



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

**Petition 451 of 2008**

**JOHN MUGENDI PETER.....APPLICANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

This is a petition filed by John Mugendi Peter against the Republic brought pursuant to Section 84 (3) of the Constitution in which he alleges contravention of his fundamental rights under Ss 70(a), 72 (2) 3(b), 74(1), 77(1), 77(2) (a) (b) (c) of the Constitution. He seeks the following orders and declarations:

- 1) A declaration that the fundamental rights and freedoms of the Petitioner contemplated under Sections 72(3) (b), 70 (a), 77(1) (2) (a) (b) (c), 72 (2) of the Constitution have been, are being or are likely to be violated by proceedings in CRC 1707/05;
- 2) That the court do issue a declaration that CRC 1707/05 is illegal, null and void and quash it;
- 3) A declaration that once there is a finding of fact by the subordinate court that the rights of the Applicant have been violated such constitutional violations are not curable;
- 4) A declaration that any explanation by the state can only explain the delay not the constitutional violations;
- 5) Any such order that the court may deem fit and convenient to grant.

The petition is predicated on the affidavit of the Petitioner dated 15<sup>th</sup> July 2008 and a supplementary affidavit dated 14<sup>th</sup> April 2009, and submissions filed in court on 6<sup>th</sup> February 2009.

The petition was opposed and Victor Mule, Counsel for the Respondent swore an affidavit dated 23<sup>rd</sup> October 2008, filed a notice of preliminary objection dated 13<sup>th</sup> October 2008, a replying affidavit sworn by Chief Inspector Peter Muigai and submissions filed in court on 19<sup>th</sup> February 2009.

The salient facts of this case are that the Petitioner was charged with the offence of Robbery with Violence and Rape in CRC 1707/05 **REP V JOHN MUGENDI PETER** as per charge sheet exhibited as (PM 1). Chief Inspector Peter Muigai was one of the investigators. The offence was reported on 12<sup>th</sup> July 2005 and the Petitioner was arrested on 13<sup>th</sup> July 2005 and taken to court on 2<sup>nd</sup> August 2005. That

there was a delay by about 9 days and the subsequent proceedings were therefore illegal null and void. He raised that issue before the subordinate court and the court agreed with him that there was a violation. That his rights were violated under Sections 70 (a), 72(3) (b) and 77(1) of the Constitution and that an explanation cannot correct the said violation.

Chief Inspector Peter Muigai has conceded that he was involved in investigations of this case where the Petitioner was alleged to have been involved in robbery and rape of several women. That he was arrested on 13<sup>th</sup> July 2005, investigations commenced and was arraigned in court on 2<sup>nd</sup> August 2005. He has explained that there was a delay of about 9 days because the Petitioner was uncooperative in that when an identification parade was held after his arrest, he feigned madness and refused to be removed from cells. That caused delay. Some of the victims were out of the country and one came back on 23<sup>rd</sup> July 2005 and an identification was held after the Petitioner agreed to take part. That the Petitioner was taken to the Doctor on 24<sup>th</sup> July 2005 for extraction of saliva but he declined to give it till he gave on 28<sup>th</sup> July 2005. That the delay was due to the ongoing investigations and the Petitioner's failure to cooperate. That between 13<sup>th</sup> July 2005 and 2<sup>nd</sup> August 2005 there were 3 weekends when they could not do much making a total of 6 days and that the Applicant was brought to court as was reasonably practicable.

Mr. Mule has also deponed that the Applicant alleged violation of his rights before the lower court and that court agreed with him and asked him to lodge the Petition. But that thereafter the Petitioner has not followed the procedure under Rule 25 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice & Procedure Rules, 2006 and is improperly before this court. That once the court agreed with him the court should have framed questions and referred them to this court in the prescribed form not by filing of a Petition.

I have carefully considered the petition, the affidavits in support, the replying affidavits in reply and submissions of both sides. No doubt CRC 1707/05 is still pending before the lower court following the filing of this Petition. In 2006 the Hon. The Chief Justice promulgated Rules under S. 84 (6) of the Constitution to guide parties in the conduct of applications under Chapter 5 of the Constitution, the Bill of Rights, S.84 (3) provides that if in proceedings in a subordinate court, a question arises as to the contravention of any of the provisions of Sections 70 to 83, the person presiding in that court may and if a party to the proceedings requests, shall refer the question to the High Court unless the presiding officer is of the opinion that the question raised is frivolous or vexatious. Rules 25 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and freedoms of the Individual) High Court Practice and Procedure Rules, 2006 sets out the procedure on how an issue raised under S.84 (3) can be dealt with. It provides that if a party raises an issue of contravention of his rights under S.70-83 of the Constitution he shall apply informally to the court that reference be made to the High Court and if the court finds that the said question is not frivolous or vexatious, it shall frame the question and refer it to the High Court in Form F that is set out in the schedule of the Rules. It is evident that the issue of contravention was raised before the Chief Magistrate who found merit in the complaint and ruled that the Applicant do go ahead and move the court by way of petition. That is not the procedure to be adopted. This petition was filed by an Advocate of the High Court in July 2008, over 2 years since the rules were made. It is expected that he would comply with the Rules. Had the Petitioner made the application in person the court would have considered the matter differently. Rules are there to guide parties when approaching the court and not meant to beautify the books. They must be adhered to. The petition is therefore irregularly before this court and is for striking out.

