



REPUBLIC OF KENYA

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS) CRIMINAL
APPLICATION 170 OF 2008**

ALLY JUMA HASSANAPPLICANT

- AND -

REPUBLICRESPONDENT

RULING

The applicant moved the Court by Chamber Summons dated 25th March, 2008 which carries pleadings that ?

1. the Police violated his constitutional rights under s. 72 (3) (b) and s. 77 (1) of the Constitution;
2. intended prosecution against him be stopped ? because of the violation of his fundamental rights, by holding him in custody for ten days before being arraigned in Court;
3. this Court do issue orders and directions acquitting him “irrespective of the nature and strength of the evidence the Police might have to support their case”.

The applicant states in a supporting affidavit that he is the accused in Crim. Case No. 4063 of 2007 at the Kibera Law Courts ? charged with the offence of trafficking in narcotic drugs contrary to s. 4 (a) of the Narcotic Drug and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994). The applicant had pleaded not guilty; and so the matter is now before the trial Court, which will eventually determine the matter in the normal manner.

But the applicant is asking this Court to terminate the trial, and relieve him of the pain and burden of having to undergo a criminal trial. He states that he was arrested on 26th June, 2007 and taken to Court on 5th July, 2007; and he objects to this, saying:

“... accordingly my [constitutional] and fundamental rights were violated by the [continued] prosecution of [these proceedings] whose genesis is null and void, as they are based on an illegality as was held in (a) *Albanus Mwasia Mutua v. Rep.*, Crim. Appeal No. 120 of 2004; (b) *Ann Njogu and 5 others v. Rep.*, Misc. Application No. 551 of 2007; (c) *James Njuguna Nyaga v. Rep.*, Crim. Case No. 40/07”.

Learned counsel **Mr. Ondieki**, for the applicant, contended that the applicant’s rights under s. 70 (a) of the Constitution were violated ? because he was not accorded the protection of the law; that there was a violation of s.72 (2) of the Constitutional because the applicant “was never informed about the charges [he] was facing within reasonable time”; that the applicant’s right to liberty under s. 72 (3) (b) of the Constitution was violated when he was held in custody for more than 24 hours, before being arraigned in

Court; on this point **Mr. Ondieki** urged:

“There is no known cure for such constitution violations. This burden always rests upon the prosecution. It never shifts. The applicant suffered injustice when this constitutional issue that they raised, was never resolved; instead the Court only remarked that the applicant can come to the constitutional Court to enforce [his] constitutional rights. With respect, this was a gross misdirection that led to a miscarriage of justice and prejudiced the applicant’s case. The applicant never faced a trial before an independent and impartial Court”.

Mr. Ondieki also contended that the applicant’s right to humane treatment as contemplated in S. 74 (1) of the Constitution had been violated. He made the factual statement which, however, is not the subject of any evidential deposition, that: “the trial Court and the superior Court made a concurrent finding of fact that the applicant was tortured. The Court never resolved this issue. This caused injustice to the applicant and prejudiced [his] case”.

Mr. Ondieki contended that “the applicant’s rights to privacy under s. 76 (1) of the Constitution [were] violated when [his] premises was searched without warrant. This caused injustice and rendered subsequent proceedings illegal, null and void”.

Mr. Ondieki contended that the applicant’s right to a fair trial before an independent and impartial Court under s. 77 (1) of the Constitution had been violated.

Mr. Ondieki contended that the applicant’s *right to property* under s. 75 (1) of the Constitution had been violated ? because “the applicant lost [his] property without due process”.

Mr. Ondieki urged that “the applicant’s constitutional right to protection against discrimination as envisaged by s. 82 (1) of the Constitutional was violated”.

Learned counsel submitted that the Police, in this case, “violated the constitutional right of the appellant by detaining him in their custody for a whole eight months [?]”

Learned counsel **Mr. Makura**, for the respondent, contested the application herein. He urged that the applicant had, on 26th June, 2007 trafficked illicit drugs by conveying them, and was on that occasion arrested at Jomo Kenyatta International Airport; and an *apprehension report* was then made in Court within three days of the arrest.

Counsel relied on the Court of Appeal decision in **Dominic Mutie Mwalimu v. Republic**, Criminal Appeal No. 217 of 2005, for the proposition that, not every Police detention amounts to breaches of a suspect’s constitutional rights, and every case is to be considered on the basis of its peculiar facts. Counsel urged that this particular case had its own peculiarities ? and these would justify a detention beyond 24 hours, before arraigning the suspect in Court.

In an earlier ruling by this Court (**Warsame, J.**), where the prayer was for orders staying the main criminal cause, it had been held:

“... the constitutional issue raised by the applicant [is not a basis for interfering] with the obligation placed upon the Police to conduct proper investigation of crimes that may have been committed by persons like the applicant. It is the duty of the Court to ensure that successful detection and proper investigation are [achieved], for the protection of the public good. The rights of an individual cannot override the.... public interest which is to promote and ensure the safety and well-being of all citizens in their daily life and operations” ? Sospeter Ndung’u Kung’u v. Republic, Nbi High Court Misc. Crim. Application No. 393 of 2008.

Mr. Makura drew from the **Sospeter Ndung’u Kung’u** case certain values which, he urged, were a reference-point in the interpretation of the specific provisions of the Constitution, upon which document the applicant was relying, and more specifically the provisions of s. 72 (3) (b) of the Constitution which

was the most relevant to the instant application. Counsel urged that the Court has obligations to take into account the safety and welfare of all citizens. He submitted that the *three days* of detention to which the applicant had been subjected, in place of the shorter period of 24 hours referred to in s. 72 (3) (b) of the Constitution, was not unreasonable, taking into account “the seriousness of the offence”. Counsel urged that the application be dismissed.

