REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPLI 752 OF 2010

PURITY KANANA KINOTI .....……..…….. APPELLANT

VERSUS

REPUBLIC …….…….....…… RESPONDENT

JUDGMENT

The petitioner, **PURITY KANANA KINOTI**, has invoked the provisions of **Articles 22 (1), 23 (1) and 165 (3) (b) of the Constitution of Kenya.**

Through her petition, she asserts that she was seized or arrested improperly, and also that she was thereafter detained by the police for more than 24 hours before being taken to court.

Through the alleged improper seizure or arrest, the respondents are said to have gained an unfair advantage to covertly force the petitioner to disclose information relating to a complaint lodged against the petitioner.

The police are said to have interrogated the petitioner without first advising her that she had a right to have her advocate represent her, as well as a right to remain silent.

It is the petitioner's case that the police urged her to co-operate with them, in exchange for her freedom.

In the light of those assertions, the petitioner asks this court to declare that the failure to advise her that she had a right to remain silent or to be represented by counsel amounted to a violation of her constitutional rights.

Secondly, the petitioner asks the court to declare that her detention for more than 24 hours was unlawful, illegal and unconstitutional.

As a consequence of her detention for more than 24 hours and her interrogation before being notified of her constitutional rights, the petitioner asks the court to grant a permanent injunction to restrain the Kenya Police and the Attorney General from proceeding with the criminal case which they had instituted against her. She also seeks compensation, together with the costs of the petition.

In her supporting affidavit, the petitioner says that she was arrested on 13th September 2010, at 9.00a.m. The persons who arrested her were two female police officers, including PC Grace Wanjiku.

Following the said arrest, the petitioner was escorted to the Pangani Police Station, where she was detained from 10.30a.m.

According to the petitioner, the police did not, at the time of arrest, tell her that she had a right to

have an advocate and a right to remain silent. Instead, the police questioned her continually about an alleged crime of theft, which the petitioner says, she denied.

The petitioner further deponed that the police urged her to give them information, promising to release her if she co-operated.

It is the petitioner's further case that she was detained at the police station until 2.30p.m. on 15th September 2010, when she was released, after her family and friends had intervened. It is her understanding that the decision by the police to release her on a free bond was simply an attempt to "regularize" her illegal detention.

Consequent upon the actions above-mentioned, the petitioner believes that her continued prosecution in Makadara CM CRC NO.3494 of 2011 was a patent illegality, because the charge preferred against her was unconstitutional, following the violation of her constitutional rights. It is for that reason that she asks for a permanent injunction to restrain the respondents from prosecuting her.

In answer to the petition, the respondents filed a replying affidavit, through PC Grace Wanjiku.

According to PC Wanjiku, she was the Investigating Officer in the criminal case against the petitioner.

In the course of her work, as an Investigating Officer, PC Wanjiku received a complaint on 8th September 2010; from Lucy Njeri Mutua. The complainant reported that the petitioner herein, who was employed as an attendant at the complainant's M-Pesa business, had stolen some money.

PC Wanjiku commenced investigations into the complaint, at a time when the petitioner had disappeared from the complainant's business, and was believed to have gone to Meru.

On 13th September 2010, the petitioner was spotted at Ngara Market, Nairobi, and the complainant informed PC Wanjiku, who proceeded to Ngara and arrested the petitioner. According to PC Wanjiku, the arrest was effected at 1750 hours.

Furthermore, it is the position of PC Wanjiku that before she commenced any interrogation of the petitioner, she cautioned her that she had the right to remain silent. Having been so notified of her rights, the petitioner is said to have volunteered to give information to the police, regarding the whereabouts of the money allegedly stolen from the complainant's business.

PC Wanjiku deponed that the petitioner did name another suspect, but she later refused to divulge any further information regarding the identity of the other suspect and also regarding the theft in question. Following that development, PC Wanjiku had no option but to charge the petitioner alone.

Having concluded her investigations, PC Wanjiku says that she granted to the petitioner a cash bail of KShs.10,000/-. That is said to have happened on 14th September 2010, in the presence of the petitioner's father, who offered to go and look for the cash bail.

