REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Crim. Appli. 687 of 2007

DAVID KURIA WAIYAKI .... APPLICANT

- VERSUS -

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

RULING

The applicant, who is the accused in Criminal Case No. 2125/06 in the Nairobi Chief Magistrate's Court, made this application alleging violation of his trial-rights under s. 72 (3) (b) of the Constitution.

Attached to a *Chamber Summons* filed on 25th September, 2007 way an affidavit, in which it was alleged that the appellant had been arrested by CID officers from Pangani Flying Squad, AT his Karen residence on 22nd August, 2006 and held in custody for 22 days; that he was later charged in Court, in Crim. Case No. 1665 of 2006 and remanded at Kamiti Main Prison; that he was, after a period of two months, brought before the Chief Magistrate's Court on another matter, Crim. Case No. 2125 of 2006; that he had been kept in custody for 86 days instead of 14 days before being charged in Crim. Case No. Case No. 2125 of 2006, and that this "constituted a fundamental breach of [his] constitutional rights"; that he made the constitutional point before the Magistrate but it was dismissed.

When this matter came up before the Court, learned respondent's counsel, *Mr. Makura* noted that the trial proceedings complained about had *already been concluded*, and the applicant had been *committed to jail* for a period of ten years; so he wondered what the nature of the instant application was.

From the record, it is clear that the trial of Criminal Case No. 2125 of 2006, *Republic v. David Kuria Waiyaki*, began in the Nairobi Chief Magistrate's Court on *8th June, 2007* and by the time it was concluded, a total of *11 prosecution witnesses* had been heard. The applicant herein, who had been charged with robbery with violence, was convicted on the alternative charge of *handling stolen property* contrary to s. 322 (2) of the Penal Code (Cap. 63, Laws of Kenya), on *17th October, 2007*, and was sentenced to ten years' imprisonment with hard labour.

On the very day when the learned Magistrate was *pronouncing sentence*, learned counsel *Mr. Ondieki* was making an application under s. 84 (3) of the Constitution; he informed the trial Court at that stage that:

"*The rights of the applicant under section 70 (a) of the Constitution and section 77 of the Constitution have been infringed.*"

The learned Magistrate found the said application out of place, and made an order in the following terms:

"*The application had earlier been determined by this Court and an appeal is pending before the High Court".*

The application now before the Court, in the manner in which it comes, confounds the line of motions and decisions which had marked the trial itself. As already noted, the Chamber Summons was filed on *25th September, 2007*; but four days earlier, on *21st September, 2007* the trial Magistrate had made a ruling in respect of which an *appeal* was expected , and it related to the claims being made in respect of the applicant's trial-rights. The following passages in the trial Court ruling may be set out:

"The accused person who faces a capital offence alleges a violation of his constitutional rights and freedoms ... provided for under s. 72 (3) (b) of the Constitution of Kenya. In a nutshell, he alleges that he was held in Police custody for over 90 days contrary to section 72 (3) (b) of the Constitution. He alleges that he was arrested on *22nd August, 2006* and arraigned before the Court on *16th November, 2006* and was then held in custody for over 90 days.

"The prosecution opposes the application and states that the accused was not held in custody for over 90 days; though he was arrested on the night of *22nd August, 2006* he was arraigned before the Court on *12th September, 2006*, twenty days later, in *Cr. 1665 of 2006* and remanded in custody *by the Court*.

"The prosecution further states that the charge in Cr. 1665/06 had many complainants and the [applicant herein] contributed to the delay as he provided information [only] piecemeal. Once the complainant was traced ... the charge was amended and [the applicant] was once again charged in this case. From my calculations, the accused having been arrested on *22nd August, 2006* and charged in this case on *16th November, 2006*, a total of 86 days had lapsed. In-between, he had been charged in Cr. 1665 of 2006 on *12th September, 2007* – i.e. twenty days after he had been arrested.

"The charge carries [the] death penalty. So the Police could hold him in their custody for up to 14 days. The prosecutor submitted that Cr. 1665 of 2006 had eight counts, and the complainant in this case had not been traced. The accused offered information ... piecemeal, hence the delay of six days. Bearing in mind the nature of the case, the fact that the accused failed to disclose that he had been charged with a capital offence as early as 12th September, 2007 and the fact that he contributed to the delay, I find that the prosecution's burden of proving that the accused was brought before the Court as [soon] as reasonably practicable ... has been discharged. The application has no merit and has been made frivolously. I shall not grant it".

