



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Case 3 of 2007

REPUBLIC.....PROSECUTOR
VERSUS
MOHAMED OMAR MOHAMED.....ACCUSED

R U L I N G

Mr. Michira (counsel for the accused herein) raised a notice of preliminary objection seeking that this court declares the case a nullity on grounds that accused's Constitutional rights have been violated. He made reference to section 72(3) (b) and section 77 of the Constitution saying such violation of the rights envisaged by these provisions renders the proceedings a nullity.

At the hearing, Mr. Michira submitted that accused was arrested on 2-2-07 and produced in court 13-3-07 – a period of 40 days having elapsed and thus contradicting the statutory recognized period of 14 days.

He argues that there is no remedy for such violation under the Constitution and the provision under section 72(6) for compensation relates to unlawful arrest. His contention is that the accused was lawfully arrested but unlawfully held in custody in excess of the period allowed under the law. He seeks to rely on the case of R v James Njuguna Njuguna HCCC No. 40 of 2007 and HCCA Appeal No.10 of 2007 Carolyn Stephany Nyawade and Another v R.

The application is opposed as:-

- (1) Being fatally defective as it does not conform with the law.

Mr. Ogoti on behalf of the State, submits that the application ought to have been made by way of a Constitutional reference. Further that even if its raised as a preliminary objection, then the circumstances under which the accused explains how his rights were violated ought to have been brought in an application supported by an affidavit.

- (2) That if there was violation of accused's rights, then section 72(6) of the Constitution provides for remedy – one whose rights are violated is entitled to seek damages.

Secondly the 14 days ought to have expired on 16-1-07, which was within the High Court vacation and Malindi Court did not sit from 18th December 2007 to 4th February 2008 – which is why the accused was held for 40 days. The file was eventually presented to court on 22nd February 2008.

Mr. Michira contests this, saying the information he has is that accused was arrested on 2-1-07 and taken to court on 12-3-08 and plea was taken on 13-3-08.

The provisions of section 72(3) (b) of the Constitution are clear – that for one facing a capital charge, he ought to be taken to court within 14 (fourteen) days from the date of arrest. The charge sheet in the court file does not indicate the date of accused's arrest although the State does not seem to contest 2-1-07 as the date of arrest.

If that was the date of arrest then he ought to have been presented to court on 16-1-07. However from the record, this was not done and he appeared before court on 22-2-07. Was there any justification for such delay?

It is a fact that the High Court vacation period for the Coast region runs from 18th December to 4th February – so the High Court in Malindi was not sitting. It is not clear whether the Malindi judge resumed duty on 5th February 2007 or whether he had an exclusive cause list for non-criminal matters in the preceding weeks – what is clear is that accused was presented to court on 22-2-07 – that was not the earliest date- it should have been within the week of 5th February 2007. but even if there was no judge sitting in Malindi then the most practical step should have been to take the accused to Mombasa High Court where there is a duty judge during the vacation, at least for taking of plea – so that explanation is not reasonable – certainly the prosecution failed to take practical and reasonable steps to have the accused taken to court at the most reasonable time. To that extent accused's rights were violated. Should an acquittal be the natural process to follow having this ground? I think not – my understanding of the provisions of section 72(6) is that where there is such violation, the remedy lies in compensation by way of damages against the State and that is the avenue of redress open to the accused.

I bear in mind this court's legal and social responsibility of protecting both the rights of an accused person as well as the victim of a crime whose rights have been violated. That very victim is entitled to the right to life, to own property as envisaged under Chapter V of the Constitution of Kenya. An acquittal in an instance where one is alleged to have taken away the life of another, is to my mind not an act of protecting those rights under Chapter 5, it is infact stoking the fires of anger in the family of the victims and society at large.

I am persuaded that my duty lies in censuring the State for violating the accused's rights and directing that he seeks for compensation by way of damages under section 72(6) of the Constitution.

The upshot is that I find no reason to declare the case a nullity and the preliminary objection is dismissed.

Delivered and dated this 11th day of February 2010 at Malindi.

H. A. OMONDI
JUDGE