

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION 12 OF 2009

DANIEL LUTTA ----- APPLICANT

V E R S U S

REPUBLIC ----- RESPONDENT

R U L I N G

The Petition before this court is by the Petitioner who seeks orders to the effect that his Constitutional rights as enshrined in the Kenya Constitution specifically Sections 72 (3) and 77 (1) were violated and that this court upon finding that indeed the Petitioner's rights were violated should terminate High Court Criminal Case No. 66 of 2003 and set the Petitioner free forthwith.

Mr. Athung'a, Counsel for the Petitioner, submitted that the Petitioner was arrested on 30/8/2003 and arraigned in court on 1/10/2003. The Petitioner was in police custody for 32 days. Counsel submitted that since the Petitioner was charged with a capital offence, he ought to have been arraigned before the court within 14 days and that Sections 72 (3) and 77 (1) of the Constitution were contravened.

The Petitioner's counsel further submitted that upon finding that the petitioner's rights were violated, the Petitioner should be set free. Counsel relied on the case of ***WEKESA SIKANGA VS REPUBLIC, KAKAMEGA HIGH COURT MISC. CRIMINAL APPLICATION NO. 8 OF 2008*** and that of ***GERALD MACHARIA GITANKU VS REPUBLIC, COURT OF APPEAL CRIMINAL APPEAL NO. 119 OF 2004***. The Respondent did not file and serve an affidavit in reply to the Petition within 14 days as required by rule 14 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules.

The Petitioner is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The information is dated 1st October, 2003. It can be taken that the Petitioner was detained for 32 days as the respondent has not provided any information or explanation on the application by the Petitioner. I do therefore find that the Petitioner was not arraigned before the court within 14 days as provided by Section 72 (3) of the Constitution. This is a violation of the Petitioner's rights and it is so declared.

The next issue for determination is whether the Petitioner should be set free forthwith and join his family in the building of our great Nation. It is clear that the Petitioner's rights were infringed. However, it is unfortunate that there is no specific provision in the Constitution stating that upon finding that a Petitioner's rights have been infringed, then the Petitioner should be set free. I am alive to the decisions by the Court of Appeal on this issue where Petitioners have been set free. However, the Constitution does not provide that a petitioner whose rights have been violated should be set free.

The important issue herein is what would have happened if the Petitioner was detained in Police custody for 32 days and thereafter released without being charged in court. I believe the Petitioner would still have had his right to pursue the violation of his detention by the police and this would be a claim for damages.

It therefore follows that the right to compensation for violation of one's rights as provided by Section 72 (6) of the Constitution is the ideal, suitable and correct remedy in such a situation. With the prevalence of applications of this nature, there is need for parliament to elaborate on this issue. At times applicants arrested on a Friday and charged in court on a Monday of a non capital offence apply to the High Court for declaration that their rights to be brought before court within 24 hours were infringed. This will call for the courts to operate for 24 hours and throughout the week.

It is therefore my finding that the Petitioner's rights to be arraigned in court within 14 days after arrest as enshrined in Section 72 (3) of the Constitution were infringed. However, that infringement would not lead to the setting free of the Petitioner. The Petitioner will be accorded a fair trial as provided by section 77 of the Constitution which trial should not be held to be unfair due to the detention of the Petitioner for more than 14 days. I do therefore find that the criminal case facing the Petitioner shall proceed for hearing and the Petitioner is at liberty to claim compensation from the Attorney General on behalf of the Police who infringed the Petitioner's rights. It is so ordered.

Delivered, dated and Signed at Kakamega this 28th day of July, 2009.

SAID J. CHITEMBWE

J U D G E