



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CRIMINAL CAE 73 OF 2006

REPUBLIC..... PROSECUTOR

VERSUS

PETER KIMANI KIHORO.....ACCUSED

RULING

The application before me has been brought by the accused, pursuant to the provisions of Section 72(3) of the Constitution of the Republic of Kenya.

It is the contention of the applicant that having been held in custody for 197 days before being produced before a court of law, his constitutional rights had been flagrantly violated.

He therefore asks this court to declare as illegal the proceedings which the state wish to undertake against him. His further request is, that after declaring the proceedings illegal, this court should proceed to order that he be released.

When asked by the court to explain why he deemed the proceedings to be illegal, the applicant submitted that the proceedings germinated from an illegal detention.

In support of his submissions, the applicant cited the following two authorities;

(i) REP. VS. HENRY OPONDO OGAM

CRIMINAL CASE NO. 75/2007;

and,

(ii) GERALD M. GITHUKU VS. REPUBLIC

CRIMINAL APPEAL NO. 119 OF 2004

In answer to the application, the state had not filed any affidavit.

When the application came up for hearing on 3rd June 2009, the state sought an adjournment because the learned state counsel had had difficulties in tracing the Investigating Officer, who would have explained the delay in bringing the applicant before the court, in the first instance.

Although the said learned state counsel demonstrated to this court that he had communicated his difficulties to the Director of Criminal Investigations, through a letter dated 27th April, 2009, the court declined to adjourn the matter. The reason given by the court for rejecting the application for an adjournment was that the mere transfer of the Investigating Officer cannot be a sufficient justification for the delay in getting the said officer to swear an affidavit which would offer an explanation, if any, for the delay in bringing the applicant to court.

That decision was arrived at by the court within the context of this case, including the fact that the state counsel had previously sought adjournments on 4 occasions.

After the court rejected the application for a further adjournment, the matter went ahead, notwithstanding the absence of any replying affidavit from either the Investigating Officer or any other police officer.

As the state did not offer any explanation for the delay in bringing the applicant to court, it follows that the applicant's constitutional rights, under Section 72(3) of the Constitution, have been violated. I so declare.

However, the learned state counsel, Mr. Imbali, did submit that the applicant should not be set free. Instead, the learned state counsel urged this court to find that the Constitution did guarantee both the right to liberty as well as the right to life.

He also urged this court to hold that the rights to freedom were subject to the rights of other persons.

That being the position, so submitted the respondent, justice and fairness can only be done if the court allowed the trial of the applicant to proceed. In the meantime, as far as the state was concerned, the applicant could invoke the provisions of Section 72(6) of the Constitution. In effect, the applicant was invited to seek compensation for the violation of his constitutional rights.

In determining this application, I need only determine whether or not to set the applicant at liberty forthwith. The reason for that is that I have already made a finding to the effect that the applicant's constitutional rights under Section 72(3) of the Constitution have been infringed.

GERALD MACHARIA GITHUKU V REPUBLIC, CRIMINAL APPEAL NO. 119 OF 2004, dealt with a situation in which the appellant was taken to court 17 days after his arrest. In other words, he was taken to court 3 days late.

The Court of Appeal nonetheless quashed the conviction and set aside the sentence. In reaching that conclusion, the court had;

“also been mindful of the fact that the appellant has now been in custody for in excess of 12 years and that his two co-accused have died in custody.”

At the same time, the Court did acknowledge the following position, as stated in the celebrated case of **ALBANUS MWASIA MUTUA VS. REPUBLIC, CRIMINAL APPEAL NO. 120/2004**;

“On the one hand 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 the Constitution.”

To my mind, their Lordships must have had in their minds the provisions of Section 70 of the Constitution, when they made reference to the need to balance those equal rights. That section stipulates that whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, the provisions of the Chapter 5 of the Constitution

“shall have effect for the purpose of affording protection to those rights and freedoms subject to such

limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

That being the position, in law, I cannot fathom how an accused person, even though he be presumed innocent until proved guilty, can then say that because his fundamental rights had been infringed, it would matter not that there could be evidence which may prove that he too had violated the fundamental rights of another person.

