



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
REVISION CASE NO. 289 OF 2011
SALIM RAZA.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

The Petitioner, **SALIM RAZA**, was arrested by the police on 13th September 2009.

The arrest was effected at the Industrial Area Police Station, where the petitioner had gone to lodge a complaint against one TARIK MOHAMED SHEIKH (who shall hereinafter be cited as “the Complainant”)

The complainant had allegedly assaulted the petitioner because the petitioner had blocked the access gate connecting Block H and Block J, within Mariakani Estate, Nairobi.

However, the complainant asserted that it was the petitioner who had assaulted him.

It is not an issue for determination by this court whether the petitioner assaulted the complainant or whether the complainant assaulted the petitioner.

It is common ground that the complainant was able to lodge his complaint against the petitioner, first. He lodged his complainant at the Industrial Area Police Station.

Thereafter, the petitioner went to the same police station. His intention was to lodge a complaint against the complainant. However, as soon as the petitioner identified himself, the police arrested him.

The incident giving rise to the arrest of the petitioner is said to have taken place at about 8.30p.m, on 13th September 2009.

According to the respondent, the complainant lodged his complaint at the police station at 9.58p.m. Therefore, it was not until the next day that the complainant recorded his statement.

It was also on 14th September 2009 that the police issued a **P3** to the complainant.

The Investigating Officer, PC John Misoi, conducted his investigations and recorded witness statements. He says that he concluded his investigations on 14th September 2009.

However, it was not until the 15th of September 2009 that the petitioner was first taken to court.

As the police did not disclose to this court about the details of the time when they concluded their investigations, I am unable to determine whether or not the police could still have taken the appellant to court on 14th of September 2009.

The onus was on the prosecution to explain why they did not take the petitioner to court within 24 hours of his arrest. The prosecution did not offer a comprehensive explanation to this court.

The ability or lack thereof, of the petitioner to raise a cash bail of KShs.5,000/- is not material.

The respondent was obliged to take the petitioner to court within 24 hours of his arrest, failing which the respondent should have demonstrated that they brought the petitioner to court as soon as was reasonably practicable.

The respondent has failed to discharge that onus.

I feel obliged to remind the police that if they find that they need more time to complete their investigations after they had arrested a suspect, they should always strive to seek the authority of a court of law, to continue to hold the suspect in custody. It is ill-advised for the police officer to determine for himself the amount of time he will continue to hold the suspect in custody, after the lapse of the period of time stipulated in the constitution.

In this instance, the petitioner should have been taken to court within 24 hours of his arrest. He was not. Therefore, because the police have not offered a reasonable explanation for the delay in taking him to court, I declare that the constitutional rights of the petitioner were violated.

In **JULIUS KAMAU MBUGUA Vs REPUBLIC, CRIMINAL APPEAL NO. 50 of 2008**, the Court of Appeal said;

“Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.”

Their Lordships made it clear that the jurisdiction of the court to hear the criminal case of the person who was taken to court late, was not ousted by the delay in taking that person to court.

The Court of Appeal concluded as follows;

“The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum.”

In the result, although the respondent did violate the rights of the petitioner, by taking him to court one day late, that did not render a nullity, the criminal case against the petitioner.

The criminal case ought to continue to its logical conclusion, so that if the petitioner was to be held criminally culpable, he would face the consequences of his actions.

However, just because the petitioner may have committed an offence would not have given authority to the police to violate his rights. Therefore, the police may well have to be held accountable to the petitioner, in separate proceedings.

Finally, if the petitioner lodged a complaint, the police are obliged to carry out independent investigations. If the petitioner has good reasons for concluding that the police have failed to conduct appropriate investigations, he may take steps towards launching private investigations, or he may take any other lawful action against the police.

Dated, Signed and Delivered at Nairobi, this 7th day of March, 2012.

FRED A. OCHIENG

JUDGE