REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Miscellaneous Criminal Application 74 of 2009

JOSEPH INDECHE ……………………………………… APPLICANT

V E R S U S

REPUBLIC ……………………………….…………….. RESPONDENT

R U L I N G

1. Joseph Indeche is the accused person in Kakamega High Court, Criminal Case No.7 of 2005. He is therein charged with the offence of murder contrary to ***Section 203*** as read with ***Section 204*** of the Penal Code.

2. By his Application dated 28.5.2009 he seeks orders that;

"1. THAT this Honourable Court do make an order declaring that the continued incarceration of the petitioner amounts to infringement of his constitutional rights of liberty.

2. THAT this Honourable Court further do declare that he will not obtain a fair trial by reason of the infringement of his constitutional rights to a speedy trial.

3. THAT this Honourable Court do order that in view of the infringement of his constitutional rights he be set at liberty forthwith.

4. THAT this Honourable Court do direct that the defence hearing against the petitioner scheduled for 17th November 2009 and 18th November 2009 for the criminal case preferred against him be deferred until the determination of this application."

3. In the Supporting Affidavit, he claims that he was arrested on 28.3.2005 on suspicion of having committed the offence of murder and he was held until 5.5.2005 when he was finally arraigned before the High Court to take his plea. That therefore his fundamental right to a speedy trial was breached and his Application should be allowed.

4. The Advocate for the Applicant relies on the following well known authorities in support of his client's case;

1) **NDEDE versus REPUBLIC**
(1999) KLR at Page 567

2) **KIYATO versus REPUBLIC**
(1982 – 88) KLR at Page 419

3) **GERALD MACHARIA GITHUKU versus REPUBLIC**
Criminal Appeal No.119 of 2004 (unreported)

4) **ALBANUS MWASIA MUTUA versus REPUBLIC**
Criminal Appeal No.120 of 2004 (unreported)

5) **ANNE NJOGU & 5 OTHERS versus REPUBLIC**
Miscellaneous Criminal Application No.551 of 2007 (unreported)

6) **RONALD MANYONGE CHEPKU versus REPUBLIC**
(High Court) Criminal Appeal No.87 of 2006 (unreported)

7) **ELIUD NJERU NYAGA versus REPUBLIC**
(Court of Appeal) Criminal Appeal No.182 of 2006 (unreported)

4. The response by the Republic is contained in a Replying Affidavit sworn on 19.10.2009 by one P.C. John Koech. He admits the fact and date of the Applicant's arrest and also admits the date when the Applicant was arraigned in court. He gives the following reason for the delay;

> "*That the doctor who was to examine the Applicant as to mental fitness was only able to do so on 19.4.2005 by time the fourteen (14) days period had lapsed.*"

5. ***Section 72 (3) (b)*** and ***Section 72 (6)*** of the Constitution provide as follows;

Section 72 –

1 …………………

2 …………………

3. A person who is arrested or detained-

(b) 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, 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 fourteen 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 is reasonably practicable shall rest upon any person alleging that provisions of this subsection have been complied with.

4 …………………….

5……………………...

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that other person."

6. I am aware that in all the decisions quoted elsewhere above, the courts in Kenya have followed the decision of Albanus Mwasia Mutua (supra) and ordered the release of Criminal suspects on account of breach of the rights conferred by ***Section 72 (3) (b)*** above without juxtaposing that order with the remedy specifically availed by ***Section 72 (6).*** It is also now generally agreed that the decision in Albanus Mutua may well have been made in the specific circumstances

of that case and was never meant to supersede express provisions of the Constitution and the remedy therein given.

7. Having so said, I have only two questions to answer;

   i) Whether the explanation by the Republic is reasonable and whether it has discharged the burden placed upon it to show that the Applicant was taken to court as soon as was reasonably practicable.

   ii) Whether the Applicant should be released from custody as he prays.

8. On the first question, the Republic has failed to explain why the Applicant was not taken to court between 19.4.2005 and 5.5.2005 so that even if I were to accept the explanation about the P3 form being prepared on that date, the lacunae in the subsequent period is unexplained and that being the case, the explanation is hollow and cannot meet the expectations of ***Section 72 (3) (b).***

9. In answer to the second question, I am persuaded by the reasoning of Ojwang J. in Ponnuthurai Balakumar vs R., H.C. Misc. Criminal Application No.218/2008 (Nbi) where he stated as follows;

   > **"Although the Albanus Mwasia Mutau case has been cited in the same vein by counsel in many other applications of the kind now before me, I am not convinced that, that authority has been properly relied upon. On the several occasions when I have had to refer to the Albanus Mwasia Mutua case, I have come to the conclusion about it and other Court of appeal decisions on the point, that, as I expressed in a recent decision, Republic v. John Paul Ombere, Nbi High Court Criminal Case No.22 of 2005, that such authorities-**
   >
   > > **"……..have underlined the need for the trial court to review the pertinent facts and circumstances, before determining the question whether or not the accused may be released, owing to breaches of *s.72 (3) (b)* of the Constitution. This Court has taken guidance from [the line of cases represented by Albanus Mwasia Mutua] as they have been, and are, in my opinion, more consistent with judicious interpretations of *s.72 (3) (b)* of the Constitution. Such an approach, moreover, I think, would carry the merits, of preserving the High Court's interpretative jurisdiction which is expressly created by *s. 60 (1)* of the Constitution; it also, in my opinion, safeguards the High Court's discretion in the assessment of evidence, so as to arrive at just decisions, as dictated by the circumstances of each particular case coming up for resolution."**

10. I wholly agree with the learned judge and each case must be looked at in the context of its circumstances. Even if the explanation given by the Republic falls short of the expectations of the Constitution, the case that the Applicant is facing has proceeded all the way to near conclusion because what is left to be done is the defence case. It would be a travesty of justice to now release him when this court has already found that he has a case to answer. The policy of the law is that resolutions of disputes must be done judiciously and fairness spread to all parties.

11. The only remedy therefore available to the Applicant if he is minded to, is that secured by ***Section 72 (6)*** of the Constitution and not release from custody as he prays.

12. In the event, the application before me is best dismissed and High Court Criminal Case No. 7 of 2005, now before, should proceed to conclusion.

13. Orders accordingly.

Delivered, dated and signed at Kakamega this 21st day of April, 2010

ISAAC LENAOLA

J U D G E