However, the petitioner's father failed to return to the police station on 14th September 2010.

Being conscious of the petitioner's rights, to be arraigned in court within 24 hours of arrest, Pc Wanjiku released the petitioner on free bond, on 15th September 2010.

Faced with the replying affidavit, the petitioner filed a further affidavit, reiterating that she was arrested at 9.00a.m. on 13th September 2010. She denied that the arrest was effected at 5.30p.m. on that date.

The petitioner also denied having been offered release on cash bail on 14th September 2010. She

insists that it was only on 15th September 2010 that she was given the cash bail.

In effect, the facts giving rise to the petition herein are in dispute. Therefore, if the court were to give the declarations sought by the petitioner, it would first have to be persuaded that the facts were proved.

In an endeavour to persuade the court to believe that the facts she deponed to were accurate, the petitioner asked the court to compare the affidavit of Pc. Grace Wanjiku, to the facts which the said police officer gave before the trial court on 30th September 2010.
On that date PC Wanjiku was explaining the circumstances in which the petitioner had been arrested and held by the police.The explanation was necessitated by the petitioner's complaint, before the trial court, that she had been detained by the police for over 24 hours, before being brought to court.

A perusal of the proceedings of 30th September 2010 reveal PC Grace Wanjiku as giving the following evidence, when she was being cross-examined by Mr. Kironji, the learned advocate for the accused;

"The accused was arrested on 13/9/2010 in the afternoon and booked in the evening. The Occurrence Book will show this."

In the light of that piece of evidence, I find no merit in the petitioner's assertion that Pc Wanjiku had, in her replying affidavit before this court, given facts which were inconsistent with or contradictory to the evidence she gave before the trial court on 30th September 2010. If anything, PC Wanjiku's evidence consistently indicated that the petitioner was arrested in the afternoon and booked in the evening.

Secondly, I hold that unless such time as the petitioner and PC Wanjiku are subjected to proper cross-examination regarding the issue as to whether or not the petitioner was notified of her right to remain silent, this court cannot determine which of the two persons is to be believed. I therefore refrain from making a determination on that contested fact, at this stage.

However, it is evident that the petitioner was held for more than 24 hours, between 13th September 2010 and 15th September 2010.

Of course, I am alive to the respondent's contention that the petitioner's father had promised to return to Pangani Police Station on 14th September 2010, to pay the cash bail of KShs.10,000/-. If that be the correct factual position, I understand the respondents to be laying the blame at the feet of the petitioner's father for the failure to release the petitioner sooner.

Even if the petitioner's father had promised but failed to remit to the police station, the cash bail of KShs.10,000/- on 14th September 2010, the fact remains that the petitioner remained in police custody for over 24 hours.

The police have not demonstrated to this court that just because the petitioner's father failed to remit the cash bail, they were unable to release the petitioner. After all, the police did release her on a free bond, on the next day. I therefore find no justifiable reason why the police, who have conceded that they were aware that the law required them to take the petitioner to court within 24 hours, failed to release the petitioner on free bond on 14th September 2010.

Pursuant to the provisions of **Article 49 (1) (h) of the Constitution of Kenya;**

"An arrested person has the right –
(1) (h) 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."

Accordingly, when the respondents failed to bring the petitioner before a court of law within 24 hours of her arrest, they violated her constitutional rights.

Meanwhile, although Mr. Kironji, the learned advocate for the petitioner submitted that the petitioner gave to the police, some self-incriminating evidence before the police warned her that she had a right to remain silent, the petitioner has failed to establish that assertion. I so find because the petitioner has expressly deponed that she continually denied the alleged theft.

Since the petitioner continually denied having been involved in the theft about which the police questioned her, she cannot have, in the same vein, given any self-incriminating evidence.

The next question that I must now address is whether or not the petitioner is entitled to the reliefs sought.

Relying on the American case of **MIRANGA Vs ARIZONA, U.S. SUPREME COURT 384 U.A. 436,** (1966), the petitioner submitted that evidence which was obtained through a process which had violated the fundamental rights of the accused, cannot be used in court.