In response, learned counsel **Mr. Ondieki** submitted that the relevant question in a matter such as this one, is not that the offence charged was a serious one, but rather, “why did the complainant not comply with the law?”

Mr. Ondieki would pay no regard to the apprehension report which the respondent made in Court after the applicant was held in custody; because in his words, “s.77 of the Constitution contemplates that the body [physically] is taken to Court, not [just] a piece of paper; s. 36 of the Criminal Procedure Code [Cap. 75, Laws of Kenya] is very clear; the person is to be produced in Court”.

Mr. Ondieki also discounted claims of the *public interest*; because “suspects are citizens, like everybody else”. Counsel went on to urge: “On the merits of this case, if the prosecution has no explanation, [then] why did [they] hold the applicant for *three days*?” Counsel urged that “compensation should be ordered”.

One aspect of the design of this application is disturbing, and must be stated to be unhelpful to the Court in its determination of issues of merit. Whereas the basis of the applicant’s grievance is a *three-day delay* before arraigning him in Court? clearly a matter falling within the ambit of s.72 (3) (b) of the Constitution? learned counsel has quite unnecessarily, in my opinion, swept into his submissions practically all possible claims that can be imagined, under the Constitution. The rights provided for under the Constitution are live norms, intended for directly-relevant claims, that call for interpretation and orders by the High Court, and thus the rule of *relevance* ought always to be observed by counsel.

The focus of the submissions of counsel, in my opinion, was s. 72 (3) (b) of the Constitution, and it is on the basis of that section that the applicant’s claim must stand or fall.

Although the applicants’ application is shown to have been served upon the Attorney-General, and the Attorney-General indeed had been represented before this Court, no *evidentiary document* emanated from the State Law office endeavouring to present any position, in relation to the depositions made by the applicant. It was clear to me that such a state of affairs was a handicap to the Attorney-General’s representative, who felt compelled to make certain factual statements from the bar. It may be noted that a formal laying out of *facts* on the basis of an oath is most important in any case in which a party brings prayers which are not going to be canvassed through a hearing of witnesses.

The pertinent fact, however, emerges from both parties: it took *three days*, rather than 24 hours, for the Police to arraign the applicant in Court after he had been arrested and detained. *Is this Court, therefore, required to terminate the due conduct of criminal proceedings against the applicant, owing to that delay?*

The answer, in my opinion, is no. For one, I have already noted the persuasive authority of this Court (**Warsame, J.**), in **Sospeter Ndung’u Kung’u v. Republic** (2008), in which it was held that the Court, in determining issues of individual rights, has to interpret potentially conflicting provisions of the Constitution, and has constantly to bear in mind issues of the safety and security of the Kenyan public? what is described in s. 70 of the Constitution as the *public interest*.

This is not an application of first impression; there are many instances in which the Courts had held that a delay in arraigning a suspect in Court, beyond 24 hours (for bailable cases) or fourteen days (for non-bailable cases) does not necessarily entitle the suspect to an excuse from all criminal process: **Dominic Mutie Mwalimu v. Republic**, Crim. Appeal. No. 217 of 2005; **Republic v. Joseph Karuru Mungai**, Nbi High Ct. Crim. Case No. 70 of 2006; **Ponnuthurai Balakumar v. Republic**, Nbi High Ct. Crim. Application No. 218 of 2008; **Alfred Kimathi Meme v. Republic**, Nbi. High Ct. Misc. Crim. Application No. 857 of 2007; **Republic v. Richard Mwathi Nyambura & Another**, Nbi High Ct Crim. Case No. 34 of

2006.

Such a position has been explained by this Court in a recent decision, *Evanson K. Chege v. Republic*, Nbi High Ct. Misc. Crim. Application No. 722 of 2007, as follows:

“Learned counsel ... has urged that there exists an attrition-chain to legal validity, which starts with delayed arraignment in Court rendering the *charge* null; a null charge rendering the *trial process* null; a null trial process rendering the *eventual verdict* itself null ? so that the moment it is established that arraignment in Court was delayed, then it follows perforce that the applicant is to be prematurely *acquitted*, [not] proceeding further to the stage of preliminary submission on the merits of the criminal case. The juristic basis for this proposed syllogism has not been cogently presented before this Court. I have found difficulty with the said syllogism, besides, as it is highly theoretic, and would rule out practical and real scenarios, such as the *facts and circumstances* of a case; it would also take away the *judicial discretion*. If the Courts had a *legal obligation* to apply the syllogism, their task would be all too easy; but the *ideal of justice* is unlikely to be found embedded in the easiest options.”

The foregoing is the principle which must guide this Court in determining the question now in hand. I have considered the *gravity of the charge* which the applicant herein faces in Criminal case No. 4063 of 2007, as well as the *public-interest implications* of that trial; and I have come to the conclusion that the said trial ought to proceed as already set, and the outcome will itself provide the goals of justice which the applicant is to be taken to be interested in.

As already noted, however, the prosecution *did not* provide a satisfactory explanation for the delay which affected the applicant, when he was arraigned in Court. I hereby *declare* that the said delay in arraignment amounted to a comprise to the applicant’s trial-rights; and I *declare* that he will be entitled to seek compensation under s. 72 (6) of the Constitution.

Otherwise, I *dismiss* the application, and order as follows:

1. The main cause shall be listed for mention, for direction for further hearing, before the trial Magistrate on 19th February, 2009.
2. The trial file shall, together with this ruling, be placed before the trial Magistrate without delay and in any case, before 19th February, 2009.
3. Production order to issue in relation to Order No. 1 herein.

Orders accordingly

DATED and DELIVERED at Nairobi this 12th day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Applicant: Mr. Ondieki

For the Respondent: Mr. Makura