



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION 256 OF 2011

SALIM KOFIA CHIVUI.....PETITIONER

VERSUS

THE RESIDENT MAGISTRATE BUTALI LAW COURTS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Petitioner's Case

1. The facts giving rise to this petition are unremarkable and commonplace. The petitioner is an accused person in *Butali Resident Magistrate's Criminal Case No. 180 of 2011* where he is charged with arson contrary to section 332(a) of the *Penal Code (Cap 63 of the Laws of Kenya)*.
2. He was arrested in Nairobi by Police officer from Muthangari Police Station on 24th March 2011 and taken to Kabras Police Station, Kakamega County on 28th March 2011. He was thereafter arraigned at the Butali court on 29th March 2011.
3. He contends that his rights guaranteed under **Article 49(1)(f)** of the Constitution were violated in so far as he was not taken to court within 24 hours of being arrested. The petition dated 15th November 2011 seeks the following reliefs;
 - (a) *A declaration that the rights of the petitioner as guaranteed by Article 49 and 50 of the Constitution have been violated.*
 - (b) *A declaration that the 2nd respondent has failed to protect the rights of the petitioner as guaranteed by Article 20 and 21 of the Constitution.*
 - (c) *An order discharging the petitioner from Criminal Case Number 180 of 2011 before the Resident Magistrate in Butali.*
 - (d) *General damages.*
 - (e) *Costs.*

4. Dr Khaminwa, counsel for the petitioner, was of the view that the 24 hour period of arrest and detention before being taken to court is cast in stone. He asserted that under **Article 49(1)(f)**, a person who is arrested has to be produced in court within 24 hours failing which the proceedings must be quashed or stayed. Counsel maintained that the provisions relating to the rights of the accused must be strictly construed and in this case there is no room, or window provided to enable the State avoid liability under **Article 49(1)(f)**.

5. Dr Khaminwa relied on the case of *Njogu and Others v Republic* [2010] 1 EALR 407 and *Waithaka and Another v Republic* [2010] 1 EALR 410. He distinguished the case of *Julius Kamau Mbugua v Republic* Nairobi Criminal Appeal No. 50 of 2008 (Unreported) on the ground that the case was determined under the former Constitution. This case, Dr Khaminwa argued, was distinguishable on the facts as the petition was brought to court before the trial and the trial is yet to begin unlike *Julius Kamau Mbugua's Case* where the matter was raised during the trial. In the circumstances, the relief sought in the petition is to quash or stay the proceedings before the Butali Court. In his view, the significance of his argument was underpinned by the words “*not later than*” contained in **Article 49(1)(f)** which must guide this court.

Respondent's Case

6. The respondents oppose the petition on the basis of the replying affidavit sworn by Godwin Nganga, the Deputy Officer Commanding Muthangari Police Station, on 15th March 2012. He deposes that the petitioner was arrested on Thursday 24th March 2011 upon receipt of an order from Kabras Police Station following an arson complaint by one Elijah Jifuli.

7. On Friday 25th March 2011, the officer in charge of Kabras Police Station was requested to make arrangements to collect the petitioner from Nairobi so that he could be charged at the Butali Law Courts. The officers from Butali Police Station came to Nairobi and upon finalisation of transport arrangements, the petitioner was taken to Kabras Police Station on Monday, 28th March 2011 and arraigned in Court on Tuesday, 29th March 2011.

8. It is the respondent's case that in presenting the accused in court there was delay as the officers from Kabras Police Station, within Kakamega County had to travel to Nairobi and being a weekend logistical arrangements had to be made to ensure that the petitioner would safely travel from Nairobi to Western Kenya.

9. In the circumstances, it was the respondent's contention that the delay was reasonable and the petitioner was not entitled to the relief sought. Mr Kakoi, for the respondent, relied entirely on the case of *Julius Kamau Mbugua* to support the respondent's position. He urged the court to dismiss the case.

Whether there is breach of Article 49(1)(f)

10. The only issue for determination there was a breach of the petitioner's rights guaranteed under **Article 40(1)(f)** of the Constitution by reason of failure of the police to produce the petitioner before a court not later than 24 hours after being arrested.

11. The question of pre-trial arrest and detention was one of considerable controversy. This controversy manifested itself in regard to the question whether the court in enforcing rights related to pre-trial arrest and detention could interfere with the trial and its processes. Dr. Khaminwa relied on the case of *Njogu and Others v Republic* (Supra) where the High Court held, “*there is as yet no known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional and fundamental rights were violated prior to the purported institution of the criminal proceedings complained against. Nor is there any room for extension of the constitutionally provided period of 24 hours, it could as well come after one year. Either way, such prosecution is a violation of the rights of the arrested or detained person and is illegal and null and void.*” In that case the court had no difficulty in declaring the detention of applicant's illegal, null and void at, “*the tick of the 60th*

minute of the 24th hour.’

12. This controversy was settled in the case of *Julius Kamau Mbugua*. In that case the court stated, “[I]n our view, the right of the suspect to personal liberty before he is taken to court under section 72(3)(b) are clearly distinct from the rights to an accused awaiting trial under section 77(1). The main difference is that the breach of right to personal liberty is not trial related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right the duty is specifically on the police where the suspect is in police custody. If by illustration, the police breach the right to personal liberty of the suspect by unreasonable detention in police custody there is a right to apply to the High Court for a Writ of Habeas Corpus to secure releaseIn addition, section 72(6) provided a remedy by way of damages to a person who is unlawfully arrested or detained. In contrast, the right to a trial within a reasonable time guaranteed by section 77(2) is trial related.....In our view, it is not the duty of the trial court or an appellate court dealing with an appeal to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.”

