



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

Petition 584 of 2008

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 70 (A) AND 77 (1) OF THE CONSTITUTION OF KENYA**

BETWEEN

ALICE MUGECHI MWICIGI..... PETITIONER

AND

THE HON. ATTORNEY GENERAL..... 1ST RESPONDENT

CHIEF MAGISTRATE, NAIROBI LAW COURTS..... 2ND RESPONDENT

JUDGMENT

On 23/9/08, Alice Mugechi Mwicigi filed this petition pursuant to S. 84 (1) of the Constitution in which she alleges violation of her fundamental rights under SS 70 (a), 72 (3) (b) and 77 (1) of the Constitution. As a result she seeks the following declarations and orders;

- 1) A declaration that the petitioner's constitutional rights have been violated;
- 2) A declaration that the charges brought against the petitioner in Criminal Case No. 8/08 be dismissed and the petitioner be acquitted forthwith for the violation of her constitutional rights by the Arresting officer;
- 3) Orders directed to the 1st and 2nd Respondents or any other judicial officer acting under or within the jurisdiction to forthwith stay the proceedings in Criminal Case 8/08 pending the hearing of this petition;
- 4) Any further order that the Court deems fit to grant.

The petition is premised on the petitioner's supporting affidavit dated 23/9/08, skeleton arguments and list of authorities filed in Court on 2/11/08. The petition was opposed and Police Constable David Cheboi, swore the affidavit dated 4/11/08 and skeleton arguments were filed in Court on 27/4/09.

The petitioner's case is that she was arrested on 27/12/07 at 12.30 p.m. and taken to Langata Police Station where she was remanded until 8/1/08. On 8/1/08, she was arraigned before the Chief Magistrate's Court where she was charged with an election offence contrary to section 4, (g) of the Election Offence's Act Cap.66, Laws of Kenya. It was alleged that on that date, while working as a polling clerk at Uhuru Gardens primary School Polling Station, without reasonable cause plucked and hid ECK Parliamentary Ballot papers serial Numbers listed in the charge sheet in breach of her official duties. She was incarcerated in police cells for 12 days which was in violation of her constitutional rights under S. 72 (3), (b). That she did not have a lawyer at the time she was charged and that is why the said issue was not raised. That S. 72 (3) of the Constitution requires that a suspect who is not arrested for a capital offence be brought before a Court of Law within 24 hours. It was also submitted that the Respondent is in breach of S. 82 (3) of the Constitution in that the petitioner was discriminated against because of her political opinions.

The petitioner relied on the following decisions;

1. **ANN NJOGU & OTHERS V. REP. MISC. APP. 551/07** where the Court held that where fundamental rights have been violated, subsequent any prosecution is null and void despite the weight of the evidence.
2. **PAUL MWANGI MURUNGA V. REP. CRIMINAL APPEAL 35/06** where the ANN NJOGU case was upheld.

That in the case of **DOMINIC MUTIE V REP. CRIMINAL APPEAL 217/05** relied on by the Respondent, the court held that where the delay was well explained, or justified, then the Court can not interfere with the proceedings. The petitioner was represented by Mr. Kiriba who held brief for Mr. Kamau Kinga. Mr. Obiri opposed the petition on behalf of the Respondent. In the replying affidavit of P.C. Cheboi, he asked the Court to take judicial justice of the fact that after the General Elections of 27/12/07, there was elections violence that broke out in the country and there were not enough police officers at the station to deal with the matters at the police station as the police went out to contain the situation. That in any event, the delay in taking the petitioner to Court was only 6 days as 28th December, 2007 was declared a holiday, 29th and 30th December, 2007 fell on a weekend and that date of arrest was not counted and this brought the delay to 6 days.

The 2nd ground of opposition was that the petition offends Rules 24, 25 and 26 of the Rules made under L.N 6/06 which requires that if a Constitutional issue arises in proceedings before a Subordinate Court, the complainant should raise the issue informally, then if the presiding magistrate forms the opinion that the issue has substance, he will frame the question for determination and refer it to the High Court for determination. The Applicant failed to follow that procedure and seek direction to the High Court and that the application is therefore incompetent. Mr. Obiri distinguished the cases relied upon as follows. That in **ANN NJOGU CRIMINAL CASE AND GERALD MACHARIA V REP 119/04**, no explanation was offered as to the delay, **PAUL MURUNGA** delay was for 24 days. In **ALBANUS MUTUA V REP. CRIMINAL APPEAL 20/04** the delay was for 8 months. That in the **DOMINIC MUTIE** case the Court of Appeal observed that the mere fact that one is taken to Court late does not mean that their rights have been violated.

