



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Constitutional Reference 242 of 2011

ERIC ERABA OYUGI.....1ST PETITIONER

STEPHEN OBIERO OWINO2ND PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The petitioners were jointly charged in the Chief Magistrate's Court in Makadara in Criminal Case No. 704 of 2009 with the offence of stealing contrary to section 281 of the Penal Code. They had been arrested on 11th February 2009 and held in custody until the 16th of February 2009 when they were charged before the Chief Magistrate's Court. They both pleaded not guilty to the charge.

2. The petitioners then raised a constitutional issue alleging violation of their constitutional right under section 72(3) of the repealed constitution. They argued that their right to be charged in Court within 24 hours of their arrest had been violated in that they were arrested on the 11th of February and were not charged in Court until the 16th of February 2009. After examining the issue raised by the petitioners, the Acting Senior Principal Magistrate was satisfied that the petitioners had raised an important matter with regard to their constitutional rights and referred the matter to the High Court for determination. The Learned Magistrate framed three questions for determination as follows:

(a) Whether the unexplained delay of the Police in bringing the applicants to Court was in violation of their constitutional rights under section 72(3) of the repealed constitution.

(b) Whether the criminal trial against the applicants for the offence charged shall be terminated and the applicants set at liberty on account of the alleged violation of their rights under section 72 of the constitution, and

(c) Whether any damages should be paid by the respondents to the applicants for the violation of their rights, and the sum thereof.

3. The reference, No. 587 of 2009, was placed before the Criminal Division of the High Court and then transferred to the Constitutional and Judicial Review Division. It had not proceeded to hearing when, in June 2011, the petitioners filed an application by way of Notice of Motion dated 28th June 2011 seeking injunctive orders to restrain the Magistrate's Court in Makadara from proceeding with Criminal Case No. 704 of 2009 which had apparently been fixed for hearing on the 15th of July 2011. The application is supported by the affidavit sworn by the 2nd petitioner, Stephen Obiero Owino, on 28th June, 2011 and alleged violation of various rights under the Constitution of Kenya 2010.

4. In opposing the application, the respondent filed a Notice of Preliminary Objection dated 14th July 2011 raising various grounds, *inter alia* that the application is incompetent and fatally defective as the cause of action arose in February 2009, a date prior to the promulgation of the current Constitution and therefore the Articles the application is based on were unknown in law. The respondent also argued that the applicants had failed to comply with the mandatory provisions set out in the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 (The Gicheeru Rules)**.

5. It appears from the Court record that the application for injunctive orders was not canvassed. Further, given that the Chief Magistrate's Court had in March, 2009 referred this matter to the High Court in compliance with the provisions of Rule 24 of the Gicheeru Rules, which reference had the effect of staying proceedings in the criminal trial of the petitioners, I take the view that the petition and the application by way of Notice of Motion dated 20th June 2011 was superfluous and the petitioners should have proceeded with reference No. 587 of 2009. Consequently, I will confine myself to the question posed for determination by the Acting Chief Magistrate in that reference.

6. In any event, the constitutional provisions applicable at the time of the petitioners' arrest were as contained in Section 72(3) of the former constitution. Further, in their respective submissions, both parties focus on the issues framed by the Acting Chief Magistrate and make no reference to the constitutional provisions cited by the petitioners in their application or the grounds of opposition filed by the respondent.

Determination

7. There is no dispute on the facts. The petitioners were arrested on the 11th of February, 2009 but were not charged in Court until the 16th of February 2009. The repealed constitution provided at Section 72(3) as follows:

(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.”

Whether the Petitioners; Rights Were Violated

8. The first issue for determination is whether the facts establish a violation of the petitioners' rights under this section. The petitioners contend that the delay by the Police before charging them in Makadara Criminal Case No. 704 of 2009 violated their constitutional rights under section 72(3) of the repealed constitution. The respondent counters this argument and submits that the petitioners rights under section 72(3) of the former constitution were not violated; that the petitioners had failed to demonstrate how their constitutional rights were violated and had not provided any evidence showing that they were indeed detained unlawfully by the Police for five days.

