REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
MISC. CRIM. APPLI. 242 OF 2008

DUKE NYANGWONO KAMANDA .....……..….....APPLICANT

- VERSUS -

REPUBLIC …….....……..……RESPONDENT

RULING

The applicant's advocates, M/s Zablon Mokua & Co. Advocates filed an Originating Notice of Motion dated 2nd May, 2008, brought under ss. 72 (3) (b), 77 (1) and 84 (1) of the Constitution, and invoking also the inherent powers and jurisdiction of the High Court.

The application carries two substantive prayers:

(i) that the Honourable Court be pleased to declare that the conviction and sentencing of the applicant was void, and that his rights had been violated by the Police who had kept him in the cells for "a period beyond the constitutionally stipulated period of not more than 24 hours";

(ii) that the Honourable Court be pleased to order that the conviction be quashed and the sentence set aside and the applicant acquitted and set free".

The applicant states in an accompanying affidavit that he was arrested on *5th May, 2005* on allegations of rape, and was then kept in the cells at Gigiri Police station for *seven* days, before being arraigned before the trial Court at Kibera Law Courts. He says he was not told why he was being held in the cells for such a long time, and so there was a breach of his trial rights. The applicant says the trial Court, after *concluding the hearing*, sentenced him to a *ten-year term of imprisonment.*

The trial Court file shows that the applicant faced a main charge of rape contrary to s. 140 of the Penal Code (Cap 63, Laws of Kenya), and the alternative charge of indecent assault on a female, contrary to section 144 (1) of the Penal Code. Trial began on *31st July, 2006,* and ended with the judgment which was delivered on *30th April, 2008,* after a hearing in which the prosecution had eight witnesses.

Learned counsel ***Mr. Mokua*** who represented the applicant submitted that the applicant's constitutional rights had been violated in the run-up to his trial and conviction, in particular because he had been held by the Police for seven days immediately before bringing him to Court to be charged. Counsel urged that 24hrs was the period during which the Police could lawfully have so held the applicant; and he stated that no reason had been given for the longer pre-trial period of detention; and consequently, counsel urged, "any proceedings emanating therefrom is null and void."

In aid of his argument, counsel cited the Court of Appeal decision in ***Gerald Macharia Githuku v. Republic***, Crim. Appeal No. 119 of 2004. He also cited the High Court decision in ***Ann Njogu v. Republic***, Nairobi High Ct Misc. Crim. Application No 551 of 2007.

Learned state counsel ***Mr. Murithi*** contested the application as being incompetent, and not properly before the Court – because the applicant was, in effect, arguing an appeal "through the back door". Counsel submitted that since the same gravemen had been raised in the lower Court, had the right procedure been followed in that Court, then the issues for

determination by the High Court would have been framed at the lower Court; but the trial Court would only do so if it was satisfied that the issues being raised were not frivolous. Counsel urged that, by the regulation for fundamental-rights applications (Legal Notice No. 6 of 2006), Rule 25, when constitutional issues are raised before the Subordinate Court, that Court is to be asked to frame the relevant issues for reference to the High Court; and since this was not done, it was submitted, it means that the lower Court was not satisfied with the merits of the complaint. And since the trial resulted in conviction, it was submitted, any issues to be raised are issues for *appeal*, and not for an application such as the instant one.

Mr. Murithi also responded to the applicant's claim that the criminal matter in question belonged not to the Penal Code, in terms of the relevant law, but to the Sexual Offences Act (Act No.3 of 2006): the commencement date for the Sexual Offences Act was 21st July 2006 whereas the applicant herein had been charged earlier under Section 140 of the Penal Code.

Mr. Mokua's response was that:

"*the Constitution is the mother of all Acts and all procedures set out in the Acts. When it is alleged that constitutional rights have been violated, then the Court must give a hearing. The rights of the applicant are guaranteed. There was no explanation offered before the Magistrate. It cannot be said if the lower Court didn't frame issues, then the constitutional rights can be violated. The very rules are clear, that the party himself can make an application to the High Court, whether or not issues have been framed by the lower Court. The High Court has the jurisdiction to interpret the Constitution; so our application is not challenged".*

This is an unusual application, as it invokes constitutional provisions, seeking to nullify trial proceedings which *have been completed* and *judgment delivered*. Under the established procedure for entertaining grievances, proceedings concluded and culminating in a final judgment, can only be contested by way of *appeal*, or by resorting to the High Court's powers for *revision* (ss. 362-367 of the Criminal Procedure Code (Cap. 75, Laws of Kenya)). This procedure is not just a technicality; it has a *constitutional significance*, in the sense that the Subordinate Courts have a jurisdiction and a role in the administration of justice (s. 65 (1) of the Constitution). A final decision of the Subordinate Court stands to be protected as an act of the Judiciary, and any challenge to such a decision is required to be made following the prescribed procedure.

On that principle alone, there is considerable difficulty with the instant application, which entirely overlooks the appeal or revision procedure, and merely invokes the elevated status of the Constitution as a primary legal document, as reason to reverse a judicial decision taken at the end of sustained and systematic proceedings.

If the applicant was seeking a *revision* of the proceedings and judgment in question, he would have invoked ss. 362-367 of the Criminal Procedure Code, as the basis. The applicant's matter is not an *appeal;* but it is also not a *revision;* though the challenges which he presents are of the nature of an appeal. But s. 364 (5) of the Criminal Procedure Code is quite clear, on the two avenues of seeking redress; it thus provides:

"***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".***

It is clear that the applicant herein has not made recourse to appeal or revision. He is aware of this; for he comes with the proposition that any matter "falling under the Constitution" is overriding, and *must* be heard when it is brought.

Such a proposition is, in my opinion, far too general to be useful in dealing with the kind of grievance with which the applicant comes. He ought to have used the procedure of appeal, or revision.

Accordingly, I hereby dismiss the application.

Orders accordingly

DATED and **DELIVERED** at Nairobi this 16th day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang' J.

Court clerk: Huka

For the Applicant: Mr. Mokua

For the Respondent: Mr. Murithi