case No. 598/2011. The Application was opposed via two replying affidavits sworn by the Learned State Counsel Moses Mungai and the investigation officer PC Peter Kisoi on 15th July and 22nd July 2014 respectively, It was deposed by Mr. Mungai that the allegations of violation of his constitutional rights have not been substantiated and that the office of the Director of Public Prosecutions under Article 157 of the Constitution exercises independent judgment and that this court cannot interfere unless it is shown that the exercise is contrary to the Constitution, done in bad faith or amounts to an abuse of the court process; that the Applicant has a right to take out civil proceedings against the Government. He further urged that the applicant has not demonstrated that he will not have a fair trial before the trial court.

On the other hand, Peter Kisoi, the investigations officer in Criminal Case No. 598/2011 deposed inter alia, that the Applicant was arrested on 25th March 2011 which was a Friday and issued with a cash bail of Kshs 5,000, which he did not raise until 27th March 2011 a Sunday after which he was released. On this basis the investigations officer deposed that the Applicant could not be arraigned before a court of law within 24 hours since the time of his arrest fell on a weekend.

When the Application came up for hearing on 26th February 2015, the Applicant reiterated the contents of his application and stated that he was arrested on 25th March 2011 and that he should have been arraigned in court on 28th March 2011, instead of 22nd July 2011. He further contended that the office of Director of Public Prosecutions should not have sworn an affidavit in support of the application and that the respondent did not have evidence in the matter and consequently urged the court to allow the application.

Mr. Mungai Learned Counsel for the State on the other hand reiterated the contents of his replying affidavit and that of the investigating officer and stated that the Applicant was arrested on 25th March 2011 which was a Friday and that he was released on 27th March 2011, which was a Sunday. He further contended that the Application was frivolous, vexatious and an abuse of the court process and that the Applicant is a perennial vexatious litigant. He urged the court to dismiss the Application.

I have carefully considered this application, the authorities relied upon and the rival submissions by the parties. The instant application is brought pursuant to the provisions of Article 49 (1) (F) (i) (ii) of the Constitution of Kenya. The same provides as follows:

"***49 (1) an arrested person has the right-***

(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;

It is not in dispute that the Applicant was arrested on 25th March 2011; I have perused the calendar of the said date and year and confirmed that the said date fell on a Friday. The applicant was issued with a cash bail of Kshs 5,000 which he did not raise until 27th March 2011, (a Sunday) after which he was released forthwith, a fact which the applicant admitted. The applicant having been arrested on a Friday and

released on a Sunday, the same cannot be said to amount to unreasonable delay and am not satisfied that the applicant's rights if any, were violated in anyway. Indeed the provisions of Article 49 (1) (f) (i) (ii) of the Constitution of Kenya which the Applicant has sought to rely on provide that an accused person ought to be brought before the court as soon as reasonably possible but not later than twenty four hours after being arrested or 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. The applicant in this case was arrested on a Friday and released on a Sunday which was not an ordinary court day. The question of what constitutes an unreasonable delay in holding an accused person before charging him was discussed in **Julius Kamau Mbugua V. Republic CA 50/2008** where the court cited with approval of **R. VS Lord Advocate [2003] 2 LRC** at page 86 paragraph 92 it was held by Lord Clyede as follows:

"**The convention seeks to identify a common minimum standard of protection applicable internationally to the states, parties to the convention. The period itself must give rise to real concern. The complexity of the case, the conduct of the accused and the manner in which the case has been handled by the administrative and judicial authorities have then all to be assessed. Unreasonable time is one which is excessive, inordinate and unacceptable. Under the jurisprudence of European Court of Human Rights, the element of prejudice is not an essential ingredient of the violation."**

Though the accused was later charged on 22nd July 2011, which was four months later, it's not clear from the record if his arraignment in court on 22nd July 2011 relates to his earlier arrest on 25th March 2011 as none of the parties has alluded to this fact. Be that as it may, the applicant was not in custody for the period between 27th March, 2011 and 22nd July 2011 having been arrested on 25th March a Friday and having been released on 27th March a Sunday. The applicant's contention that he was held in custody for 2712 hours is totally untrue and unfounded. Consequently, I am not satisfied that the applicant has demonstrated that his fundamental rights have been violated as alleged and prayer 1 of the application must fail.

