



- Violation of constitutional rights
- Whether proved
- Whether initiates criminal charges against petitioner
- Whether compensation can be ordered

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR MISC NO. 12 OF 2010

HESBON KIRUJA MURIITHI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

LESIIT J.

R U L I N G

The Petitioner Hesbon Kiruja Muriithi has filed this petition under S.84 (1) and S.72(3)(b) of the old Constitution. His main prayers are 3 as follows:-

- (1) A declaration that the charges and proceedings in Nkubu Criminal Case No. 363 of 2000 are illegal, null and void ab initio.**
- (2) Compensation for the violation of his fundamental rights & freedoms as the court may deem fit.**
- (3) Costs be provided.**

The Petitioner basis the petition on grounds he was arrested on 11th March 2008 on suspicion of the offence of Defilement contrary to section 8 (1) (2) of the Sexual Offences Act. That he was held from

11th March 2008 to 13th March 2008 when he was arraigned in court. The Petitioner argues that he was held for over 24 hours as law prescribed and that in the circumstances the charges preferred against him were a nullity as they contravened his Constitutional Rights.

The Petition was argued by Mr. Nyaga on behalf of the Petitioner. Counsel relied on the cases of **GERALD MACHARIA GITHUKU VS. REPUBLIC CA NO. 119 OF 2004** and **ALBANUS MWASIA MUTUA VS. REPUBLIC CA NO. 120 OF 2004**.

Mr. Kimathi represented the State. The learned State Counsel opposed the Petition. The counsel's main contention was that the Petitioner's rights were not violated because they expired on 12th March 2008. That he was arraigned in court on 13th March 2008 within the period stipulated by the law.

The question whether or not the Petitioner was held for a period beyond that prescribed in the law is a question of fact. It is not disputed that the Petitioner was arrested on 11th March 2008 and arraigned in court on 13th March 2008. A simple calculation of the period the Petitioner was held in police custody before he was arraigned in court shows two clear days. The 24 hours lapsed on 12th March 2008. By 13th March 2008, the Petitioner was arraigned in court. Even if it can be argued that 24 hours ended on 12th and that therefore by taking the Petitioner before the court on 13th violated his constitutional right, the lapse of time involved is minimal.

In **DAVID NJUGUNA WAIRIMU V. REP. CA NO. 28 OF 2008**, the Court of Appeal was determining a similar question but in a capital charge. The constitution required the police to arraign a suspect in court for a capital charge within 14 days of arrest. The court of Appeal observed:-

“The period of 14 days was not absolute. The prosecution may have had a good reason for not bringing the appellant to court within the stipulated 14 days. However, the duty to explain the delay lay upon it. They could only be called upon to account for the delay if the issue was raised either at trial or on first appeal.”

It is clear from the facts of this case that the Petitioner was taken to court on the next working day after the expiry of 24 hours. There was nothing for police to explain and therefore no violation of the Constitutional Rights. In case I am wrong and it is found that indeed the Petitioner ought to have been taken to court before the end of 12th March 2008, I will say the following.

One that under S.70 of the old constitution the rights and freedoms of an accused person were subject to the rights and freedoms of others and for public interest. Although the Petitioner was entitled to his fundamental rights and freedoms, the enjoyment of same was subject to the respect for the rights and freedoms of others and to public interest. See **REPUBLIC VS DESMOND MULUSA [2010] eKLR**.

Two if indeed the rights of the Petitioner were violated, S.72 (6) of the Old Constitution provided a remedy in situations where S.72 (3) of the old Constitution are said to be violated. In order to benefit from the provisions of S.72(6) of the Constitution, the Petitioner had to file a Civil Suit against those who he perceives to have violated his rights under S.72(3) in order to give opportunity for evidence to be called and the suit to be proved as required under the civil law.

Three of the rights of an accused under S.72 (3) of the Constitution were not absolute. The same

Constitution did make provision for a remedy in case of violation under S72 (6) of the Constitution. It cannot be said that the delay in this case if any, was inordinate and therefore if there was any delay it was for a short time. It cannot be said to have vitiated the charges against the Petitioner.

Having come to these conclusions I order as follows:-

- 1. I find no merit in this petition and do dismiss it accordingly.**
- 2.The stay of proceedings order granted in this petition by this court on 19th July 2010 be and is hereby vacated.**
- 3.The Petitioner should present himself before Nkubu SPM's court for the hearing and determination of the charge against him in Criminal Case No. 363 of 2008.**
- 4.The Respondents Costs of the Petition be borne by the Petitioner.**
- 5.This order be served on Nkubu SPM's Criminal Case No. 363/08.**

Those are my orders.

Dated Signed and delivered at Meru this 10th day of February 2011

LESIIT, J

JUDGE