The finality with which the learned Magistrate made the said orders dictated, in good practice, that any disagreement with the trial Court should come by way of *appeal;* and in the course of arguing the appeal, any pertinent constitutional question would then be raised; for it tends to make little of the trial Court's jurisdiction, to proceed as if the said ruling did not exist − and that would tend to undermine the integrity of the judicial process.

How did *Mr. Ondieki,* counsel for the applicant, justify an autonomous application, on a point which the trial Court ruled upon in the course of hearing and determining the main cause? In his words: "The application arose before the case was concluded; we didn't get an earlier date; an illegality is an illegality, and it matters not when it occurs".

Mr. Ondieki submitted that his client's belated application was still in order, because he was coming under *s. 60 of the Constitution* which states that the High Court has original and unlimited jurisdiction.

The applicant sought to argue typical appeal questions, with regard to the trial Court's judgment, through a citing of what was perceived as breaches of the Constitution, during the conduct of trial. He urged that the applicant had been denied his rights to defence − and that, consequently, the entire trial proceedings had become "illegal, null and void"; and in this regard *Mr. Ondieki* sought to rely on the terms of s. 77 of

the Constitution. He said:

"Therefore the proceedings were skewed; and I made the Chamber application. As an officer of the Court I thought we should not allow an illegality to subsist. Due process entails a fair hearing. This application is *sui generis*. Our law does not contemplate every event. Our law allows the Court to act according to circumstances."

Mr. Ondieki said he was asking this Court to *broaden the powers* contained in ss. 65 (2) and 77 of the Constitution, and s. 362 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), to accommodate the instant application − by calling for and quashing the proceedings of the trial Court, notwithstanding that *no appeal* had been filed against the judgment of that Court. Indeed, counsel denied the propriety of filing an appeal; he said: "An appeal fails to acknowledge that the [trial process] is an illegality".

Although such are clearly novel ideas, without a place in the procedural law, *Mr. Ondieki* urged that the applicant's case had support in several judicial decisions: *Albanus Mwasia Mutua v. Republic*, Crim. App. No. 120 of 2004; *Paul Mwangi Murunga v. Republic* Crim. App. No. 35 of 2006; *Republic v. George Kibe Kimani,* Nbi High Ct Crim Case No. 68 of 2007.

Learned respondent's counsel, *Mr. Makura* was not in agreement; he stated: "We have a duty as officers of the Court to state the law; but in the instant case, an attempt is being made to argue an appeal by way of revision."

Mr. Makura recalled the content of s. 364 (5) of the Criminal Procedure Code, on the issue of *revision*; it thus stipulates:

"*When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."*

Once the trial Court's judgment was delivered, on 17th October, 2007, counsel urged, the only avenue left to the applicant herein, was by way of appeal − and in that process the applicant could then raise any issue as to breaches of his trial-rights under the Constitution. The moment the trial Court delivered its judgment, counsel urged, it became *functus officio,* and so its proceedings could no longer be varied in any particulars, save through the final decision of an appellate Court. Counsel noted that *Mr. Ondieki* had himself acknowledged that his Chamber Summons application was *overtaken by events;* and urged that consequently, the applicant was improperly before the High Court on this occasion.

Mr. Makura typified the instant application as a travesty of the procedural law, and urged that the prescribed procedures were the handmaiden of justice, and ought to be followed.

As already noted, the learned Magistrate in the trial Court had not only *concluded proceedings* and given a final judgment, but had also made an authoritative *ruling* when the applicant herein sought to raise points bearing on the Constitution. I hold it to have been improper to overlook the said ruling, and to come before the High Court with an independent application that bore *no reference to the ruling.* Still more important, the trial Court's judgment delivered on 17th October, 2007 was an ultimate act which, in the circumstances of the case, could only be contested on *appeal;* and all such constitutional questions as the applicant sought to raise by application, should have been formulated as *grounds of appeal,* and heard and resolved on that basis.

The specific and detailed law of procedure, such as is contained in s. 364 (5) of the Criminal Procedure Code, is not prescribed in vain, but is intended as the regular and objective framework that defines the course of the machinery of justice. Without these structures, judicial determinations would rest on pure discretion, and this entails the risk that free-ranging discretion could merge into whim.

I do not, therefore, agree that the instant application carries any fundamentals in the delivery of justice which must be resolved outside the established procedure of the criminal law. The application is dismissed.

Orders accordingly.

DATED and DELIVERED at Nairobi this 29th day of January, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Applicant: Mr. Ondieki

For the Respondent: Mr. Makura