



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
MISCELLANEOUS CIVIL CASE 62 OF 2009
MISC NO. 62 OF 2009
CAESAR NJAGI
VERSUS
REPUBLIC
RULING

1. The accused person in Kitui PM's Court Criminal Case Number 274/2006 is one Caesar Njagi and he is facing the charge of forgery contrary to section 349 of the Penal Code. He denied the charges and on 29.5.2007, his trial commenced. On 23.9.2008 he tendered his evidence in his defence and judgment was reserved for 26.2.2009. However before delivery of judgment, learned trial magistrate, T.M. Mwangi, Esq, SRM delivered a Ruling on that day and rendered himself partly as follows:

“That after some reflection I am of the opinion that it may not be prudent to decide the case on its merit when the accused has in the cause of trial strongly put forth a case that his rights under section 72 of the constitution have been violated. In the case of Nairobi Court of Appeal Cr. Appeal No. 120 of 2004- Albanus Mwanzia Mutua vs Republic it was, *inter alia*, held on page 6 of the judgment that the nature and strength of the evidence brought by the prosecution in support of the charge does not really count, (when an accused's constitutional right has been violated – emphasis mine).”

2. He went to expound on the law relating to violation of rights under section 72 of the Constitution and the fact that the accused person had made out a strong case that his rights have been violated in the instant case and then concluded as follows;

“In sum accused was seeking for protection of his rights under section 72 of the constitution. The following are issues for determination by the superior court.

a) Under circumstances of this case, have the rights of the accused under section 72 of the constitution been violated?

b) When in a case before a subordinate court an issue or question arises of violation of accused's rights under section 72 of the constitution, can a subordinate court dispose off the issue by following the established judicial decisions of superior courts that have themselves already interpreted that section or would doing so by subordinate court amount to an interpretation of the constitution and

therefore unlawful?”

3. The issues raised and procedure adopted by the learned trial magistrate need clarification because Rules 24-32 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 provide as follows:-

“(24) Where in proceedings in a subordinate court a

question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) of the Constitution, and the presiding officer is of the opinion that the question raised is not frivolous or vexatious, he may refer the question to the High Court in Form E set out in the Schedule to these Rules.

25. Where a party to proceedings in a subordinate court alleges contravention of his fundamental rights or freedoms under sections 70 to 83 (inclusive) of the Constitution in relation to himself, he shall apply informally to the presiding officer during the pendency of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.

26. If the presiding officer is satisfied that there is merit in the allegation made under rule 24, and that it has not been made frivolously or vexatiously, he shall grant the application whereupon the court shall frame the question to be determined by the High Court in Form F set out in the Schedule to these Rules.

27. As soon as is practicable, and in any case not later than twenty one days from the date of framing the question, the subordinate court shall refer the matter to the High Court.

28. The Registrar shall within seven days of receipt of the reference under rule 25 place the matter before a judge to fix a hearing date or give further directions.

29. The High Court may on an application by a party order that all further proceedings before the subordinate court shall be stayed pending the hearing and determination of the reference.

30. At the hearing of a reference only the questions framed in Form F shall be raised.

31. Where a party intends to rely on any reported or unreported case, or to quote from any book, he shall lodge with the court, and serve copies of the reported or unreported case of the quotation, as the case may be, two days before the hearing.

32. The hearing of all applications and referenced to the High Court shall be given priority over all other cases and shall be heard and determined expeditiously.”

4. It seems to me therefore that this court while otherwise properly seized of the matter without hearing the parties and without a proper Petition (in the format set out in **Form E and F** in the schedule to the Rules aforesaid) being placed before it cannot determine the issues raised.

5. In the event, I will return the lower court file to the trial magistrate to prepare a proper Petition in the procedural manner and return it for this court to fix hearing dates on notice to the parties and thereafter to determine the twin issues raised in the Ruling aforesaid .

6.Orders accordingly.

Dated and delivered at **Machakos** this **28th** day of **May 2009**.

Isaac Lenaola

Judge

In the presence of;

Isaac Lenaola

Judge