



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
PETITION 291 OF 2011

NISHA SAPRA.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

AND

KULDIP MADAN MOHAN SAPRA.....INTERESTED PARTY

JUDGMENT

Introduction

1. Nisha Sapra, the petitioner, is charged with manslaughter contrary to **section 202** of the **Penal Code (Chapter 63 of the Laws of Kenya)** in **Nairobi Criminal Case No. 528 of 2008**. The particulars of the charge are that on the night of 20th and 21st August 2005 at Lower Kabete in Nairobi within Nairobi Area she unlawfully killed Yogesh Madan Mohan Sapra.

Petitioner's Case

2. She brings this petition dated 9th May 2008 claiming that her fundamental rights and freedoms protected under the Constitution have been infringed. She prays for the following reliefs;

(a) That this Honourable Court do make a declaration that petitioner's detention in police custody for a period of 23 days from September 11, 2005 to October 3, 2005 was in breach of sections 70 (a), 72(2) and (3)(b) and 77(2)(a) of the Constitution.

(b) That this Honourable Court do make a declaration that the petitioner's apprehension on 15th January 2008 as a direct consequence of the Inquest Magistrates findings and her detention in police custody till her appearance in court on 28th January 2008 was illegal and in breach of sections 70(a), 72(2) and (3) and 77(2) (a) of the Constitution.

(c) That this Honourable Court do declare that the sustenance and prosecution of Chief Magistrate's Criminal Case No. 528 of 2008 is contrary to the Constitution, and is likely to deprive the petitioner of her fundamental rights and freedoms as guaranteed there under.

(d) That this Honourable Court do make a declaration that the proceedings in Criminal Case No. 528 brought against the petitioner to be null and void.

(e) That this Honourable Court gives such other and further orders as it may deem just and proper.

3. The facts upon which the claim is based are not contested by the parties and are set out as follows.

The facts

4. On 11th September 2005, the petitioner was arrested and detained in police custody at Spring Valley Police Station and thereafter at Gigiri Police Station until 3rd October 2005 for a period of 23 days.

5. During this time the petitioner claims that she was not informed at all or with sufficient detail of the reasons for which she was arrested and detained contrary to **section 72(2)** of the Constitution.

6. On the orders of the Attorney General, an inquest was held before the subordinate court from 11th November 2005 to 15th January 2008. At the conclusion of the inquest, the subordinate court recommended that the petitioner be apprehended and arraigned before the High Court to be tried for the murder of her deceased husband Yogesh Madan Mohan Sapra.

7. As a consequence of that order, the petitioner was rearrested and taken into custody. She remained in police custody at Gigiri Police Station from 15th January 2008 until 28th January 2008 when she was arraigned before the High Court to face a charge of murder. The plea was deferred to 4th February 2008 upon request of her counsel. She was thereafter remanded at the Lang'ata Women's Prison until the date of her plea. She pleaded "not guilty" on 4th February 2008 and the case was fixed for hearing from 14th to 17th April 2008.

Issues for determination

8. This petition seeks the enforcement of fundamental rights and freedoms thus I shall restrict myself to submissions and facts that are necessary to determine whether there was a violation of the petitioner's rights.

9. The facts and circumstances of this case occurred before the promulgation of the Constitution. Since the Constitution is not retrospective, the reference to Constitution in this judgment is a reference to the former Constitution unless otherwise stated.

10. From the uncontested facts and the prayers in the petition, there are three issues for consideration by the court;

(1) Whether the petitioner's arrest and detention from 11th September 2005 to 3rd October 2005 and from 15th January 2008 to 28th January 2008 was contrary to the provisions of **section 72(3)** as read with **section 70(a)** of the Constitution.

(2) Whether the recommendation of the Magistrate conducting the inquest was outside the scope of **section 364** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** and therefore in breach of the petitioner's fundamental rights and freedoms.

(3) Whether the prosecution of the petitioner in **Chief Magistrate's Criminal Case No. 528 of 2008** which has been brought almost three years after the alleged incident will deprive the petitioner of her right of fair trial by reason of unreasonable delay contrary to **section 77(1)** of the Constitution.

Arrest and Pre-trial detention

11. Mr Billing, counsel for the petitioner, argued that the issue of pre-trial arrest and detention was not conclusively settled by the case of **Julius Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 (Unreported)**. 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 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)*).

12. Mr Billing argued that the Court in *Julius Kamau Mbugua's Case* could not have overruled previous decisions of the Court as those precedents could only be overruled by a five judge bench thus the previous cases that entitle the accused to an acquittal where pre trial detention is unconstitutional are proper and ought to be followed and are indeed binding on this court.

13. Both Mr Okello, for the State, and Mr Rebello, for the interested party, disagreed with Mr Billing and stated that the case of Julius Mbugua represented a proper reading of **section 72(3)** of the Constitution.

