REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONST. REFERENCE NO. 5 OF 2009

SAMUEL CHEPASA :: APPELLANT

=VERSUS=

REPUBLIC :: RESPONDENT

JUDGMENT

This is a reference made by **Samuel Chebasa** (hereinafter the **"Petitioner"**) under the provisions of Articles 49 (1) and 50 of the Constitution. The Petitioner seeks the determination of the following questions:-

1. Whether the accused's rights under Article 49 (1) of the Constitution was breached in view of the evidence of P.W.4 and the information available from the Charge Sheet.
2. Whether the accused's right to a fair trial guaranteed by Article 50 of the Constitution were breached in view of the defective charge which was not amended by the prosecution before the accused was called upon to defend himself though the issue had been raised bearing in mind the provisions of sections 214 and 382 of the Criminal Procedure Code.

The background of this reference is as follows:-

The Petitioner was charged in Iten Resident Magistrate's Court Criminal Case No. 2270 of 2006 with the offence of rape contrary to section 3 (1) of the Sexual Offences Act of 2006. He also faced another count of committing an indecent act with a woman contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The charge of rape carried the particulars that the Petitioner, on the 29th day of November 2006, at K Village, intentionally and unlawfully committed an act which caused penetration with his genital organs to **D. K**. It was alleged, in the second count, that the Petitioner in precisely the same circumstances, same place, same date, unlawfully did an indecent act to the same **D.K** by touching her private parts namely, vagina.

The Petitioner appeared before **Shiundu (RM**) on 6/12/2006 and pleaded not guilty. The trial commenced on 13/3/2007. The Investigating Officer **P.C. Samuel Tuitoek (P.W.4)** took the witness stand on 6/3/2008. He admitted, in cross-examination, that the Petitioner was arrested on 4/12/2006 and

was taken to court on 6/12/2006. The said Investigating Officer testified that he did not know why the Petitioner was held in police custody for that period which was in excess of the period allowed by the Constitution.

At the conclusion of the evidence tendered by the prosecution, the learned trial magistrate did not find that a prima facie case had been demonstrated against the Petitioner in respect of the offence of rape. He accordingly acquitted him of that offence. He however found that there was sufficient evidence for the Petitioner to answer in respect of count 2 which alleged that the Petitioner had committed an indecent act on a woman contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

The Petitioner, being dissatisfied with the findings of the learned trial magistrate, has moved this court under Articles 49 (1) (f) and 50 of the Constitution and the High Court Practice and Procedure Rules for determination of the questions referred to above.

When this reference came up before me for hearing, **Mr. Kabaka,** learned counsel for the State did not support the findings of the learned trial magistrate and concurred with the Petitioner that the charge was indeed defective and that his fair-trial rights under the Constitution had been breached.

The offence for which the Petitioner is to answer is that of an Indecent Act with a woman contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The Particulars allege that on the 29th day of November 2006 at Kapko Village in Keiyo District of the Rift Valley Province, the applicant unlawfully did an indecent act to **D.K** by touching her private parts namely, vagina.

The complainant, **D.K** on 13/3/2007. On being cross-examined, she stated that she had adult children which demonstrated that she was herself not a child as defined in the Children Act. Yet the offence for which the Petitioner is charged is that of committing an indecent act with a child. The section reads as follows:-

“11. (1) any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than 10 years”

Upto the time the prosecution closed its case, it never sought leave to amend the charge despite the testimony of the complainant. It cannot be over emphasized that an accused person should be told in detail all the ingredients of the charge he is facing. That is why it is fatal for a trial to proceed without the plea of the accused being taken which plea is to a specific charge. The importance of the charge is further demonstrated by the provisions of Section 214 (1) of the Criminal Procedure Code which read as follows:

“214 (1) Where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge either by way of amendment of the charge or addition of a new charge as the court thinks necessary to meet the circumstances of the case provided that:

1. **Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
2. **Where a charge is altered under this subsection, the accused may demand that the witness or any of them be recalled and give their testimony afresh or be further cross-examined.”**

In the premises, I agree with the Petitioner that in the absence of an amended charge, his further trial is of no significance as an acquittal is inevitable.

The next important point taken by the Petitioner is that his constitutional rights as enshrined in section 72 (3) (b) of the repealed Constitution have been violated. The relevant article now is 49 (1) (f). The record of the trial court shows that the Petitioner was arrested on 4/12/2006 and arraigned in court on 6/12/2006 – two days later. That Position was confirmed by the Investigating Officer P.C**. Samuel Tuitoek** who testified at the trial as P.W.4. In his own words:-

"The accused was arrested on 4/12/2006. He was brought to court on 6/12/2006. It is more than 24 hours after arrest. I do not know why the accused was kept in custody illegally."

So, no attempt was made by the Prosecution upon whom the burned rested, to satisfy the court that the Petitioner had been brought before the court as soon as was reasonably practicable. The Court cannot lose sight of what the Court of Appeal stated in the case of **Albanus Mwasia Mutua –vrs- Republic [Criminal Appeal No. 120 of 2004] (UR).** In their own words:

"On the one hand it is the duty of the courts to ensure that crime where it is proved is appropriately punished: this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution".

In this case, the prosecution conceded that the Petitioner's Constitutional rights were violated. The delay may be of only a day but it was still a violation of the Petitioner's Constitutional rights enshrined in the Constitution. The delay required an explanation which was not and has not been given.

In the end on the two points discussed above, the Petitioner's petition must be allowed. I order that the trial of the Petitioner be terminated forthwith as the same offends the Constitutional Provisions above stated and is also founded on a defective charge. The Petitioner is accordingly acquitted.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY 2011.

F.AZANGALALA

JUDGE.

Read in the presence of:-

1. Mr. Otieno for the Petitioner and
2. Mr. Kabaka, state counsel for the Republic.

F. AZANGALALA

JUDGE.

27/1/2011.