



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MISC. APPLICATION NO. 227 OF 2014

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
MANDAMUS AND CERTIORARI**

AND

IN THE MATTER OF DISPUTE RELATING TO CRIMINAL CASE NO. 3657 OF 2011

**SAMWEL NDEHI MAINA (Suing through the next of kin GABRIEL
KAMAU.....
.....APPLICANT**

VERSUS

**INSPECTOR GENERAL OF POLICE.....1ST
RESPONDENT**

**SUPERINTENDENT MATHARI DISTRICT HOSPITAL.....2ND
RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....3RD
RESPONDENT**

**CHIEF MAGISTRATE COURT AT MAKADARA.....4TH
RESPONDENT**

JUDGEMENT

1. By a Notice of Motion dated 1st August, 2014, the applicant herein seeks the following orders:

1 THAT this Honourable Court be pleased to issue orders of mandamus to compel the respondents to release the applicant from Mathari General Hospital where he is detained arbitrarily and unlawfully.

2 THAT the Honourable court be pleased to issue orders of certiorari to quash the ruling of the 4th Respondent given on 21st August, 2013.

3 THAT the costs be in the cause.

2. These proceedings seems to have been triggered by the decision made by the 4th Respondent herein on 21st August, 2013 in which the 4th Respondent declined to review its orders made on 2nd November, 2012. On 2nd November, 2012, the Court ordered that the applicant be detained at Mathari Mental Hospital as he undergoes treatment and further checkups and further extended the suspension of the applicant's bond. He further directed that certified copies of the proceedings be submitted to the Minister for Home Affairs for consideration by the President.

3. The reason given for the suspicion of the applicant's bond was the 4th Respondent's view that the applicant had suffered disability from childhood and the Court was not sure that the safety of other members of the public would be guaranteed.

4. **Mr. Kiragu**, learned counsel for the applicant argued that the decision by the 4th Respondent was unlawful and that instead of committing the applicant to Mathari Hospital the applicant ought to have been referred to the said Minister for the purposes of the aforesaid consideration by the President.

5. On her part **Miss Spira** ha opposed the application on the ground that the orders sought are not merited as the material disclosed do no warrant the grant of the same.

6. I have considered the foregoing. Section 162 of the *Criminal Procedure Code* provides:

(1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

(3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.

(4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, may think fit, and shall transmit the court record or a certified copy thereof to the Minister for consideration by the President.

(5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody, and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.

7. This Court has considered the foregoing and whereas these proceedings are not proceedings in the nature of revision, this Court under Article 165(6) of the Constitution "*has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*"

8. Therefore where the facts as disclosed to the Court are such as to warrant the exercise of its supervisory jurisdiction, the Court may notwithstanding the fact that the proceedings are strictly speaking not revisionary in nature invoke its revisionary and supervisory jurisdiction and make appropriate orders for the ends of justice as long as the parties are heard on the issue.

9. That the applicant had been released on bail is not disputed. On 2nd November, 2012 when the Court

made orders suspending the applicant's bond, no application was made to the effect that the circumstances warranted the suspension thereof and the applicant was never heard on the issue before the said decision was arrived at. What weighed on the mind of the Court was that the applicant had suffered disability since childhood and the Court was not sure that the safety of the public was guaranteed. Whereas the Court appreciates the 4th Respondent's concerns, the 4th Respondent ought to have invited the parties to address it on the issue before arriving at its decision otherwise the said decision which clearly affected the applicant's liberty was not fairly arrived at.

10. Having considered the material before me the order which commends itself to me and which I hereby grant is that the orders made by the 4th Respondent in Makadara Chief Magistrate's Criminal Case No. 3657 of 2011 on 2nd November, 2012 suspending the applicant's bond are hereby set aside. The 4th Respondent is directed to reconsider the issue afresh after affording all the parties an opportunity of being heard thereon. The matter to be dealt with by any other Magistrate other than **Hon. E. Nyongesa, RM.**

11. In the meantime the Minister for Home Affairs is directed to comply with the provisions of section 162 of the ***Criminal Procedure Code*** and treat the matter with the priority it deserves.

12. In the circumstances of this case there will be no order as to costs.

Dated at Nairobi this 27th October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiragu for the Applicant

Cc Patricia