REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
PETITION NO. 12 OF 2010

GEOFREY GITHIRI KAMAU……1ST PETITIONER
JOHN MBURU KIMANI……2ND PETITIONER

VERSUS

THE CHIEF MAGISTRATE – NAIVASHA...1ST RESPONDENT
ATTORNEY GENERAL……2ND RESPONDENT

RULING

Before me is the chamber summons dated **13th September 2010**, brought by **Geoffrey Githiri Kamau** and **John Mburu Kimani** against the **Chief Magistrate, Naivasha** and **the Hon. the Attorney General**. The application is expressed to be brought pursuant to **Sections 165(3) (b) and (6) of the Constitution of Kenya** *(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual)* High Court Practice and Procedure Rules, 2006.

The Applicants were arrested and are facing charges in **Naivasha Criminal Case No. 65 of 2010 – Republic Vs Geoffrey Githigi Kamau** and **John Mburu Kimani** and their prayer is that the said proceedings be stayed pending the hearing of the petition herein. The application is based on grounds found in the body of the chamber summons and an affidavit sworn by both applicants, dated 13th September 2010 and a further affidavit dated 2nd November 2010. The applicants' complaint is that they were arrested on 6th January 2010 and placed in custody at Magumu Police Post and were arraigned before the Chief Magistrate's Court, Naivasha charged with non capital offences in Criminal Case No. 65 of 2010. They were jointly charged with offence of attempting to extort by threats contrary to **section 300 (1) of the Penal Code** and 1st Applicant was also charged with the offence of personation contrary to **section 382 of the Penal Code**. They were kept in police custody for 3 days which was a violation of the right under **Section 49 (g) of the Constitution**.

It is their contention that because they were not charged within 24 hours as provided with the Constitution, the charges are an illegality. They tried to raise the issue before the trial Magistrate who kept adjourning the matter till 31st May 2010 when they made an informal application and the Magistrate declined to refer the matter to the High Court for trial and commenced the criminal trial. **Ms Njoroge** who appeared on behalf of the applicants urged that no good reason was given why the applicants were not arraigned before the Magistrate within 24 hours as provided by **Section 49(g)** of the Constitution. She said the explanation given by PC Wesonga that the complainant was on a business trip is not true. The applicants claim to have had money for bail but the police officers refused to release them on bail and tortured them and they sought medical treatment after their release when another senior police officer intervened. It was also contended that no investigations were done during the applicant's incarceration as the investigation diary shows that Sgt. Wesonga started investigation on **11th January 2010** – 5 days after the applicants' release. Counsel made reliance on the decisions in **Republic Vs Murunga [2008] KLR 1223** where the Court of Appeal considered **Section 72 (3)** of the repealed Constitution, the equivalent of Article 49(g) of the current Constitution. In the above cited case, the accused had been kept in custody for 10 days after arrest and no satisfactory explanation was given for holding him beyond the 24 hours and the court ordered his release.

The application was opposed and a replying affidavit was sworn by **Sgt. John Wesonga**, who described himself as the investigating officer in the criminal case. He deponed that after the applicants' arrest on 4th January 2010, the witness statements could not be taken as the complainant was away on a trip. The applicants were allowed to pay cash bail of Kshs.5000/= to secure their release but they were not able to raise it. He exhibited **JW2 A&B**, O.B. extracts indicating when the applicants were given cash bail. The police could not give free bond because the applicants were strangers and they could not know if they could be traced. **Mr. Omutelema** of the State Law Office urged that the fact that one alleges infringement of fundamental rights does not automatically entitle one to acquittal or a stay of criminal proceedings. He urged that the applicants need to demonstrate that the alleged infringement will vitiate the trial. He cited the case of **JULIUS KAMAU VS**

REPUBLIC Criminal Appeal No. 50 of 2008 where the Court of Appeal held that the applicants had to show that they could not get a fair trial due to what happened to them.

Counsel also submitted that if the applicants' rights were infringed, that can be dealt with without vitiating the criminal trial. He further submitted that the trial Magistrate commenced the hearing to avoid delay and so far, there is no allegation levelled against the Magistrate that she was biased or that the trial would be prejudicial to the applicants.

Mr. Omutelema also observed that the averments in the affidavits of both parties are contentious and can only be resolved at a hearing and the matter should proceed to full hearing. He also raised issue with the filing of the application under the new Constitution when the cause of action arose during the existence of the old Constitution.

Article 19 of paragraph 5 of the Transitional Provisions of the new Constitution provides that until the Chief Justice makes the Rules contemplated under Article 22, for the enforcement of the fundamental rights and freedoms under **Section 84 (6) of the former Constitution** still continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with **Article 22 of the Constitution.**

The applicant has purportedly brought this matter under the new Constitution and should comply with the rules made under **Section 84(6) of the former Constitution**. There is no evidence that the Chief Justice has made Rules under **Article 22 of the Constitution** that could be in use.

