

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL MISC. NO.2 OF 2014

REPUBLIC.....APPLICANT

VERSUS

HUSSEIN ABDI HAMISIRESPONDENT

RULING

1. These proceedings places before me the original file to Busia Misc. Application NO.29 of 2014 **Republic –vs- Hussein Abdi Hamisi (Hamisi)** under the following order of Learned Magistrate:-

“This matter is referred to the High Court.”

2. Hamisi had appeared before the Subordinate Court yesterday (29/01/2014) on information under oath by Walter Ongaga (An Inspector of Police attached to Busia Police Station) that he is a habitual offender. The Proceedings before the Learned Magistrate can be termed “Bond to keep peace Proceedings” as the State had moved the Court to require Hamisi to show cause why he should not be ordered to execute a bond for his good behavior.
3. The handwritten record of the Learned Magistrate shows that, before referring the matter to this Court, Hamisi had complained that he was arrested on Friday at 12.00p.m and brought to Court the Wednesday following. He was raising a complaint that, as an arrested person, his right to be brought before a Court not later than 24 hours after being arrested had been breached (Article 49 (1) (f) of The Constitution 2010).
4. I am afraid I cannot deal with this Reference. In the previous Constitutional order a Subordinate Court could refer a Constitutional question arising in Proceedings before it to the High Court for determination. That would be after the Subordinate Court satisfying itself that the question arising is not merely frivolous and or vexatious (Section 84 (3) of The Pre-2010 Constitution). Salutary to those provisions the now revoked Gicheru Rules provided the procedure and manner in which the Subordinate Court would refer such a question to the High Court.
5. The current Constitution does not have a provision akin to Section 84(3) and there may be no basis for this reference to me. Similarly, The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (recently christened “The Mutunga Rules” by the Court of Appeal) does not provide for reference of a Constitutional question from the Subordinate Court to the High Court. That would be in recognition that the Constitution itself does not provide for such reference.
6. What then is a Judicial officer to do if a person appearing before her/him alleges a contravention of a Constitutional Right in respect of, connected to or related to the proceedings or matter before the Court? In my view, the Judicial Officer must decide whether the question goes to the heart or substance of the matter before the Court or whether the question is collateral to the substantive matters. An example of a latter question is where an arrested but yet to be convicted person alleges that he was held together with persons serving a sentence (A breach to Article 49(1) (e) of The Constitution 2010).
7. After making that decision then the Learned Magistrate may decide to deal with the Constitutional question as part of the matters before the Court for determination or advise the person raising it to move the High Court by way of Petition. That this is the way to deal with such a situation is contemplated, in my view, by Rule 10(2) (e) of The Mutunga Rules which requires that a Petition before the High Court discloses, inter alia,

“details regarding any civil or criminal case, involving the Petitioner or any of the Petitioners,

which is related to the matters in issue in the question.”

8. Clearly I have no choice but to return the file to Busia Chief Magistrate Misc. No.29/2014 back to the Trial magistrate for her to deal with the Constitutional question as she deems appropriate. Those are my orders.

DATED AND SIGNED IN CHAMBERS THIS 30TH DAY OF JANUARY 2014.

F. TUIYOTT

JUDGE