14. At the time material to this case, the Court of Appeal was the highest court in the land. By virtue of the doctrine of *stare decisis* the decisions of that Court bind the High Court and all the subordinate courts. The Court of Appeal, while not bound by its own decisions would, for the sake of consistency and stability, ordinarily follow its decisions. The Court of Appeal under the Constitution is properly constituted by a bench of three judges, so that it is proper for a bench of three to overrule its previous decisions. However, where a request is made to the Court, the Court may consider constituting a five judge bench to overrule a previous decision of the court or to reconcile inconsistent decisions.

15. In the *Income Tax v T [1974] EA 546, Spry Ag VP*, speaking for, the East Africa Court of Appeal stated that, **"I would also remark that where it is intended to ask this court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges although a bench of three has the same powers"** This course was adopted by the Court of Appeal in the case of *Troustik Union International & Another v Mrs Jane Mbeyu and Another Civil Appeal No. 145 of 1990 (Unreported)*, *Eric V. J. Makokha & Others v Lawrence Sagini & Others Nairobi Civil Application No. 20 of 1994 (Unreported)* and more recently in *Echaria v Echaria Nairobi Civil Appeal No. 75 of 2005 (Unreported)* where the Court considered its own inconsistent decisions in the area of matrimonial property. The fact that a five judge bench was not constituted in the *Julius Kamau Mbugua* case does not affect its efficacy and its effect upon the courts subordinate to the Court of Appeal.

16. I take the position that the case of *Julius Kamau Mbugua* overruled the previous decisions on pre trial arrest and detention and restated the law concerning the interpretation of **section 72(3)** of the Constitution. I am bound by that decision and even if I were to choose between the conflicting authorities, I would prefer it as it was an extensive and exhaustive analysis of both local and international decisions on arrest and pre-trial detention and is an authoritative interpretation of **section 72(3)** of the Constitution. It is therefore clear that Mr Billing's argument lacks merit.

17. **Section 72(3)** of the Constitution implies that the 14 days, applicable to arrest upon suspicion of having committed an offence 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 as material as 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]

18. 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.**’

19. What I am required to consider is whether on the facts and circumstances of the case, the 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 which 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 Corporal Harrison Gikandi sworn on 15th July 2008 which set out the chronology of events. As regards the first period of arrest and detention, Cpl Gikandi states, that the petitioner filed a report of the death of her husband on 10th September 2005 stating that the deceased had been attacked and injured on 21st August 2005 and thereafter succumbed to injuries in hospital on 8th September 2005.

21. On 11th September 2005 the police visited the scene of crime and arrested the petitioner in connection with the deceased’s death and detained her at Spring Valley Police Station. On 12th September 2005, the petitioner accompanied investigators to the residence and several items were recovered.

22. On 16th September 2005, Cpl Harrison proceeded to the Nairobi City Mortuary to trace the police pathologist, Dr Wasike but she was away on leave so he could not obtain the post mortem report nor statement.

23. On 20th September 2005, the Government Chemist offices were visited for purposes of conducting forensic investigations. Forensic investigators visited the scene of crime at Farasi Lane and collected items on 22nd September 2005. On 23rd September 2005, the applicant was escorted to Nairobi Area Police for age and medical assessment. Witness statements were recorded on 17th September 2005.

24. An investigation file was thereafter compiled and forwarded by the police to the Attorney General’s office on 27th September 2005 with a recommendation that a public inquest be held. It was only after studying the file that the Attorney General through a letter dated 3rd October 2005 directed that a public inquest be held. It is on this date that the petitioner was released and the public inquest held.

25. I have considered this explanation in light of the factors I have set out in paragraph 19 above. The petitioner originally faced a charge of murder, which more after than not, is not a straight forward offence to investigate. I have also taken into account the fact that the initial report about the case was that the death of the deceased related to a robbery. The deceased succumbed to injuries on 8th September 2005 which was several days after the violent act that led to his death.

26. The petitioner was held for an additional 9 days in addition to the 14 days permitted under the Constitution. In light of the facts set out by the respondent, I do not consider the period of pre-trial detention unreasonable in the circumstances and I hold that in this respect there was no breach of the petitioner’s fundamental rights.

27. The second period of detention for consideration was after the subordinate court recommended that the petitioner be apprehended for murder. The petitioner was arrested on 15th January 2008, detained at Gigiri Police Station and arraigned before the High Court and charged with murder in *Nairobi High*

Court Criminal Case No. 7 of 2008.

28. Cpl Gikandi depones that after the inquest decision, the petitioner was apprehended. In the meantime on 21st January 2008, the police resubmitted the police file together with a copy of the ruling of the inquest court to the office of the Attorney General. The file was subjected to an independent review as a result of which it was decided to prefer murder charges. The information was drawn and signed on 25th January 2008.

29. Quite apart from the fact that the second arrest was on the basis of a judicial recommendation, the period of detention was for a period of 13 days which was well within the provisions of **section 72(3)** of the Constitution. I therefore do not find any breach of the provisions of **section 72(3)** of the Constitution.

