



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Miscellaneous Criminal Case 93 of 2008

JULIUS S. LIDONDE APPLICANT

VRS

REPUBLIC RESPONDENT

RULING

The petition before me was brought under the provisions of section 84 (2) of the Constitution of Kenya.

The petitioner asserts that his constitutional rights have been infringed. His assertion stems from the fact that he was held in police custody for almost 4 months, before he was charged with murder.

The undisputed facts are that the petitioner was arrested on 14th January, 2008. He was then held at the Kakamega Police Station until 5th May, 2008, when the state caused him to be charged with the offence of murder in **CRIMINAL CASE NO. 12 of 2008**.

Pursuant to Rule 23 of **The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006**;

“Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”

In this instance, the petitioner was charged with the offence of murder. His said case is before the High Court. Therefore, the petitioner ought to have raised the constitutional issue herein, within the same case he is facing.

To my mind, the rationale for that rule is that the constitutional issue would be addressed within the perspective of the broader case facing the person who alleges that his constitutional rights had been infringed.

By so saying, I am not suggesting that this court is unable to make a finding on whether or not the petitioner’s constitutional rights have been violated, except if the issue is raised within the context of the

murder case.

The need to give consideration to the constitutional issue within the criminal case being tried before the High Court stems from the realization that that would enable the court to make an informed decision on the remedy to prescribe, if it should conclude that the constitutional rights of the petitioner had been violated.

In this case, the learned Senior State Counsel, Mr. Daniel Karuri, told the court that the police had no explanation for the delay in taking the petitioner before a court of law. In the event, I find and hold that the petitioner's constitutional rights were infringed. I so find because the petitioner ought to have been taken before a court of law within 14 days of his arrest. However,, it was not until after the lapse of almost 60 days that he was first taken to court.

The petitioner urged me to terminate the trial against him, and to set him free, if I should find that his constitutional rights were infringed.

To his mind, it was literally automatic that if his constitutional rights were violated, he should be set free. However, in my considered view, the issue is not at all straight – forward. In ***NICHOLAS KADENGE NDOTI Vs REPUBLIC, MALINDI HCCR.C NO. 125 of 2006***, my learned sister, Omondi J. expressed herself thus, on that issue;

“Would the fact that his rights were violated then be an overriding factor and earn him an acquittal? I think not – my reading of section 72 (6) of the Constitution is that in the event of a court establishing that there had been a violation of rights, the remedy lies in compensation, not acquittal.”

I am aware of numerous decisions pronounced by the Court of Appeal, which have ended in the acquittal of persons whose constitutional rights had been infringed.

In ***ALBANUS MWASIA MUTUA Vs REPUBLIC, CRIMINAL APPEAL NO. 120 of 2004***, the court of Appeal said;

“We must admit that the matter has caused us some considerable thought and anxiety. 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 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 our constitution.”

Having made it abundantly clear that the courts have an obligation to balance the rights of the society against those of the accused person whose constitutional rights had been violated, the Court of Appeal subsequently held that;

“an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.”

In arriving at that holding, the court emphasized that it was the duty of the courts to enforce the provisions of the constitution.

I not only agree with those reasons, but I am also bound by the decision of the Court of Appeal. But I also note that in enforcing the provisions of the Constitution, the Court of Appeal did not say that if there was a violation of a constitutional right of an accused person, he must be acquitted.

Secondly, it is clear that the attention of the Court of Appeal was not drawn to the provisions of section 72 (6) of the Constitution of Kenya. I am therefore unable to know what the Court of Appeal would have said, had its attention been drawn to that section. The said section reads as follows;

“A person who is unlawfully arrested or detained by another person shall be entitled to compensation

therefore from that other person.”

If I am to enforce that provision of the Constitution, as is my obligation, I would not acquit the petitioner, but instead, I would order that he ought to be compensated by the police who detained him for a period exceeding that which is allowed by section 72 (3) of the Constitution.

Accordingly, I find and hold that the police have violated the Constitutional rights of the petitioner herein, by detaining him for more than 14 days, before taking him to court. However, the said violation will not lead to an acquittal of the petitioner. Instead, it shall entitle him to seek compensation from those that violated his constitutional rights.

Meanwhile, in the discharge of its duty to the society, this court will continue to afford to the petitioner herein, a fair hearing in the murder case facing him. If the trial court should find him guilty, the petitioner will pay the price for his actions. That way, the family of the victim and the society at large will feel that justice had been done.

But regardless of whether or not the trial court should convict the petitioner herein, the police would be obliged to compensate him for the violation of his constitutional rights. It is so ordered.

Dated, signed and delivered at Kakamega this 28th day of April 2009.

FRED A. OCHIENG'

JUDGE