



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Criminal Case 44 of 2004

REPUBLICPROSECUTOR

~VRS~

**BRAMWEL MASAI MBUYA
PATRICK CHESIRE MBUYA.....ACCUSED**

RULING

This is a petition by one Bramwel M. Mbuya the first accused in this case. It is brought under section 84 and section 72 (3) (b) of the Constitution of Kenya, under Rule 23 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules 2006.

The Petitioner avers that he was arrested on 30/06/2004 and arraigned in court on 20/7/2004. This was after being detained in police custody for twenty days which is contrary to the provisions of section 72 (3) (b) of the Constitution. This law provides that any suspect held in custody must be taken to court within 14 days in case of a capital offence. Mr. Ikapel urged the court to nullify the charges facing the accused person for reason of violation of his constitutional rights. The counsel referred the court to several authorities on the issue of violation where in some of the decisions, the court nullified the charges upon establishing that there was violation.

The state orally opposed the application. Mr. Onderi Senior Principal State Counsel submitted that the rights of the first accused were not violated. The accused was arrested on 30/6/2004 and was arraigned in court before a magistrate on 10/7/2004. He was then taken for plea to the High Court on 20/7/2004. The state emphasized on the rights of both the accused and the family of the deceased this being a case of murder. It was his contention that the decisions relied on by the Petitioner ignored the rights of the other side and gave relief to only the accused. He urged the court to uphold the charges and have the Petitioner use the remedy provided for under section 72 (b) of the Constitution:

Section 72 (3) (b) provides as under:

“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 as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within 14 days of his arrest or detention, where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as reasonably practicable shall rest upon any person alleging that the provisions of this sub section have been complied with.”

Section 77 (1) of the Constitution deals with expeditious disposal of criminal cases. Every such case must be afforded a fair

hearing. The other relevant section herein is section 77 (2) (a) (b) which provides that an accused person shall be presumed innocent until he is proved or has pleaded guilty.

Having carefully gone through the submissions and the authorities relied on by the Petitioner, I make the following observations and conclusions. It is not in dispute that the Petitioner was arrested on 30/6/2004 and arraigned in court for plea on 20/7/2004. The state contends that the Petitioner was taken before a magistrate's court on the 10/7/2004 where the case was mentioned and fixed on 20/7/2004. The state only produced a copy of charge sheet showing date of arrest as 30/06/2004. The date when the accused was arraigned in court has been altered to read 10/7/2004. The alteration was done using blue ink on top of the typed date. It is not possible to read which date it was before the said alteration. The alteration in itself casts some doubts as to the date the Petitioner was arraigned in court. It would have been prudent for the state to produce a certified copy of proceedings before the magistrate who mentioned the case. The state had a chance of replying to the application through a replying affidavit but chose not to do so. I am convinced that if this was done it would have strengthened their response to this application. There were no records from the police station to show the movement of the accused on the material date. The copy of charge sheet produced is not in itself authentic and cannot be evidence that the Petitioner was arraigned before a magistrate on 10/7/2004. The Petitioner is facing a capital offence and the maximum period within which he should be taken to court is fourteen (14) days. He was therefore over-remanded for six (6) days. There was no explanation offered by the state on why this happened. The police know the law and had a duty to comply with it. The question that arises is whether the remedy under section 72 (6) for compensation is adequate in the circumstances. The state argued that the Petitioner can sue whoever violated his rights which suffices in his predicament instead of declaring the charges null and void. The defence contends that nullification of the charges is the correct thing for the court to order.

Section 72 (b) provides:

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

Mr. Ikapel argued that this section has two limbs namely:

- a) Violation of constitutional rights,**
- b) Unlawful arrest or detention.**

He therefore contended that the redress under section 72 (b) only serves the limb where one has been unlawfully arrested or detained. To this extent, I disagree with that kind of interpretation. The redress under section 72 (b) applies to both unlawful arrest and detention which act in itself may lead to violation of constitutional and fundamental rights. The redress could be utilized by any person whose constitutional rights have been violated.

It has been held by the Court of Appeal in several decisions that the state must offer an explanation for the delay in taking the accused to court. Where there is no explanation offered or where the explanation does not satisfy the court, then the Petitioner is entitled to be given any order or direction that this court thinks fit in the interest of justice. That notwithstanding, the Petitioner can still apply to the court for compensation.

I am guided by some Court of Appeal decisions and also those relied on by the Petitioner. I hereby declare that the constitutional rights of the Petitioner Bramwel Masai Mbuya were violated by unlawfully detaining him in custody for six (6) days over and above the fourteen (14) days allowed by the law. On the same breath, I declare the charge facing the Petitioner in this case null and void as it is premised on an illegality.

The prayers in the petition are hereby allowed as aforesaid. The Petitioner shall therefore be released forthwith unless otherwise lawfully held.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 22nd day of March, 2010.
In the presence of the 1st accused (Petitioner), counsel Mr. Ikapel and the State Counsel Mr. Onderi.