The recommendation by the Inquest Magistrate

30. The thrust of petitioner's case is that in so far as the Magistrate conducting the inquest recommended the arrest and prosecution of the petitioner for murder, it exceeded its jurisdiction.

31. This issue was determined by Hon. Mr Justice J B Ojwang' (as he then was) in a ruling dated 27th February 2008 in ***Nairobi High Court Misc. Criminal Application No. 39 of 2008***. The ruling arose from a revision application filed by the petitioner to examine the legality of the inquest proceedings on the basis that the inquest magistrate had no power or jurisdiction to recommend and order that the petitioner be apprehended and arraigned before the High Court to be tried for murder.

32. Justice Ojwang' considered the issues before him and concluded as follows, ***“Since the prosecutorial function by section 26 of the Constitution, belongs in substance to the Attorney General, the inquest Magistrate's mandate was limited to stating his finding of fact, without preferring a particular course of prosecution action to be taken by the Attorney General. I will not, however, hold this shortcoming in the inquest ruling to have compromised the prosecutorial decision later taken by the Attorney General as there is no evidence that the Attorney General has made reliance on not just the inquest findings, but also on the records of evidence in the Police files. These foundations of prosecution have the effect of rendering the inquest proceedings, as such, essentially a historical record, and I hold that it will not by any means prejudice the applicant. The Attorney General may proceed with prosecution in accordance with the law.”***

33. This decision was made by a superior court exercising concurrent jurisdiction as such I can neither review it nor set it aside. The course suggested by the petitioner is not permitted by **Article 165(6)** of the Constitution (see also the case of ***Peter Ng'ang'a Muiruri v Credit Bank Limited & Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)***).

Fair trial within a reasonable time

34. Under **section 77(1)**, an accused is entitled to be ***“afforded a fair hearing within a reasonable time”***. According to petitioner, the events of that led to the charge of manslaughter she is facing occurred in 2005 and it is likely that the prosecution took so long after this period will prejudice her defence in terms of strained recollection of events and availability of witnesses.

35. Whether a fair trial can be obtained within a reasonable time is a question of fact dependent on the circumstances of the case. This issue was also dealt with in the ***Julius Kamau Mbugua*** case where the Court of Appeal set out certain principles as follows;

(i) The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.

(ii) The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their

actions.

(iii) The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.

(iv) There is no international norm of “reasonableness”. The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.

(v) Although an applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden may shift depending on the circumstances of the case. However, the court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.

(vi) The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorised as unreasonable.

(vii) Although the procedure for raising a violation of the right varies from one jurisdiction to the other, the violation of the right should be raised at the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.

36. The chronology of events since the petitioner was arrested has been set out in this judgment. She was arrested first on 11th September 2005. Thereafter the inquest took place from 14th November 2005 to 15th January 2008. The petitioner was arraigned in court to plead to the offence of murder and pleaded to the charge on 4th February 2008. Thereafter, a *nolle prosequi* was entered on 14th April 2008 and those proceedings terminated.

37. The petitioner was charged with manslaughter before the **Chief Magistrate’s Court in Criminal Case No. 528 of 2008** on 15th April 2009. It is therefore clear that the petitioner has been subject of continuous judicial proceedings since she was charged. A stay of those proceedings was issued on 11th June 2006 when this petition was filed and it is still in force pending this determination.

38. No facts have been placed before the court to show that indeed the petitioner will suffer prejudice by reason of the delay. The facts, in my view, do not disclose an unreasonable delay if only because the pending trial for manslaughter, has been stayed to enable her to agitate this petition which seeks to vindicate her fundamental rights and freedoms. But for these proceedings, her trial for manslaughter would have proceeded for hearing.

39. I therefore hold that there has been no unreasonable delay of trial as contemplated by **section 77(1)** of the Constitution.

Disposition

40. I have found against the petitioner on all the three issues framed for determination. In light of the findings, I also hold that the petitioner has not been deprived of her presumption of innocence as alleged in the petition.

41. It follows that the petition lacks merit and is dismissed. I will not award costs as this is a case for the enforcement of fundamental rights and freedoms under the Bill of Rights.

42. I must also add that procedure under **section 84** of the Constitution is for the determination of whether fundamental rights and freedoms have been infringed or violated. I have therefore refrained from commenting on matters which are unnecessary for such determination particularly concerning the

relationship between the petitioner and the family of the deceased represented by the interested party. I have also refrained from commenting on the evidence which that will be subject of the criminal proceedings as such comments may prejudice the petitioner's fair trial.

DATED and **DELIVERED** at **NAIROBI** this 30th March 2012.

D.S. MAJANJA

JUDGE

Mr M. Billing instructed by Guram& Company for the petitioner.

Mr E. Okello instructed by the State Law Office for the respondent.

Mr A. Rebello instructed by A R Rebello & Company Advocates for the interested party