



IN THE MATTER OF: SECTION 84(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF: RULES S24 AND 26 OF THE CONSTITUTION OF KENYA(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL)

AND

IN THE MATTER OF: HIGH COURT PRACTICE AND PROCEDURE RULES 2006

AND

IN THE MATTER OF CRIMINAL CASE NO.[.....] AT HOME BAY

BETWEEN

REPUBLIC PROSECUTOR

VERSUS

MAURICE NYANGI SIMEON ACCUSED

RULING

The applicant **Maurice Nyangi Simeon** was arrested on 23/8/07 and charged before the Resident Magistrate, Homa Bay on 28/8/07 with the offence of rape contrary to **section 3(1)(a)** of the **Sexual Offences Act 2006**, and in the alternative with indecent assault contrary to **section 11(1)** of the same Act. The complainant in both charges was **KAO** who, in the alternative charge, was alleged to be aged 14 years. If that was the case, the applicant ought to have been charged with defilement contrary to **section 8(3)** of the **Act** in the main charge.

However, this matter was referred to me by the trial court, at the request of the applicant’s counsel, because of the alleged contravention of the applicant’s right under **section 72(2) (b)** of the **Constitution** which provides that a person arrested for a non-capital offence, and who is not released, has be brought before court within 24 hours of his arrest, or as soon as is reasonably practicable. Where he is not charged within 24 hours, it is up to his arresters to explain to court why it became necessary to hold him for longer than it is allowed.

Mr. Nyambati appeared for the applicant and submitted that, since no explanation had been offered why his client had been detained for five days before charge, it be found that there was violation of his constitutional right. He sought to rely on the decisions in **Ann Njogu and 5 Others v. Republic, Nairobi Misc. Application No.551 of 2007**, **Albanus Mwasia Mutua v. Republic, Criminal Appeal NO.120 of 2004 at Nairobi**, **Isaya Ayie Adenyo v. Republic, HC. Misc. Application No.1 of 2007 at Kisii**, and other decisions.

The state was granted leave to file a Replying Affidavit but none was filed. **Mr. Kemo, Senior Principal State Counsel**, was unable to secure any explanation from the police who had arrested the applicant and detained him. It follows that the detention of the applicant for five days, which was outside the period allowed by **section 72(2)(b)** of the **Constitution**, has received no explanation. Such impunity on the part of the police cannot be countenanced by the court. It does not matter the amount of evidence the police held against to applicant, the fundamental rights and freedoms enshrined in the **Constitution** have to be respected.

The result is that the charges are quashed and the applicant set at liberty unless he is otherwise being legally held.

Dated, signed and delivered at Kisii this 17th day of **July, 2009**.

A. O. MUCHELULE

JUDGE

17/7/2009

Before A. O. Muchelule Judge

Mongare c/c

Mr. Kemo for state.

Mr. Nyambati present

Accused present

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE