



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

Petition 2 of 2008

MICHAEL SIMIYU SIBA.....PETITIONER

~VRS~

REPUBLIC.....RESPONDENT

RULING

The Petitioner Michael Simiyu brings this petition under section 72 (3) of the Constitution of Kenya. The procedure of such matters is governed by Rule 11 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 was represented by Mr. Onchiri who submitted that his client was arrested by police officer from Bungoma Police Station on 20/05/2004 and detained in the cells for five (5) days. He was arraigned in court on 25/5/2004 in Criminal Case No.1414 of 2004. The following offences were preferred against he petitioner:

- a) **Making a document without authority contrary to section 349 of the Penal Code;**
- b) **Forgery contrary to section 353 of the Penal Code; and**
- c) **Forcible detainer contrary to section 91 of the Penal Code.**

The period of detention by police amounted to 120 hours as opposed to the 24 hours allowed by the law where one is charged with bailable offences. It is the Petitioner's case that the non-compliance with the law renders the proceedings in the criminal case a nullity. The court was referred to a number of authorities relevant to the matter.

The provisions of section 72 (3) of the Constitution are as follows:

“A person who is arrested or detained

a) for the purpose of bringing him before a court in execution of the order of a court: or

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 practicable, and where he is not 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 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 it is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

Section 72 (3) provides that a person arrested and detained for an offence other than capital offence shall be arraigned in court within 24 hours.

Mr. Ogoti, Senior Principal State Counsel opposed the petition orally in court. He submitted that the mere act of over detention does not entitle the Petitioner to a discharge from the criminal proceedings. Section 72 (6) provides a remedy where the Petitioner may sue for compensation for violation of rights. He argued that the rights of both the offender and the victim must be protected.

The state did not file a replying affidavit in response of this application. The facts deponed by the Petitioner would only be

effectively dealt with through a written response. The oral submission does not make any attempt to explain why the Petitioner was over-detained in police custody. Assuming that the State Counsel gave an oral explanation, this would not be adequate to respond to the supporting affidavit. An affidavit by the police officer commanding Bungoma Police Station or the District Criminal Investigation Officer would be appropriate. In the absence of such an explanation, I find that the state has not given any explanation. The Petitioner was remanded for 72 hours over and above the 24 hours allowed by the law. The time of arrest was not indicated but the excess time runs from 23/05/2004 to 25/05/2004. The 24 hours expired by the end of the day on 22/05/2004.

I rely on the Court of Appeal case of **ELIZABETH AKINYI ODOYO & ANOTHER –VRS- REPUBLIC CRIMINAL APPLICATION NO.161 AND 162 OF 2006** where the Applicants were remanded in such unexplained circumstances for more than 24 hours. The court declared violation of rights under section 72 (3) and nullified the criminal charges.

The authorities of the **NAIROBI HIGH COURT OF REPUBLIC –VRS- JAMES NJUGUNA APPLICATION NO.40 OF 2007 and that of ANNE NJOGU & 5 OTHERS –VRS- REPUBLIC CR. APPLICATION NO.551 OF 2007** enumerate the same principles. In those cases the judges declared that the Applicants' rights were violated and ruled that the criminal proceedings against them were null and void.

Having found that the Constitutional rights of the Petitioner were violated, the issue which arises is whether the criminal proceedings become a nullity. The police know the law and cannot pledge ignorance of the same. Even if they did, the maxim that ***“ignorance of the law is no defence”*** defeats such a plea. The police are duty bound to operate within the law and comply with all legal requirements to promote expeditious disposal of cases. The concept of the law must be promoted by the law enforcers. It would appear that for the police to over-detain the Petitioner in custody for 96 hours, they had no evidence to charge him. It follows that they had no reasonable suspicion to arrest the Petitioner. If they had, the Petitioner would have been charged within 24 hours. By allowing the criminal charges in criminal case no.1414 of 2008 to proceed against the petitioner means that their fundamental rights which have been violated will continue to be violated. This holding was made in the case of **ALBANUS MWASIA MUTUA -VRS- REPUBLIC CRIMINAL APPEAL NO.120 OF 2004** and it fortifies my observation. It is my finding that the criminal proceedings facing the Petitioner are *void ab initio* due to the unjustified violation of the Petitioner's Constitutional rights.

In effect, I allow the prayers sought in the petition.

**F. N. MUCHEMI
JUDGE**

Ruling dated and delivered on the 15th day of July, 2010 in the presence of the Petitioner and Mr. Ogoti for the Respondent.

**F. N. MUCHEMI
JUDGE**