REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 111 of 2008
JOHN KIMANI KIOI .....

JAMES IRUNGU THUO .....

RICHARD MWIRIGI MWANGI ..... APPLICANTS

BENSON KAMAU NJOKI .....

PETER MWANGI NGUGI .....

- VERSUS

REPUBLIC .....……..…..…... RESPONDENT

RULING

The five applicants moved the Court by Chamber Summons filed on 20th February, 2008 which states that they "were prejudiced by being unlawfully detained in Police custody beyond the period [allowed] by law"; and that "the subsequent detention was a violation of our fundamental human rights to freedom as enshrined in section 72 (3) (b) of the Constitution". Each of the applicants swore an affidavit, making depositions mainly of a factual nature.

John Kimani Kioi states that he was unlawfully detained in Police custody for *39 days*, and that this was a violation of his fundamental rights under s. 72 (3) (b) and s. 77 (1) of the Constitution. ***James Irungu Thuo*** states that he was unlawfully held in Police custody for 18 days. ***Richard Mwirigi Mwangi*** states that he was unlawfully detained in Police custody for *15 days.* ***Benson Kamau Njoki*** states that he was unlawfully detained by the Police for *28 days.* And ***Peter Mwangi Ngugi*** states that he was arrested on 9th May, 2006 and brought before the Court on 15th May, 2006, and that he had been held in Police custody unlawfully.

Learned counsel ***Mr. Mbiyu*** canvassed the 1st applicant's case. He urged that 1st applicant was arrested on 26th March, 2006 but not arraigned in Court until 5th May, 2006, and that this period of detention infringed the 1st applicant's constitutional rights as he ought to have been brought before the Court within fourteen days. Counsel submitted that the prosecution had committed a breach of s. 77 of the Constitution, by not notifying 1st applicant of the charges being brought against him within a reasonable length of time. Counsel urged that, as 1st applicant only learnt of the charges facing him when he came before the Court, the criminal proceedings against him should be declared null – no matter what the strength of the evidence against him may be.

Mr. Mbiyu urged that, as the prosecution had *filed no affidavit explaining the delay* in arraigning 1st appellant in Court, the proceedings now running against him should be nullified.

Mr. Mbiyu submitted that the trial of 1st applicant which started on 5th May, 2006 but has not been concluded, had not been conducted within reasonable time; and that the 1st applicant was entitled to fair and speedy trial.

The other applicants individually made submissions akin to those of counsel for 1st appellant.

Learned counsel ***Mr. Makura*** noted that the applicants were all being tried at Thika Law Courts, in *Criminal Case No. 1881 of 2006* and the main charge facing them was robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya). According to the records, counsel urged, the applicants were arrested on *28th April, 2006* and held at Makuyu Police Station until *5th May, 2006* on which date apprehension reports were made in Court; and consequently, none of them had been kept in Police custody for longer than seven days. The instant application, counsel urged, was not based on *factual information*; so it was submitted, counsel for 1st applicant had made submissions without a basis in law or fact. ***Mr. Makura*** submitted that it was speculative to say there had been a breach of s. 77 of the Constitution; for the Police upon arresting the suspects had indicated to them the nature of the intended charges.

In his reply, ***Mr. Mbiyu*** urged that the explanations emanating from the prosecution side were explanations *from the Bar,* and were hardly sufficient. Counsel urged that the investigating officer be required to provide *affidavit evidence* explaining the position in regard to the arrests and detention in question.

The vital fact-base such as is required for the taking of a *judicial decision* is missing in this matter. Not only are the affidavits sworn by the applicants quite cursory, and incapable of illuminating the nature of the claims, but the positions taken by both counsel constitute no more than a tussle not founded on plain fact.

A judicial decision cannot be sought on that basis, for such a decision is not lightly given, merely because a party asks for it. A judicial decision in its essential character, is based on *sufficient fact,* on *legal prescriptions,* and on *conviction as to merits.* Those ingredients apply to this case *a fortiori* because what is sought by the applicants, as constitutionally-guaranteed trial rights, has the potential to run into conflict with *other* claims of the same Constitution.

Such potentially-conflicting claims of the Constitution have been remarked in case law. For instance, in ***Albanus Mwasia Mutua v. Republic***, Crim. Appeal No. 120 of 2004 the Court of Appeal thus remarked:

"***On the one hand it is the duty of the courts to ensure that crime, where it is proved, is appropriately punished: this is for the protection of the society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution".***

And this Court adverted to the same point in ***David Karobia Kiiru v. Republic,*** Nbi High Ct. Misc. Crim. Application No. 863 of 2007, in the following terms:

"***[Section 72 (3)] of the Constitution is being cited as the basis for terminating a criminal trial which is in progress ....***

"***When, in law, should the High Court put an end to the constitutional function of trying criminal cases, as a State function authorized by law (s. 26 of the Constitution of Kenya)?***

"***It is clear that such a claim, when rested upon the constitutional document itself, must be thought through carefully: because criminal prosecution is a public-interest, governance process itself founded***

on the constitutional document. So, if that process is ... being challenged by citing the same Constitution, then conflicts within the provisions of the Constitution become apparent: and in that case, it is within the jurisdiction of the High Court to interpret the Constitution, and to declare what is true meaning is".

The fact-base of the instant application gives *no basis* for the Court to decide the very important question which runs through the claim.

It is now ordered, in the circumstances, that the respondent shall, *within 14 days of the date hereof*, have an affidavit sworn and filed, dealing with the relevant points in the application.

This matter shall be listed for *mention* on *26th February, 2009,* for the issuance of appropriate directions.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 2nd day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the 1st Applicant: Mr. Mbiyu

For the Respondent: Mr. Makura

Other applicants in person