In my considered opinion, public interest demands that if there is evidence that can lead to the conviction of an accused person, such evidence should be led, so that where it is proved that the accused was guilty, he should be appropriately punished.

In other words, I hold the view that if a conviction was quashed or criminal proceedings were terminated simply because the fundamental rights of an accused person had been violated, that would be tantamount to elevating the rights of that accused to a level that was higher than both the rights of the victim as well as to public interest.

As the Court of Appeal held in the case of **ALBANUS MWASIA MUTUA V. REPUBLIC** (supra), it is the equal duty of the court to punish for crimes that are proved, whilst also upholding the Constitutional rights of the accused person.

It is difficult for me to visualize how the court can achieve that duality of purpose if an accused person who was arrested on reasonable suspicion of his having committed, or being about to commit a criminal offence is then simply set free because his constitutional rights had been infringed.

By setting free the accused person, regardless of the evidence which had been adduced, or which is available to the prosecution, for production before the trial court, it would appear that the court would have disregarded the rights of the victim as well as the public interest.

If a crime had already been proved against an accused person, so that the trial court had convicted him, or if the evidence in the hands of the prosecution is such that it can lead to the conviction of the accused person, yet the court proceeded to set free the said accused person on the grounds that his constitutional rights had been infringed, I think that the court could be justifiably accused of elevating the rights of the accused to a level that was higher than the rights of the victim, the rights of the family of the victim, and the public interest. I find no sound legal ground for not upholding the rights of the accused person to be at par with the rights of others as well as with public interest.

In the case of **ALBANUS MWASIA MUTUA** (supra), the Court of Appeal expressly stated that the courts have an equal duty to punish someone who is proved to have committed a crime, on the one hand, as well as a duty to uphold the said person's human rights, on the other hand. That is as it should be.

It is important to always bear in mind the provisions of Section 70 of the Constitution, which provides as follows;

“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest,.....”

The authors of the Constitution deemed it necessary to clarify that the provisions for the protection of fundamental rights and freedoms of the individual;

“shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and

freedoms of others or the public interest.”

In **REPUBLIC VS. TALIB ABUBAKAR & 5 OTHERS, CRIMINAL REVISION No. 1 OF 2008**, Ojwang J. expressed himself thus;

“After summarizing the main points in this matter, and carefully considering the submissions of counsel, I have come to certain conclusions. Firstly, a plain reading of S. 72(3) of the Constitution shows it to establish a rule, regarding the lawful period of detention before a suspect is arraigned in Court – but with an exception; prolonged detention beyond the stipulated periods, can in certain circumstances be explained away.”

The fact that a prolonged detention of an accused person may, depending on the circumstances, be explained away, implies that the constitutional right is not absolute in itself.

In **DOMINIC MUTIE MWALIMU V REPUBLIC, CRIMINAL APPEAL NO. 217** of 2005, the Court said;

“In our view, the mere fact that an accused person is brought to court either after twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution, does not ipso facto prove a breach of the Constitution. The wording of S.72(3) is in our view, clear, that each case has to be considered on the basis of its peculiar facts and circumstances.”

In this case, the accused says the court should proceed to declare the intended criminal proceedings illegal. He views the prosecution as illegal because the same would be founded on an illegality.

In my understanding of the law, the trial of an accused person is founded upon a charge or information. It is not the arrest nor the detention of an accused person which forms the foundation upon which he is to be tried. I say so because a person may be arrested, and may even be detained in custody, but he may thereafter be released without having been charged with any offence.

It is also possible that one can be arrested and then charged before a court of law, but without his having been detained in custody.

In the Constitution of Kenya, it is lawful to arrest a person on the basis of reasonable suspicion that he had committed or was about to commit a criminal offence.

If after there has been a lawful arrest, the suspect is detained in custody for a period beyond that which is permissible under the Constitution then such detention becomes *prima facie* unlawful. But until and unless the prescribed period has run out, the detention would be lawful.

When the suspect is held in custody for longer than is constitutionally permissible, the person who alleges that the suspect had been taken to court as soon as was reasonably practicable, may still try to satisfy the court that his contention was justified. It is only if the person fails to discharge that onus that the court would then make a finding that the prolonged detention was unconstitutional.

