



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 402 OF 2009**

**BETWEEN**

**WILLIAM MOTARI NYAMBEKI.....PETITIONER**

**AND**

**THE NAIROBI CHIEF MAGISTRATE.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner claims that his fundamental rights and freedoms were violated when he was arrested and detained in police custody before being charged beyond the time stipulated in the former Constitution.
2. It is unfortunate that this petition has delayed for this long. It was last in court on 1<sup>st</sup> February 2010 when it was adjourned generally. It was thereafter dismissed for want of prosecution on 15<sup>th</sup> March 2012 and thereafter reinstated for hearing on 20<sup>th</sup> February 2014. The parties agreed to rely on the written submission filed in the case.

**Petitioner's Case**

3. The petitioner's case is set out in the petition dated 26<sup>th</sup> June 2008 and his supporting affidavit sworn on the same day. There is also a further affidavit sworn on 18<sup>th</sup> December 2009. He has also filed written submissions dated 4<sup>th</sup> January 2013.
4. The petitioner is a businessman and an accountant by profession. At the time material to this case he was employed by Kumbu Kumbu Sacco ("the Sacco") as Manager. He states that when he reported to the Sacco offices on 27<sup>th</sup> October 2003 whereupon he was arrested by Police Officers from Parklands Police Station on claims that he had stolen Kshs. 855,000/= from the Sacco.
5. The petitioner contends that despite his arrest on Monday, 27<sup>th</sup> October 2003 he was detained at Parklands Police Station until Monday, 3<sup>rd</sup> November 2003 when he was charged in ***Chief Magistrate Criminal Case Number 2705 of 2003*** for the offence of stealing by servant contrary to

**section 381** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

6. The petitioner avers that his fundamental rights and freedoms under **section 72(3)** of the former Constitution were violated by his detention at Parklands Police Station for a period exceeding twenty four hours. The petitioner submits that there was no reason to detain him as the offence for which he was charged was a bailable. He also contends that the institution and the prosecution of criminal charges against him is an abuse of the court process.
7. The petitioner relies on the case of *Ann Njogu and Others v Republic Nairobi HC Criminal Appl. No. 551 of 2007 [2007]eKLR* where the Court holding of a person in police custody beyond 24 hours was a violation of his rights and that the prosecution therefrom was illegal null and void.
8. As a result of the violations the petitioner prays for, *inter alia*, the following reliefs;-
  - a. A declaration that the charge prosecution and trial proceedings against him before the *Chief Magistrate, Nairobi in Criminal Case No. 2705 of 2003* are null and void, for violating the petitioner's rights to liberty and freedom enshrined in **section 72 (3)** of the former Constitution.
  - b. A declaration that the Attorney General has violated **section 26** of the former Constitution by exercising of his powers capriciously.
  - c. An order forbidding the Attorney General from prosecuting the petitioner in the charges before the 1<sup>st</sup> respondent.
  - d. A declaration that the trial of the petitioner in *Chief Magistrate, Nairobi in Criminal Case No. 2705 of 2003* is a nullity.

**Respondent's Case**

9. The 2<sup>nd</sup> respondent opposes the petition on the basis of the Replying Affidavit of Sgt Boniface Kiilu sworn on 17<sup>th</sup> November 2009. At the time material to the case he was the investigating officer. The respondent has also filed written submissions dated 22<sup>nd</sup> December 2009.
10. Sgt Kiilu depones that on 27<sup>th</sup> October 2003, one Mr Jama Galgalo, the treasurer of the Sacco, reported a case of stealing through fraud its Manager, the petitioner. He presented documents that showed that a sum of over Kshs 855,000/= had not been banked by the petitioner for a period stretching from April 2003 to October 2003.
11. In the course of investigation, Sgt Kiilu recovered documents relevant to the case from the petitioner's car. He obtained a warrant to investigate the Sacco account and to recover the original's slips which he compared with the banking slips obtained to confirm whether or not they tallied. He also took statements from potential witnesses including the Sacco Committee members. The entire exercise of the gathering documents and evidence was conducted between 28<sup>th</sup> October 2003 and 31<sup>st</sup> October 2003. He also had to obtain handwriting specimen and known handwriting of the petitioner for analysis and examination by the document examiner.
12. Sgt Kiilu deposes that during the investigations, the petitioner could not be released because he was still in employment and would have gone back to the offices of the Sacco and interfered with investigations. He further stated that on Friday, having done a substantial part of the investigations, he offered the petitioner police cash bail but he said he could not raise the required amount.
13. The 2<sup>nd</sup> respondent argues that there were reasonable grounds to hold the petitioner and that his rights were not been violated. The respondents rely on the case of *Dominic Mutie Mwalimu v Republic Nairobi CA Criminal Appeal No. 217 of 2005* where the court held that under **section 72(3)** of the former Constitution the State could escape liability if it furnished a reasonable explanation for the detention beyond 24 hours.

