



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Crim. Appli. 94A of 2008

MICHAEL WAMWEA NJENGAAPPLICANT

- AND -

REPUBLICRESPONDENT

RULING

Part of the application of 12th February, 2008 was heard and disposed of on 30th June, 2008 – and such a partial mode of hearing was occasioned by the manner in which the matter was presented in Court. In the remaining part, the applicant’s contentions are: that the applicant’s constitutional and fundamental rights have been “violated, contravened and he has been harassed and intimidated as a result of illegal detention in the Police cells for five days, contrary to section 72 (3) of ... the Constitution”; and that “the Honourable Court be pleased to quash [Chief Magistrate’s Court Criminal Case No. 1978/06, *Republic v. Michael Wamwea Njenga*] as it is an illegal prosecution, and acquit the applicant”.

The applicant asked the Court to nullify the proceedings in *Criminal Case No. 1978 of 2006*, on the grounds that his constitutional rights had been violated; that he had been arrested and detained by the Police on 18th October, 2006 but was not taken to Court until five days later, on 23rd October, 2006: he urged that this was a contravention of his trial-rights under s. 72 (3) (b) of the Constitution.

The applicant made reference to case law which he urged, supported his application for acquittal at this early stage: *Paul Mwangi Murunga v. Republic*, Crim. Appeal No. 35 of 2006; *Ndede v. Republic* [1991] KLR 567.

Learned respondent’s counsel, *Mrs. Gakobo* opposed this appeal, and invited the Court to take into account the replying affidavit of *Inspector Kigen*, dated 27th June, 2008.

Inspector Kigen is the Investigating Officer in respect of *Criminal Case No. 1978 of 2006*. He deponed that the Banking Fraud Investigation Unit had received a complaint relating to the fraudulent transfer of Kshs.97,125/70 from Acc. No. 0007401100 held at Bank of Baroda, in the name of Mamu Hardware Ltd. to Acc. No. 026010124198 held at Equity Bank in the name of *Michael Wamwea Njenga* (applicant herein) who had been arrested by the bank’s security team. The deponent *re-arrested* the applicant, and booked him in at the Banking Fraud Police offices, OB. No. 4 of 18th October, 2006 at 5.50 p.m. On the following day, 19th October, 2006 the deponent carried out investigations and prepared documentation for the applicant to be brought before the Court; but it proved impracticable to bring the applicant before the Court on 19th October, 2006 ? on account of logistical limitations. By the standing administrative procedures at the Court’s criminal registry, the charge-sheet is to be registered by 8.00 a.m. Then 20th October, 2006 was a public holiday; and 21st October, 2006 and 22nd October, 2006 fell on a weekend ? and so the applicant could not be brought before the Court. It was on 23rd October, 2006 that the applicant was charged in the Chief Magistrate’s Court, in *Criminal Case No. 1978 of 2006* which is now being challenged by the applicant.

The deponent said: “though I exercised due diligence in the investigations, it was not reasonably practicable to present the applicant [before the] Court within the [twenty-four] hour period”.

The applicant did not, apparently, take time to analyse the merits of the Investigating Officer’s affidavit; he reckoned that

all Police detention beyond the twenty-four hour period, before the production of a suspect in Court, and where the offence to be charged was a bailable one, was inexorably a *violation of constitutional rights*; and he cited many cases which he urged, supported his contention.

Learned counsel **Mrs. Gakobo** remarked that the Investigating Officer had conceded he did not have the suspect (the applicant) arraigned in Court within twenty-four hours of arrest; but she noted that the respondent through the replying affidavit, had explained the circumstances that made it impossible to bring the applicant before the Court within twenty-four hours; no investigations could have been conducted on 18th October, 2006 as it was coming up to night-time; only on 19th October, 2006 was it possible to conduct the investigations, and it was not possible on that very day to present the applicant before the Court, as charge-sheets are required to be registered by 8.00 a.m. on each working day; and then there was a *public holiday* and a *weekend* intervening, before the next working day. In these circumstances, counsel urged, it was not possible to present the applicant before the Court; and the only date when this was possible was 23rd October, 2006, ? and that precisely, is when the applicant was brought before the Court.

Learned counsel urged that the tenor of the replying affidavit showed diligence on the part of the Investigating Officer, in the conduct of investigations and in bringing the applicant before the Court. Counsel submitted that the Investigating Officer had made a *bona fide* statement, in which he shows practical difficulties that made it impossible to bring the applicant before the Court in time.

Of s. 72 (3) (b) of the Constitution which deals with a suspect's trial-rights, **Mrs. Gakobo** submitted that it contemplates that there *will* be circumstances that render it impracticable to bring a suspect before the Court within the specified time-periods. Counsel urged that no violation of the terms of s. 72 (3) (b) of the Constitution had been shown; but she added that if the Court should find any violation of the applicant's trial-rights, then this would be a meet case for compensation under s. 72 (6) of the Constitution.

Mrs. Gakobo supported her argument with case-authority, this Court's decision in **Shem Karanja Waigwa v. Republic**, Nbi High Ct. Misc. Crim Application No. 186 of 2008, in which it had been stated that there are certain factors that bear on the determination of a case such as this one: *rights of the accused*; *the public interest*; and *the Court's discretion*.

As the applicant does not contest the purely factual account on the circumstances surrounding his arrest and arraignment in Court, I take it that the burden of his application is that *there exists* case law which calls for the expeditious bringing to Court of a suspect who has been arrested. That point of principle is, of course, valid, and will continue to guide the Courts as they determine applications of this kind. But the Court has always to bear in mind that the essence of a judicial decision lies in the fair and balanced mode of relating law and principle to the *factual situation*. On the facts in this case, I am quite convinced that the prosecution could not have brought the applicant before the Court on an earlier date than that on which they brought him. And it follows that a perfectly reasonable explanation has been given before the Court for the delay, precisely in the terms of s. 72 (3) (b) of the Constitution.

Accordingly, I hereby dismiss the applicant's application. The trial file on *Criminal Case No. 1978 of 2006* shall be placed before the trial Court, on 12th February, 2009 for mention and for directions on continued hearing.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 9th day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Appellant: Mr. Gakobo

Applicant in person