REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL MISCELLANEOUS APPLICATION NO. 39 OF 2010

1. **JACTON MLAIVU MALALO**
2. **JOHN MWANDISHA MNYAKA**
3. **KARORI OSENI … APPLICANTS**
4. **DAUDI NDAWIRO MKAMBURI**
5. **MAULID MGHOSI**
6. **JOHNSON MORRIS**

VERSUS

REPUBLIC ……..…….. RESPONDENT

RULING

By this application dated 31st August 2010, the six applicants pray

"THAT the MISC. NO. 1 of 2010 in Wundanyi Resident Magistrate's Court be quashed, nullified and declared illegal and unconstitutional"

MR. NGAIRA, Advocate argued the application on behalf of the six (6) applicants whiles **MR. ONSERIO**, State Counsel appeared for the Respondent State. The background to this application is that all six (6) applicants were arraigned before the learned Resident Magistrate, Wundanyi Law Courts on 16th August 2010. One No. 231140 **CHIEF INSPECTOR CHARLES KIBET**, gave evidence on Oath to the effect that the police had received numerous complaints against the applicants from residents of the area with respect to house-breaking and stealing. Based on this testimony alone the trial court imposed upon each applicant a bond to keep the peace in the amount of Kshs.20,000/- + 1 surety of a like amount. The applicants aver that the proceedings in the lower court amounted to a breach of their constitutional rights as guaranteed by S. 72(3) of the old 1963 Lancaster House Constitution of Kenya.

In the grounds filed in support of the present application it is stated that the 1st and 2nd Applicants **JACKTON MWAIVU MALALO** and **JOHN MWANDISHA MNYAKA**, were arrested on 10th August 2010 whilst the 2nd, 3rd, 4th and 5th Applicants namely **KARORI OSENI**, **DAUDI NDAWIRO MKAMBURI, MAULID MGHOSI** and **JOHN MORRIS**, were all arrested on 11th August 2010. All six (6) applicants were detained in police custody at Wundanyi Police Station until 16th August 2010 when they were finally arraigned in court vide Misc. No. 1 of 2010. Mr. Ngaira for the applicants argues that this detention of six (6) and five (5) days respectively exceeded the 24 hour period provided by S. 72(3) of the old Constitution, which violation nullified the subsequent proceedings before the lower court. I am mindful of the fact that S. 72(3) of the old Constitution provided that where a suspect is arrested and detained on suspicion of his having committed a non-capital offence, that suspect **shall** be brought before a court within 24 hours. The term shall made this a mandatory provision. The applicants were arrested on suspicion of having committed offences of Housebreaking and/or stealing. Both being non-capital offences they ought to have been taken to court within 24 hours of their arrest. The fact that the six (6) applicants were all detained in custody for over 24 hours is not denied by the State. In his replying affidavit dated 22nd September 2010 **P.C. DAVID MASINDE** of Wundanyi Police Station explains that the delay was unavoidable given that the police were enquiring into a ***'multiplicity of***

complaints.'

The question of whether or not such delay in bringing suspects before a court, necessarily leads to the nullification of all subsequent proceedings is one over which our courts have pondered for several years with varying different decisions. The latest (and dare I say conclusive) decision on this question was rendered by the Court of Appeal sitting in Nairobi in the case of **JULIUS KAMAU MBUGUA –VS-REPUBLIC CR.A. 50 of 2008.** In that case their lordships drew a distinction between the rights of a suspect to personal liberty and the trial rights of an accused person. The court held

"…. The breach of a right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizen enjoy the right. The duty is specifically on the police where the suspect is in police custody …."

The court went further to hold

"In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused"

In so holding the Court of Appeal has finally declared that any violation of a suspect's pre-trial rights does not fall under the scope of a trial or an appeal. As such the ensuing trial (or proceedings) cannot be declared a nullity on that ground alone. The applicants however should not despair as they retain the right to seek monetary compensation as against the State for this violation. As such I dismiss this limb of the application.

Having said that I do feel that the application has raised an equally important question. That of penalizing a suspect on the basis of mere allegations. As pointed out by Mr. Ngaira the applicants were **not** charged with any offence when they were finally arraigned in court on 16th August 2010. Instead the court was treated to a series of conjectures, rumours and innuendos by none less than a Chief Inspector of police. It is preposterous that police would waste their valuable time arresting and arraigning suspects in court on the basis of rumours and hearsay from the public. No witness was called to testify that his/her home had been broken into. Would such time not have been better spent investigating actual crimes committed? In his replying affidavit at para 5 PC Masinde states

'That the complainants were investigated but none of the applicants was connected to any of those incidents thus prompting the OCS to arraign them in court for bond to keep the peace"

If the applicants were found to have been uninvolved in the reported crimes then I fail to see why they were arrested. This action by the police amounts to an abuse of S. 46 of the Criminal Procedure Code. Having failed to establish any offence the police decided to present the applicants as habitual criminals. If indeed the applicants were habitual criminals, then in my view there should have been sufficient evidence to charge them with. There is no evidence of any past convictions against any one of the applicants for either House-breaking or Stealing to merit such a conclusion. In my view the learned Resident Magistrate erred in relying upon the unsubstantiated statement of one police officer to bond the applicants. There was no basis on which to impose the Kshs.20,000/- bond since the six were investigated and found to have no connection to any reported crime. I therefore find that the bonds as executed were null and void and I do hereby cancel the same. Any surety documents deposited to be returned to the depositors. All six (6) applicants to be released forthwith unless they are otherwise lawfully held.

Dated and Delivered in Mombasa this 5th day of November 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-
Mr. Ngaira for the 5 applicants
Mr. Onserio for State

M. ODERO
JUDGE

5/11/2010