



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 405 OF 2008

ALFAYO OREMO ONDEGO..... 1ST APPLICANT
SIMON MURITU MUCHERU2ND APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

The Petitioners, **ALFAYO OREMO ONDEGO** and **SIMON MURITU MUCHERU** have asked this court to declare that the proceedings in Criminal Case No. 230 of 2007 are illegal, null and void, because the said proceedings were based on the unmitigated contravention of their fundamental rights.

The petitioners ask that this court should order their immediate acquittal.

The basis of the petition was that the applicants' were held in police custody for a period of 5 days before they were first taken to court. The delay in taking the applicants to court is deemed to constitute a contravention of their fundamental rights.

It is the petitioners' further submission that by being held in police custody for 5 days, without any justifiable cause, the petitioners were not afforded a hearing within a reasonable time. As a consequence, the petitioners invited this court to hold that their rights under **section 77 (1) of the Constitution** had been violated.

Citing the case of **REPUBLIC Vs ANN NJOGU & 5 OTHERS, MISC. CRIMINAL APPLICATION NO. 551 of 2007**, the petitioners asserted That because they had been taken to court after the lapse of more than 24 hours from the time of their arrest, their prosecution was null and void.

With all due respect to my learned brother who determined that application, I am unable to share his view. I say so because the arrest and the subsequent arraignment of a suspect before the court is an exercise which is carried out by the Executive arm of Government. It is not a judicial function.

The judicial function in a criminal case starts with the taking of a plea. It is that step that sets in motion the trial of the accused person.

Therefore, something that was done before the case came before the court cannot affect the legality of the court proceedings.

The manner of arrest, the length of time a suspect is held in custody before his is first brought to court, or the circumstances under which he was held before being brought to court may all be at variance

with the requirements of the law. However, in as much as any such actions or omissions took place outside the judicial proceedings, they cannot, of themselves, render the proceedings a nullity or an illegality.

The actions complained about in this case took place in February 2007. At that time, **section 72 (6) of the Constitution of the Republic of Kenya** provided as follows;

“A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”

Therefore, the Constitution expressly stipulated the remedy available to a person whose arrest or detention was unlawful. He would be entitled to compensation, from the person responsible for the unlawful arrest or detention.

In **JULIUS KAMAU MBUGUA Vs REPUBLIC, CRIMINAL APPEAL NO. 50 of 2008**, the Court of Appeal, carefully analysed the decisions made prior to 8th October 2010. The said decisions were premised on alleged violations of the rights of accused persons, pursuant to **sections 72 (3) and 77 of the Constitution**.

Their Lordships did set out a few broad principles, including;

“ (i) The trial within a reasonable time guarantee is part of international human rights law, and although the right may not be textually in identical terms in some countries, the right is qualitatively identical. . . .

(viii) The purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.

(ix) The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland, and it is not designed to avoid trials on merits.”

Their Lordships went on to hold that the rights of a suspect, to personal liberty, before he was taken to court (under **section 72 (3) (b)**) are clearly distinct from his right when he was awaiting trial (under **section 77 (1)**).

It was the finding of the Court of Appeal that;

“The main difference is 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.”

Thus where the police did violate the rights of the suspect, that cannot be attributed to the judiciary. The responsibility remains that of the police. It cannot therefore render the trial process a nullity or an illegality.

But, as the Court of Appeal said;

“..... the right to a trial within a reasonable time, guaranteed by Section 77 (2), is trial-related. It is related to the trial process itself and is mainly designed to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court, which has control of the trial to ensure that the right to speedy trial is observed.”

In this case, although the petitioners cited **section 77 of the Constitution**, they only gave facts which supported the issues raised pursuant to **section 72 (3) (b) of the Constitution**. They talked of pre-trial delays, whilst they were in custody. They did not complain about any specific delays during the trial.

If anything, the only assertion regarding delay in the trial process is attributed, by the petitioners, to the initial delay in bringing them before the court, in the first instance.

As the Court of Appeal held in the case of **JULIUS KAMAU MBUGUA V REPUBLIC CRIMINAL APPEAL NO. 50** of 2008, at Page 44;

“...Even where violation of personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity.....”

For that reason, the Court went further to say that it was incorrect to assert that the court lacked jurisdiction to try a suspect after his rights to personal liberty have been breached by the police before he was charged. There was no law which barred the prosecutions of persons whose pre-trial rights were violated.

Accordingly, I find no basis in law or fact to warrant the grant of the reliefs sought. Therefore, the Originating Notice of Motion herein is dismissed.

The Chief Magistrate’s Court, Nairobi, should now proceed to hear the Criminal Case No. 230 of 2007.

Dated, Signed and Delivered at Nairobi, this 25th day of October, 2011.

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FRED A. OCHIENG
JUDGE