



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Miscellaneous Application 7 of 2009

NELSON PATRICK KARUGUMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

Nelson Patrick Karugumi hereinafter referred to as the petitioner, has petitioned this court through Magee Wa Magee Advocates for the following orders:-

- (a) ***That there be a declaration that the petitioner’s fundamental rights and freedoms under section 72(1), 72(2), a, b, c, 72(3) and 77(1) of the Constitution of Kenya have been contravened and/or violated.***
- (b) ***There be a declaration that, in view of the contravention of the petitioner’s fundamental rights and freedoms, Kerugoya criminal Case number 1240/2007 is null and void.***
- (c) ***There be an order quashing the proceedings and orders in Kerugoya Criminal Case number 1240 of 2007.***

He has supported the application with his 7 paragraph supporting affidavit dated 16/4/2009 and supplementary affidavit dated 26/6/2009. He avers that he was arrested on 5/9/2007 on allegations of defilement of a girl under 15 years of age contrary to section 8(1) (3) of the sexual offences Act No. 3 of 2006. He was taken to court on 11/9/2007 after being detained in police custody for a period of 6 days. This he says contravened his fundamental right as enshrined under Section 72(3) of the constitution. He also contends that his right to the presumption of innocence until proven guilty and of being accorded a fair trial within a reasonable time were violated. In my considered view however, these 2 later rights inhere to a person after being charged. There is no evidence of denial of a fair hearing and nor is there any evidence that the petitioner was not presumed innocent pending the final verdict of the court. Indeed, I note that counsel’s submissions hinged on the alleged violation of Section 72(3) of the constitution. The said Section provides as hereunder;

“A person who is arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence and who is not released shall be brought before a court within 24 hours of his arrest or from the commencement of his detention or within 14 days I....., the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

The state relies on the Replying Affidavit of Cpl. Josphat Chebon. He does not deny that the petitioner was arrested on 5/9/2007. He also conceded that he was taken to court on 11/9/2007. His explanation as contained in paragraph 6 of the Replying Affidavit was to the effect that there was public outcry in the

area following the petitioner's arrest and that ***"it was decided not to release him on police bond to save his life."***

The petitioner has of course denied any such outcry. I also note that other than Cpl Chebon's averment none of the said public swore an affidavit to confirm the said outcry. Jurisprudence in this area is now quite well developed and there are many decided cases both by the High Court and by the Court of Appeal on the subject. I do not therefore need to expound on the matter. What is clear from the said constitutional provision and the case law is that a suspect of a non-capital offence should be taken to court within 24 hours. This right is nonetheless not absolute and is diluted by the concession that the suspect can be taken to court ***"as soon as is reasonably practicable"***. Where it is not possible for the state to confine itself to the 24 hours. In order for the delay to be sanctioned by the court however, the state must discharge the burden of proving that the subject was taken to court as soon as reasonably practicable. As held in the ***Court of Appeal Case of DOMINIC MUTIE MWALIMU –V- R- (Cr. App No. 217 of 2003).***

" the mere fact that an accused person is brought to court either after the 24 hours. or the 14 days, as the case may be, stipulated in the constitution does not ipso facto prove a breach of the constitution ...each case has to be considered on the basis of its peculiar facts and circumstances.."

In this case therefore what I need to consider is whether the replying affidavit in question has sufficiently explained the delay of 6 days.

The main reason given is that the petitioner was detained for his own safety. As stated elsewhere in this ruling, that assertion was not supported by any other evidence. There was no O.B entry produced to show that the petitioner was being detained for his own safety. This averment was in my considered view made for lack of any other plausible reason. The complainant's statement and that of her mother were made on 6/9/2007 the following day after the petitioner's arrest. That would have formed sufficient basis for the charges preferred against the petitioner. It was not necessary to wait for the P3 to be completed more so when the complainant was 5 months pregnant and the pregnancy was clearly visible even to the naked eyes.

My finding is that this delay of 6 days has not been adequately explained. This is one of the very few cases where I find that the accused's rights transcends those of the complainant and the public interest. I find and hold that the petitioner's fundamental rights as enshrined under Section 72(3) of the constitution were violated and this renders the proceedings before the Kerugoya court in Criminal Case No.1240/2007 null and void.

The said proceedings are hereby quashed and the petitioner/accused set at liberty unless he is otherwise lawfully held.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 23rd day of Feb 2010
**In presence of:-Applicant – Mr. Keneth Githinji for him and
Mr. Omwega for state.**

W. KARANJA
JUDGE
23/2/2010