The petitioner also cited the decision in **MICHAEL FREEMANTLE Vs JAMAICA HRC Comm. No. 625 of 1995**, as authority for the preposition that a suspect has the fundamental right to be informed of his right to have an advocate present when he was being interrogated, as well as his right to remain silent.

The petitioner submitted that in America, the courts would quash charges if they found that the fundamental rights of the accused had been violated. She therefore invited this court to do the same.

And in order to persuade me of the need to quash the charges, the petitioner also cited the decision of the Court of Appeal in **GERALD MACHARIA Vs REPUBLIC, CRIMINAL APPEAL No. 119 of 2004.** In that case, the Court quoted with approval the following words from **ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL No. 120 of 2004;**

"At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge."

In answer to those authorities, Mr. Obiri, learned state counsel, submitted that the case of **MIRANDA Vs ARIZONA** was distinguishable from the petitioner's case. His reason for so submitting was that in that case, the applicant had been held incommunicado, whereas the petitioner herein had access to her friends and family.

That notwithstanding, Mr. Obiri pointed out that in the **MIRANDA case**, it is only the admissibility of the evidence which was obtained irregularly that was challenged successfully.

Having given due consideration to the authorities cited, I note that the decision in **GERALD MACHARIA GITHUKU Vs REPUBLIC, CRIMINAL APEPAL NO. 119 of 2004** the court was mindful of the fact that the appellant had been in custody for over 12 years, and also that his two co-accused had died whilst he was in custody. It was for those reasons that the court felt constrained to mention that even though the delay of 3 days did not give rise to any substantial prejudice to the appellant, the same could not be disregarded.

To my mind, that suggests that if the delay was present but the other circumstances were different, the Court of Appeal may have reached a different conclusion.

Meanwhile, in the case of **MICHAEL FREEMANTLE Vs JAMAICA**, the Human Rights Committee expressed the following view, at page 8 of its decision;

"The author has claimed a violation of article 9, paragraph 3 of the Covenant since there was a delay of 4 days between the time of his arrest and the time when he was brought before a judicial authority. The committee notes that the State party has not addressed this issue specifically but has simply pointed out in general terms that the author was aware of the reasons for arrest. The committee reiterates its position that the delay between the arrest of an accused and the time before he is brought before a judicial authority should not exceed a few days. In the absence of a justification for the delay of four days before bringing the author to a judicial authority the Committee finds that this delay constitutes a violation of article 4, paragraph 3, of the Covenant."

The Committee in that case was giving its views on the International Covenant on Civil and Political Rights (ICCPR).

Having found that the author's rights had been violated, the Committee asked the State party to give to it, within 90 days, information regarding the measures it had taken to give effect to the Committee's views. However, one member, ECKART KLEIN, expressed the view that the committee should have proceeded to specify the remedies which the author was entitled to. On his part, Klein declared that the remedy which the author was entitled to, as a consequence of the violation of his right under article 9, was compensation.

By placing reliance on that authority, it is thus not clear if the petitioner was, by inference, indicating that she was asking for compensation.

At any rate, the Human Rights Committee did not declare the proceedings a nullity.

Meanwhile, in **MIRANDA Vs ARIZONA, 384 U.S. 436 (1966**) it expressly held that the prosecution may not use statements, whether inculpatory or exculpatory, stemming from questioning initiated by law enforcement officers, after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the fifth amendment's priviledge against self-incrimination.

In arriving at that decision, the Supreme Court expressed itself thus, at page 11;

"A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them."

Although that legal position has been varied by legislation in Kenya, it is largely accurate. But in process of questioning any suspect the Supreme Court made the following poignant point;

"Decency, security and liberty alike demand that the government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means .... would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

I could not agree more. And it is for that reason that although the delay in taking the petitioner to court was not inordinate, I have nonetheless found that it constituted a violation of her constitutional rights. To hold otherwise, would amount to telling the police or the Attorney General that it was alright to delay in taking an arrested person to court. It is not alright; and the Constitution has so ordained.