13. The Court of Appeal in coming to this conclusion reviewed various cases including the case of *Njogu & Others v Republic (Supra)*, foreign decisions, international human rights treaties and instruments.

14. Dr Khaminwa’s objection to the Court of Appeal decision in *Julius Kamau Mbugua* was on the basis that the case was applying the specific provision of **section 72(3)** of the former Constitution and not **Article 49** of the Constitution. Though that judgment was delivered after the promulgation of the Constitution, it related to facts occurring during the currency of the former Constitution.

15. The **section 72(3)** of the former Constitution provides;

72(3) A person who is arrested or detained -

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, 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.

16. In the case of *Dominic Mutie v Republic Nairobi Criminal Appeal No. 217 of 2005 (Unreported)*, the Court of Appeal construed the provisions of **section 72(3)** as follows, “A plain reading of that provision of the Constitution as a whole shows that the provision requires that a person arrested upon reasonable suspicion of having committed or about to commit a criminal offence, among other things, has to be brought before the court as soon as is reasonably practicable (emphasis ours). The section further provides that where such a person is not taken to court within either the twenty-four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of section 72 (3) above is in our view clear that

each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity.”

17. In *Julius Kamau Mbugua*, the Court maintained, “**By section 72(3) 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. Under **section 72(3)** of the former Constitution, the State could avoid liability by demonstrating that the detention of a person detained beyond the time limits specified was reasonable in the circumstances.

19. **Article 49(1)(f)** of the Constitution 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;

20. From a clear reading of **Article 49(1)(f)**, I would agree with Dr Khaminwa that the introduction of the words, “*but not later than*” circumscribes the period within which a person can be held in police custody prior to being brought to court. **Sub Article (f)(i)** provides a period not later than 24 hours in any case and **(f)(ii)** the end of the next court date where the 24 hours end outside the ordinary hours end outside the ordinary court hours or on a day that is not an ordinary court date. **Sub articles (f)(i) and (ii)** provide outer limits of what is permissible for pre-trial detention and if the detention period falls outside the contours of this provision, then there is a breach of the petitioner’s fundamental rights.

21. In this case the petitioner was arrested on Thursday, 24th March 2011. According to **Article 49(1)(f)** then he should have been taken before the court of Friday, 25th March 2011 assuming that the time of arrest was within the day so that the 24 hour period fall within the day of Friday. If not, then the next court date would be Monday. The accused though, was arraigned in court on Tuesday, 29th March 2011 well outside the outer limits prescribed by **Article 40(1)(f)(i) and (ii)**.

22. I therefore find and hold that the petitioner’s right under **Article 40(1)(f)** were breached when he was arrested on 24th March 2011, detained in police custody and arraigned before the court in Butali on 29th March 2011.

23. In coming to the conclusion that I have, I have taken into account the provisions of **Article 49(g), (h) and (2)** which provide as follows;

49.(1) An arrested person has the right –

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there

are compelling reasons not be released.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.

24. The tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty-four hours or for the period necessary to secure his production in court of the next available date. In any other case any detention beyond 24 hours must be authorized by court as provided by **Article 49(1)(g)**. Once the person's attendance has been secured within the 24 hours, the court may order the person released or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.

Whether there is breach of Article 50

25. **Article 50** sets out the rights of an accused during the trial process. I have read the petition and supporting affidavit and I do not find any allegation or breach of the petitioner's rights under **Article 50** of the Constitution.

26. The case of **Julius Kamau Mbugua** decided that there was an important distinction between the rights of a person before who has been arrested and which are now provided for under **Article 49 (section 72** of the former Constitution) and those of a person charged under **Article 50 (section 77** of the former Constitution) and these rights should not be conflated.

27. Hence, conduct which is not trial related should not affect the trial process and that is why the Court of Appeal was very clear that any breach of pre-trial rights did not entitle the party aggrieved to an acquittal. In this respect **Julius Kamau Mbugua's** case is valid in so far as the provisions of **Article 49** and **50** are concerned. I must therefore hold that pre-trial detention rights as I have found do not entitle the petitioner to a discharge from the criminal proceedings or a stay thereof. I am therefore unable to grant prayer (c) of the petition. For the avoidance of doubt, the petitioner's trial shall continue according to the law.

Remedies and disposition

28. From the findings I have made, I have no difficulty in granting the declaration vindicating the rights of the petitioner.

29. The petitioner has prayed for general damages, the petitioner's advocate did not indicate what damages I should award in relation to the circumstances of this case. Under **Article 23**, an award of damages is discretionary and the court is entitled to consider awarding damages in addition to the declaration. It is in considering the level of award that the conduct of the respondent is relevant.

30. I have consider the actions of the police as explained by Godwin Nganga reasonable in the circumstances given that the offence took place in Kakamega, petitioner was arrested in Nairobi and taken to the Butali Court in Kakamega County for arraignment. The reasons proffered were not contested by the petitioner. I did not detect malice or bad faith or any aggravating factors. In the circumstances I award nominal damages in the sum of **Kshs. 10,000.00** in order to vindicate the petitioner's right.

31. As there is no wrong alleged against the 1st respondent, the Resident Magistrates Court at Butali, I dismiss the case against it.

32. I therefore enter judgment for the petitioner against the 2nd respondent as follows;

(a) I declare that the right of the petitioner as guaranteed by **Article 49(1)(f)** have been violated by the 2nd respondent when he was arrested on 24th March 2011 and charged on 29th March 2011.

(b) I award the petitioner the sum of **Kshs. 10,000.00** as damages for violation.

(c) I award the petitioner the costs of this petition.

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

D.S. MAJANJA

JUDGE

Dr Khaminwa instructed by Khaminwa and Khaminwa Advocates for the petitioner.

Mr E. Kakoi, Litigation Counsel, instructed by the State Law Office for the respondent.