But the above notwithstanding, even if the Applicant were to come by way of petition, what is before the court is not a petition envisaged under the Rules. Under Rule 12 a petition shall be set out as in Form D of the schedule to the Rules.

In accordance with Form D, the petition has to be brought under S.84(1) of the Constitution which is the enforcement Section. The Sections of Chapter V which are allegedly contravened should be set out Specifically and allegations set out precisely. This is not what the Applicant has done. The jurisdiction of this court has not been invoked under S. 84(1). The Petitioner lists the Sections allegedly contravened and does not set out concisely what the allegations against the Respondent are. Then the supporting affidavit contains arguments and not the facts to support the said allegations. It is only after the

Respondents filed a reply that they set out exactly what the Petitioner's case is and the petitioner then replied in his supplementary affidavit. It is trite and the courts have repeatedly held that in such an application under Sections 65, 67 and 84 of the Constitution, the Party alleging contravention must plead with precision and particularity that of which he complains and must state the provisions of law he comes under. In **ANARITA KARIMI NJERU V R (NO. 1) 1979 KLR 154**, Trevelyan and Hancox JJ held:

**“we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important, (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains the provision said to be infringed and the manner in which they are alleged to be infringed.”**

In **CYPRIAN KUBAI V STANLEY KANYONGA MWENDA HMISC 612/01** and **MATIBA V AG HMISC APPLICATION 666/1990** the courts echoed what was decided in the **ANARITA CASE**.

For a contravention to exist the requirements set out in the above quoted case must be met. In this case the allegations leveled against the Respondents are not pleaded with particularity as required. Even if the Applicant had the right to come by way of petition his petition would not be properly before this court and would be struck out in any event.

Coming to the merits of this application, once an allegation of contravention is raised in the lower court, the Respondents must be given a chance to respond. In this case, the Petitioner was alleging that there was delay in taking him to court and that breached S.72 (3) (b) and consequently his right to a fair hearing was compromised. The protection under S.72 (3) (b) is not absolute. The Section provides that the burden of proving that a person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest on any person alleging that the provisions of the subsection were complied with. It follows that it is the prosecution (Respondent) to prove that the delay in bringing the petitioner to court after the period allowed was justified. I have considered the explanation given by the said officer. It has not been controverted. There are allegations of the Petitioner failing to cooperate, the complainants being away and the fact that there were weekends when nothing could be done. In my view that is a plausible explanation that is justifiable in the circumstances. The fact that the lower court rejected that explanation by the inspector does not mean this court is bound by that decision. Alleged violation of fundamental rights cannot mean an automatic acquittal. That is why if the Respondent has a plausible explanation then the protection under S. 72 3 (b) is not available. In **PAUL MURUNGA V REP CA 35/06** the Court of Appeal found that there was no reasonable and acceptable explanation given by the State for the delay of 10 days in bringing the Applicant to court. Similarly, in **ALBANUS MUTUA V REP CA 120.2004** the delay was not explained by the Respondent. These cases which were relied upon by the Applicant are easily contrasted with the instant case.

Besides, it is my view that the drafters of the Constitution were alive to the fact that such situations would arise when there can be an unexpected or justified delay and thus included S. 72 (6). That Subsection provides that a person who is unlawfully arrested and detained by another shall be entitled to compensation from that other person. If indeed the Applicant was unlawfully detained, he still has an opportunity to get compensation from the Respondents by filing a civil suit. I believe that even in the Civil Suit, the Respondent would still be called upon to prove that the detention beyond the period allowed in the Constitution was justified.

For all the reasons considered in this judgment that the petition is wanting in form and substance and that there is a reasonable explanation given by the Respondents, the Applicant is not entitled to the prayers sought in the petition. It is hereby dismissed with each party bearing their own costs.

Dated and delivered this 9<sup>th</sup> day of June, 2009.

R.P.V. WENDOH

JUDGE

**Present**

Petitioner in person

Lenzi: Court clerk