To my mind, the fact that a detention had become unconstitutional, because it was for longer than allowed, cannot, by itself, render either the original arrest or the charge or information null and void.

The applicant submitted that the office of the Attorney General, the prosecution and the police were all part and parcel of one office, which prosecutes accused persons under the authority of the Attorney General. In that respect, the applicant relied on the decision of Mutungi J. in **REPUBLIC VS. HENRY OPONDO OGAM, CRIMINAL CASE NO. 75 OF 2007**

What the learned Judge said in that case was as follows;

“To begin with the distinction being drawn between the police and the office of the Attorney General is

untenable. The police and the State Counsels who actually appear in court are all part and parcel of the prosecution, under the Attorney General, on whose behalf they prosecute for the state.”

By virtue of the provisions of Section 85(1) of the Criminal Procedure Code, the Attorney General is empowered to appoint public prosecutors for Kenya. The law says that he may appoint, as public prosecutors, any advocate of the High Court or any person employed in the public service.

To the extent that every public prosecutor is, pursuant to Section 85(3) of the Criminal Procedure Code, subject to the express provisions of the Attorney General, there can be no distinction between them, regardless of whether they were advocates or any other category of public servants.

However, with all due respect to my learned brother, I find that there is a clear distinction between the police who have been appointed as public prosecutors, on the one hand, and the other police officers who are engaged in investigations of cases, on the other hand. Those police officers who were engaged in investigations are not subject to the express directions of the Attorney General: they are answerable to the Commissioner of Police.

It is my considered opinion that the process of investigations is distinct from that of prosecution.

Investigations entails the processes of making inquiries with a view to obtaining evidence, and finding the connections, if any, between the evidence and the suspect. It is only after the investigations have been completed that a suspect ought to be charged with the offence which has been disclosed through the investigations.

When a charge or information is drawn up on the strength of well founded investigations, the said charge or information would be lawful. Before it is drawn up, the trial proceedings cannot commence. But once it is drawn up, the accused person may take his plea, which marks the commencement of the proceedings.

The incarceration of the suspect before he is brought to court is done by the police, who do not have any role in the prosecution of the accused.

As there are distinct processes between investigations and prosecution, I find that the accused herein has failed to demonstrate to me how the fact that he had been held in custody for longer than is permissible under the Constitution, can, by itself, have the effect of rendering the proceedings null and void.

He had not challenged the legality of his arrest or of the charge sheet. Had he done so, and had he thereafter taken steps to satisfy the court that his assertions were merited, I could have so held.

For now, it is necessary for me to bear in mind the following words of section 72 (6) of the Constitution;

“A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”

From my understanding of that sub-section, a person whose arrest was unlawful is entitled to compensation from the person who effected his said arrest. The Constitution does not stipulate that the person who was unlawfully arrested shall be set free, even though his constitutional rights would have been infringed.

Given the fact that a person who was unlawfully arrested is entitled to compensation, I should think that justice cannot demand that another person whose arrest was lawful, but who was thereafter held in custody for longer than is permissible under the Constitution should be entitled to more.

In any event, this court is enjoined to enforce the Constitution. That Constitution says that;

“A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”

(Emphasis is mine)

To my mind, a person who is held in custody for longer than is permissible under the Constitution is said to be unlawfully detained.

Therefore, in so far as the applicant's detention herein is unlawful, the applicant's right is governed squarely by Section 72 (6) of the Constitution.

In **EVANSON K. CHEGE V. REPUBLIC, MISC. CRIMINAL APPLICATION NO.722 of 2007**, Ojwang J. expressed himself thus;

“The Constitution itself has a provision for possible compensation for breaches of trial-rights; and the inference which I must draw is that the Court has a discretion as to what remedy to allow, where an accused person has been detained in custody for an unduly long period, before being arraigned in Court.”

In the result, although the constitutional rights of the applicant have been undoubtedly violated, I decline to hold that the proceedings which are intended to be mounted against him are illegal or null and void.

Accordingly, the trial of the applicant shall proceed to its logical conclusion. In the meantime, he may, if he is so minded, institute appropriate separate proceedings, to pursue his entitlement to compensation.

Dated, Signed and Delivered at Nairobi this 25th day of June, 2009.

FRED A. OCHIENG

JUDGE