That is why I also agree fully with the following words of J. Edgar Hoover, the legendary Director of the Federal Bureau of Investigation (FBI) when, in 1952, he said;

"***Law enforcement, however, in defeating the criminal must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory."***

Notwithstanding that high threshold, the U.S. Supreme Court did not annul proceedings even when the police had failed to secure the accused person's priviledge against self-incrimination. The Supreme Court only declared that any statements obtained in a manner that violated the Fifth Amendment could not be used at all, by the prosecution.

Therefore, even on the basis of the case law relied upon by the petitioner, there would be no justification for a permanent injunction to issue, restraining the respondents from prosecuting the petitioner.

If the trial court should be satisfied that the police did not inform the petitioner of her right to an advocate, as well as her right to remain silent; and that they begun to interrogate her before so doing, the trial court would be entitled to lock out from the case, such evidence as was obtained during that period of time. But the said failure, even if it is established, is not a basis for stopping the police or the Attorney General from prosecuting the petitioner.

In **JULIUS KAMAU MBUGUA Vs REPUBLIC, CRIMINAL APPEAL NO. 50 of 2008,** the Court of Appeal quoted the following words of the Constitutional Court of South Africa, in **SANDERSON Vs THE ATTORNEY GENERAL, EASTERN CAPE (1998) 2. S. A. 38 C.C;**

"Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of appropriate remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable prejudice as a result of delay."

In that case, their Lordships analysed the remedies available in varied jurisdictions around the world. They noted that in Canada and New Zealand, proceedings may be stayed permanently, if the fundamental rights of the suspect had been violated. However, under the Common Law and under the jurisprudence of the European Court of Human Rights;

"a permanent stay of proceedings is considered a draconian remedy, only granted where it is demonstrated that the breach is so severe that a fair trial cannot be held."

In that case, the Court of Appeal went on to hold that;

"... the breach of the 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."

As the breach of the right to personal liberty is not trial related, the Court of Appeal held that where the said right was violated;

"... the ensuing prosecution is not a nullity, and that a prosecution would only be a nullity, if any of the circumstances (such as prosecution for the same offence in relation to which the person had been tried and acquitted or convicted, or where he had been pardoned; or where the offence was not defined and a penalty therefor prescribed by law; or if the accused was not to be tried by an independent and impartial court that was established by law)"

The Court of Appeal made it crystal clear that;

".....it is not correct to say that the court has no jurisdiction to try a suspect after his rights to personal

liberty have been breached by police before he was charged."

Therefore, the learned trial magistrate at the Makadara Law Courts, who is seized of the criminal case against the petitioner herein has the jurisdiction to continue to hear the said case. He should therefore proceed to undertake the very task which he is mandated so to do, by law. In other words, I decline the petitioner's invitation to issue a permanent (or any other) injunction to restrain the police or the Attorney General from prosecuting the petitioner.

The petitioner is entitled to compensation for the delay in taking her before a court of law. The delay was for about 24 hours or less.

The petitioner did not undertake any exercise in assisting the court to determine an appropriate sum to be awarded as compensation. She also did not assist the court in determining the respondent who should pay the said compensation.

On my part, I failed to trace any precedent from the region of East Africa, which would help me make a meaningful determination in that regard.

Doing the best I can in the circumstances, I find that the delay is wholly attributable to the police. The Attorney General has had no role in the delay to take the petitioner to court.

I have also taken into account the fact that the police officer concerned was under the impression that the petitioner's father would return to the police station with the cash bail, which would have resulted in the release of the petitioner timeously. Thus, the violation herein was attributable to the failure by the police officer concerned exercising her mind to the possibility of releasing the petitioner on free bond, as soon as it became apparent that the petitioner's father was not forthcoming with cash bail.

The violation was not flagrant.

In the result I hold that PC Grace Wanjiku was liable to compensate the petitioner, in the sum of KShs.10,000/-.

It is so ordered.

Dated, Signed and Delivered at Nairobi, this 31st day of May, 2011.

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FRED A. OCHIENG
JUDGE