## Determination

14. As the events complained of occurred before the promulgation of the Constitution, the petitioner's case is to be determined under the former Constitution.
15. The petitioner's case concerns pre-trial arrest and its effect on the prosecution and trial of the accused. The conflicting decisions of the High Court and Court of Appeal on the effect of denial of pre-trial rights was settled in the case of **Julius Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 [2010]eKLR**. In that case the Court of Appeal considered the provisions of **section 72(3)** of the Constitution in relation to pre-trial detention in light of existing decisions, international law and precedents. In previous decisions, the Court of Appeal and several High Court judges had held that pre-trial detention in excess of the time limited under **section 72(3)(b)** of the Constitution entitled an accused to an acquittal. (*See Ann Njogu and Others v Republic (Supra)*, *Paul Mwangi Murunga v Republic Nakuru Criminal Appeal No. 35 of 2006 (Unreported)* and *Gerald Macharia Githuku v Republic Nairobi Criminal Appeal No. 119 of 2004 (Unreported)* and *Albanus Mwasia Mutua v Republic Nairobi Criminal Appeal No. 120 of 2004 (Unreported)*).
16. **Section 72(3)** of the former Constitution implies that the 24 hours, applicable to arrest upon suspicion of having committed an offence not punishable by death, is not absolute. The State may, in an appropriate case, offer an explanation which may absolve it from blame for the detention and delay in charging a person. The wording of that section is material and is as follows;

*72(3). A person who is arrested or detained*

*(a) ...*

*(b) ...*

*and who is not released, shall be brought before a court as soon as is reasonably practicable ..... the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*  
[Emphasis mine]

17. In **Julius Kamau Mbugua** the Court, in relation to the construction of **section 72(3)**, stated that, 'By section 72(3)(b) a suspect so arrested or detained and who is not thereafter released had to be taken to court as soon as reasonably practicable and if he is not taken within 24 hours, if arrested or detained for non capital offence or within 14 days, if he is arrested for capital offence, then the section cast a burden on a person who alleges that any detention beyond the specified period is still constitutional, of proving that the suspect was still brought before the court as soon as is reasonably practicable.'
18. The Court in the **Julius Kamau Mbugua Case** settled the issue that any pre-trial violations of the kind alleged by the petitioner do not entitle the petitioner to an acquittal or a stay of the criminal proceedings against him. In effect the case of **Ann Njogu and Others v Republic (Supra)** was wrongly decided and the principle enunciated therein overruled by the Appellate Court.
19. The duty of the court in this case to consider is whether on the facts and circumstances of the case, the 2<sup>nd</sup> respondent's actions were reasonable to the extent that the State is absolved from any liability under **section 72(3)** of the Constitution. Some of the factors to be considered and alluded to by the Court in **Julius Kamau Mbugua** were the length of delay, waiver of time periods, the reasons for delay including the delay caused by the nature of the case, actions of the accused, actions of the state, limits of institutional resources and prejudice to the accused. It is the burden to the State to furnish proof of these matters to enable the court discharge it from liability.

20. The justification for detention in excess of the period for under **section 72(3)** of the Constitution is set out in the replying affidavit of Sgt Kiilu sworn on 15<sup>th</sup> July 2008 which set out the chronology of events which I have set out above. I have considered this explanation in light of the factors I have set out in paragraph 10 and 11 above and I find that the holding of the petitioner was justified by the nature of the investigation and the intervening weekend which are not working days.

21. I therefore find and hold that the provisions of **section 72(3)** of the Constitution were not violated.

22. While the petition pleads that the charges brought against the petitioner are an abuse of process, this claim is starved of evidence. There is also no evidence that the Attorney General abused his authority to bring charges against the petitioner. Likewise nothing has been alleged against the 1<sup>st</sup> respondent to entitle the petitioner to relief against it.

### **Disposition**

23. The petitioner's case is therefore dismissed with no order as to costs. For the avoidance of doubt the order of stay in this matter is discharged and the petitioner shall appear before the Chief Magistrates Court Criminal Court Milimani on 27<sup>th</sup> February 2014.

**DATED and DELIVERED at NAIROBI** this 24<sup>th</sup> day of February 2014

**D. MAJANJA**

**JUDGE**

Mr Mariaria instructed by Mariaria and Company Advocates for the petitioner.

Mr Ndege, Litigation Counsel, instructed by the Director of Public Prosecutions for the respondent.