

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION 23 OF 2009

SHEM HEZRON ASHIONO ----- 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. 902 of 2005 and set the Petitioner free forthwith.

The Petitioner in his written submissions 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. He submitted that he was arrested on 19th January, 2005 and charged in court on 16th March, 2005, a period of 56 days.

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 (Supervising 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. It can be taken that the Petitioner was detained for 56 days as the respondent has not provided any information or explanation in response to 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. 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 56 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 right to compensation for violation of one's rights as provided by Section 72 (6) of the Constitution is the correct remedy in such a situation.

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