

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION 10 OF 2009

PATRICK OTOZO MASIZA.....APPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

The Petitioner 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. 29 of 2004 and set the Petitioner free forthwith.

The Petitioner submitted that he was arrested on 9/8/2004 and arraigned in court on 27/10/2004. The Petitioner claims to have been in police custody for 78 days. He submitted that since he 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. The petitioner relied on the case of **ANN NJOGU AND 5 OTHERS vs REPUBLIC – CR. APPLICATION NO. 551 OF 2007, NAIROBI and ALBANUS M. MUTUA vs REPUBLIC – CR.APPLICATION NO. 120 OF 2004, C.A. NAIROBI.**

The Petitioner is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The respondent filed an affidavit sworn by Chief Inspector **HENRY KUGO KIMETO**. In the said affidavit, it is explained that the applicant was arrested on 10th August, 2004 by officers from Gambogi Police Station. He was then transferred to Vihiga Police Station on the same day. The accused was charged in court on 27th/10/04 and the affidavit states that the delay was not intentional.

I do not think the above explanation has explained the delay satisfactory. It has not clearly explained why the applicant was not arraigned in court within 14 days and what the cause of the delay was. 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. 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.

The important issue herein is what would have happened if the Petitioner was detained in police custody for 78 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 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 29th day of July, 2009.

SAID J. CHITEMBWE

J U D G E