It follows that the applicant should have moved the court under Rule 12 by filing a petition supported by an affidavit setting out their claim. For conservatory orders, the applicants should have invoked **Rules 20** and **21 of the Constitution of Kenya** *(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual)* **Practice and Procedure Rules**, **2006**. Counsel did not bother to follow this procedures.

Even before I consider the merits of the chamber summons dated 13th September 2010, I wish to point out that I have perused this court file and I see no petition upon which the chamber summons is predicated. A party cannot move the court for interim orders of stay without seeking substantive prayers in the main suit, in this case, the petition. Interim orders can only be granted pending the determination of the petition. It is apparent that the applicants have not complied with the rules made under **Section 84(b)** of the Constitution. What happens after the orders of stay are granted? Is the matter to be left in limbo?

The header in the application indicates that it is petition No. 12 of 2010 but no petition exists on the file. In the event that some reason, the petition has been omitted by some mistake, I will go ahead to consider the merits of the application. Otherwise no orders can issue on a chamber summons alone without the petition.

This application is brought pursuant to Article 49 (g). That provision reads as follows:

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

(a) to be informed promptly, in language that the person understands, of-

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(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;

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

and"

The applicants' complaint is at variance with the arose section because what the applicants complain of is that they were detained for over 24 hours before they were arraigned before the court. They have not complained against the court. They have already been charged, released on bond and proceedings commenced. It is my view that the proper provision that should have been invoked is **Section 49 (1) (f)** (supra).

In constitutional applications, the party moving the court should plead with precision the section, sub-section or paragraph under which he complains and plead with precision that of which he complains to enable the respondent ably respond. That is what the court held in **MATIBA VS ATTORNEY GENERAL HCCR 666 OF 1990** and **ANARTHA KARIMI NJERU VS ATTORNEY GENERAL [1979] KLR 154.** In the instant case, the allegation is at variance with the provisions of law that were invoked and this court cannot grant the orders sought.

I have considered the rival arguments. The 1st respondent herein is the Chief Magistrate who has conduct of the criminal cases. The applicants have not demonstrated that the trial Magistrate has breached any of their rights or is likely to do that. The court was not part of the alleged delay in bringing the applicants to court and there is not a good reason why the court cannot proceed with the hearing of the criminal charges.

Sgt. Wesonga filed an affidavit explaining why they could not arraign the applicants in court within 24 hours as investigations were incomplete and the complainant was not available and that in any event, the applicants were given cash bail but they did not afford to pay. The applicants allege the contrary, that they had money to pay for cash bail but police rejected it and that no investigations were ongoing but the police intentionally refused to release them. If indeed the police intentionally breached the applicants' rights to liberty under **Article 49(f)**, all is not lost because they have recourse under Article 23 of the Constitution which give the High Court jurisdiction under **Article 165** to hear and determine applications relating to alleged breach of fundamental rights and issue declaration orders if courts opt. Breach of fundamental right cannot be determined by staying of criminal proceedings which and different case of action all together.

I would not agree with the decision in **Murunga case (supra)** because the criminal charges were commenced as a result of a complaint made by a person who is not party to breach of the applicants' fundamental rights, if at all. If there has been breach, it has been perpetrated by the State machinery or Government representatives (police) and it is the Government that guarantees the rights of its individuals who are answerable. The criminal charges cannot be shelved and ignored because of the faults of others. In my view, the applicants have to demonstrate that the alleged unlawful detention for 3 days has a link to the trial process and that it will cause prejudice to them. They have not shown that. The unlawful detention cannot exonerate the applicants from the alleged criminal charges levelled against them. The trial has to proceed to its logical conclusion and the applicants do pursue their claims under the Constitutional remedies under Article 23 of the Constitution. If the applicants invoke the old Constitution, then they have a remedy under Section 72(6), for compensation.

Mr. Omutelema submitted that this application should have been brought under the provisions of the old Constitution. The cause of action allegedly arose on 6th January, 2010 when the old Constitution was in still operation. **Section 23(3)(b) of the Interpretation and General Provisions Act (Cap. 2)** provides that where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed, and legal proceedings or remedy may be continued as per the appealed law. I do agree with Mr. Omutelema and find that the cause of action having arisen in January 2010, this application should have been brought within the provisions of law under the old Constitution. This application is incompetent and orders cannot be granted.

In the result, apart from the application being incompetent, it is also not remitted and it is hereby dismissed with costs.

DATED and **DELIVERED** this 11th day of March 2011.

R. P. V. WENDOH
JUDGE