With regard to prayer number 2, the applicant has sought an order to dismiss **Criminal Case Number 598 of 2011 Rep V Michael Kungu,** which he claims was preferred against him as violation of Article 49 (1) (f) (i) (ii) when he was arraigned before court on 22nd July, 2011 instead of 28th March, 2011. The purported Criminal Case is before an independent and competent court of law. What the applicant is doing is inviting this court to stop the trial court before it even exercises its jurisdiction to hear the case. Even if the police did delay to arraign the applicant in court within 24 hours, it has nothing to do with the trial court. The trial court must be allowed to consider the evidence before it on the merits and the applicant may move to this court after the court determines the matter if he still feels aggrieved. The sufficiency or otherwise of the evidence in the criminal case must be determined by the trial court but not at this forum. The Applicant also alleges that there is no evidence against him but that is not for this court to determine. In this application all that this court is enquiring into is whether or not the applicant's rights under Article 49 of (f) (i) and (ii) were infringed but not the merits of the case pending in the lower court. Even if this court were to find that the applicant's rights were violated at the time of arrest, it would not dismiss the Criminal charges. As clearly held in the case cited by the applicant himself, (Mbugua's case supra), if indeed there is violation of the applicant's fundamental rights, he has a right to seek compensation through the civil process. This court does not have the jurisdiction to dis miss the case that is pending before the lower court as doing that would be tantamount to usurping the powers of the trial court. The best that this court can do is to stay the proceedings as was done by my sister Lesiit J on 23rd July 2014 to allow for this application to be heard.

Even then, it is now well settled practice that the courts should exercise caution before granting stay in criminal proceedings. This principle was recently restated by the Court of Appeal in the case of ***MANILAL JAMNANDAS RAMJI GOHL V DIRECTOR OF PUBLIC PROSECUTIONS NAIROBI CRIMINAL APPEAL NO. 57 OF 2013*** where the Court of Appeal rendered itself thus:

"***We are mindful that an order staying criminal proceedings would be granted only in the most exceptional circumstances.*** See ***GODDY MWAKIO AND ANOTHER V REPUBLIC (2011) Eklr***

where the court stated as follows;

"***an order for stay of proceedings particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances…"***

In his grounds, the applicant also alleged that his rights under Article 22, 23, 27, 29 a,b,c,d,e,f 35(i) a, b and 2. Article 22 allows one the right to enforce His rights which he is doing by this application. Article 23 confers jurisdiction of this court to hear and determine applications of violation of rights. Article 27 guarantees equality before the law and the applicant has not demonstrated that this court or the trial court or anybody else has acted in a discriminatory manner towards him. Article 29 guarantees freedom and security of the person. The applicant has not demonstrated that he was detained arbitrarily. Article 35 guarantees right to information. Again nowhere in the application has the applicant demonstrated that his right to information has been violated. It is settled law both in the retired and the new Constitution that he who alleges infringement of a right must clearly and specifically plead the nature of the violation and provide proof thereof. See **Cyprian Kubai vs Stanley Kanyonga Mwenda Nairobi High Court Misc. Application No. 612 of 2002 (unreported) Khamoni J.**

"An Applicant moving the court by virtue of Sections 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Section, but also to the subsection and where applicable, the paragraph or sub-paragraph of the Section set out of 70-83, allegedly contravened plus the relevant act of that contravention so that the Respondent knows the nature and extent of the case to enable the respondent prepare accordingly and also know the exact and nature of the case it is handling…"

The applicant has asked the court to strike out the affidavit sworn by the State Counsel, Mr. Mungai, because he is the prosecutor. I have read the affidavit. Whereas counsel would not purport to depone on facts being the prosecutor in this case, he only deponed to matters of law. It is the investigation officer who deponed to the facts. Even if I strike out Mr. Mungai's affidavit, it will not serve any purpose because he will still submit to the same orally.

The applicant also sought to have the affidavit of the investigating officer struck out for having been filed out of time and without leave of the court. However, at the time of the request, the applicant had already filed a reply to the said further affidavit and the court did grant him leave to reply to the said further affidavit.

Having found that the applicant has not demonstrated that his constitutional rights were violated, I am not convinced that the applicant has made out sufficient grounds for staying of criminal proceedings in the lower court or dismissing the case. This court is alive to the fact that the respondent is constitutionally mandated to prosecute criminal offences and should be given room to do so. Only in situations of clear abuse of power should this court intervene to prevent the Respondent from continuing in the said abuse. That has not been demonstrated in this case.

In the end result, I find the application to be without merit and the same is dismissed in its entirety. The orders issued by Lesiit J on 23rd July, 2014 shall be vacated forthwith.

DATED AT MERU THIS 24th DAY OF APRIL, 2015.

R. P. V. WENDOH

JUDGE.

Applicant present in person

Mr Musyoka for State

Mwenda Court Assistant