9. The petitioners were arrested on the 11th of February, a Wednesday, but were not charged in Court until the 16th of February, which was the following Monday. The former constitution required that they should have been charged in Court within 24 hours of their arrest, which meant that they should have been charged in Court on the 13th of February, 2009. Clearly, therefore, there was a delay beyond the

constitutionally mandated period. Section 73(3), however, in its proviso, excused delay in complying with the constitutional requirement by providing that

“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.”

10. In the proceedings before the Chief Magistrate’s Court in Makadara, the Police explained the delay on the basis that they needed to take statements from witnesses between the 12th and the 13th of February, 2009. The 14th and the 15th of February 2009 fell on a weekend when courts do not sit, so the delay in charging the petitioners in court was for one day. Technically, there was a violation in the failure to take the petitioners to court within the constitutionally mandated period of twenty four hours. Unlike the current Constitution, the repealed constitution offered scope for excusing the delay where a reasonable explanation for the delay could be provided by the Police. In the present case, the explanation is that they needed to take witness statements before charging the petitioners in court. That may indeed be so, but it is not, in my view, sufficient to excuse the delay. I therefore find and hold that the petitioners’ rights under Section 72(3) of the former constitution were violated by the failure to charge them in court as required under section 72(3) of the former constitution.

Whether Makadara Criminal Case No. 704 of 2009 Should be Terminated

11. The petitioners contend that as a result of the violation of their rights under section 72(3) of the former constitution, the case against them in Makadara Criminal Case No. 704 of 2009 should be terminated and they should be set at liberty. They rely on the case of **Albanus Mwasia Mutua -v- Republic, Criminal Appeal No. 120 of 2004 (unreported)** in which the court held that the trial of the accused was a nullity as his constitutional rights had been violated when he was held in custody for a period of eight months before being charged in court.

12. However, as correctly submitted by the respondents, the Court of Appeal has settled the issue with regard to violation of the rights under Section 72(3) of the former constitution with regard to pre-arraignment detention. In the case of **Julius Kamau Mbugua -v- Republic Criminal Appeal No. 50 of 2008**, the Court of Appeal, after reviewing various decisions relating to pre-arraignment detention, including the case of **Albanus Mwasia Mutua –v- Republic (supra)** relied on by the petitioners, held that the right protected by section 72 (3) (b) is the right to be taken to court as soon as reasonably practicable, but not the right not to be tried. The Court stated as follows in that case:

“Had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised”.

13. I therefore answer the second issue framed by the Magistrate in the reference to this court in the negative: the petitioners’ trial in Makadara Criminal Case No. 704 of 2009 should not be terminated but must proceed in accordance with the law.

Whether the Petitioners are Entitled to Damages, and the Measure Thereof

14. The third issue framed by the Ag. Chief Magistrate is whether any damages should be paid to the petitioners, and the amount thereof. In **Julius Kamau Mbugua -v- Republic (supra)** the Court of Appeal held that should there be a violation of an accused person’s rights under Section 72(3) of the former constitution, the remedy available to the accused was an award of damages. Having found that the petitioners’ rights under the former constitution were violated by their being held in custody for one day longer than they should have been held before being charged in court, I find and hold that they are entitled to an award in damages.

15. With regard to the measure of damages, I take the view that, given the explanation given by the Police and the length of the delay in taking them to court, the petitioners are only entitled to nominal damages.

In the case of **Salim Kofia Chivui -v- Butali Resident Magistrate's court & Another Petition No. 256 of 2011**, where the accused was arrested on the 24th of March 2011 and charged in court on 29th March 2011, Majanja, J made an award of Kshs 10,000. The petitioners in this case were held in custody for a day longer than permitted in the Constitution, and an amount of **Kenya Shillings Ten Thousand (Kshs10,000/-)** to each of the petitioners is sufficient recompense in the circumstances. The petitioners shall also have the costs of the reference.

16. I further direct that the court file in respect of Makadara Criminal Case No. 704 of 2009 should be returned to the court and the case may now proceed to hearing.

Dated, Delivered and Signed at Nairobi this 27th day of September 2012

MUMBI NGUGI

JUDGE