I totally agree with the Court of Appeal's observation that the mere fact an accused person is brought to court after 24 hours is not per se a violation of their rights. This is because S. 72 (3) (b) does not give an absolute right. The prosecution is allowed to offer an explanation for the delay and if the explanation is found to be plausible, the Court can not interfere with the said criminal proceedings. S. 72 (3) provides as follows:

“(3) A person who is arrested or detained

- (a) for the purpose of bringing him before a court in execution of the order of a court; or**
- (b) upon reasonable suspicion of his having committed, or being about to commit, a**

criminal offence,

And who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

In the instant case, it is not denied that there was a delay in taking the petitioner to the Court. From the explanation of the Respondent, it is apparent that the delay was not 12 days but the delay was about 6 days. PC Cheboi has given an explanation that due to the happenings in the country at the time, the police were not able to produce the Petitioner before the court within the prescribed time. This court does take judicial notice of what happened in this country at that time, that is, post Election violence that must have forced redeployment of police officers to the troubled areas. I find that explanation to be plausible in the circumstances and the Respondent has complied with the limitation in S72(3)(b). I find that there was no violation of the petitioner’s right under S72(3)(b). In the above cited cases, the Court of Appeal repeated that once there is a plausible explanation as to the delay, the court would not find that there was any violation of any rights.

The Applicant also alleges breach of his rights under S77.(1) of the Constitution. That section offers protection to a fair hearing in criminal cases. That section reads as follows:-

“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law”

There is no pleading or allegation made in the petition and affidavit or even submissions in relation to this section. It is not enough to allege. He who alleges must prove. That allegation is not supported by evidence. The Rules promulgated under S84 and specifically the schedule, Rule 11 or 26 shows exactly how the petition should be drawn with the section allegedly breached and the nature of breach. Those Rules are supported by several decisions e.g ***CYPRIAN KUBAI v STANLEY KANYONGA MWENDA H MISC 612/08. ANARITA KARIMI NJERU V THE REP. 1979 KLR 154.***

Where the courts have held that the allegation of constitutional breaches must be specifically pleaded as regards the section, subsection or even paragraph allegedly breached and the nature of the breach to enable the Respondent ably respond. It has not been shown how the court was partial or delayed the case or generally unfair to the Petitioner. There is no pleading regarding section 77 (1) and the claim must fail.

In regard to S.82(3) of the Constitution, the Applicant makes the allegation that she was discriminated against based on political opinions. That is all that is pleaded. There is no evidence in the supporting affidavit of the petitioner in support of the said allegation. I reiterate the above decisions in which courts held that the pleadings must be specific and supported by evidence. The petition has not named the persons who were given preferential treatment to her. S.82(3) provides the categories of discrimination that an aggrieved person should come under. The section reads as follows:-

82 (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect.

82(3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

The Applicant has not endeavoured to demonstrate how she was discriminated against due to her political opinion. Who were the persons that were favoured as opposed to her? Again that claim must fail.

The Rules promulgated under Legal Notice 6/06 provide the manner in which an aggrieved party who alleges violation of their fundamental rights may approach the court. Rule 11 allows a party who alleges contravention or threatened violation to move the court for redress. Under Rule 24 if an issue arises in proceedings before the Subordinate Court, that court shall refer that issue to the High Court for determination. Under R 25, if a party raises a constitutional issue in proceedings before the Subordinate Court, if the court is of the view that the issue is not frivolous, it will frame the issue and refer the issue to the High Court for determination under Form F of the schedule to the Rules.

Rules 25 and 26 provide as follows:-

25. Where a party to proceedings in a subordinate court alleges contravention of his fundamental rights or freedoms under sections 70 to 83 (inclusive) of the Constitution in relation to himself, he shall apply informally to the presiding officer during the pendency of the proceedings that a reference be made to the High Court to determine the question of the alleged violation.

26. If the presiding officer is satisfied that there is merit in the allegation made under rule 24, and that it has not been made frivolously or vexatiously, he shall grant the application whereupon the court shall frame the question to be determined by the High Court in Form F set out in the Schedule to these Rules.

The above rules are couched in mandatory terms. They were put in place to guide the parties on how to approach the court, to save on costs and the court's time. If the lower court had a chance to consider the issue first, it would have sifted through them and determined whether the issues are vexatious or not. That procedure has to be followed. In ***JAMES KARUME NJENGA V SPEAKER NATIONAL ASSEMBLY, C.A. 192/1992 (2008) KLR 425*** The Court of Appeal said that where a statute or the Constitution provides a particular procedure for redress headed by a party, that procedure must be adhered to. The Rules Committee had good reason why these Rules 11, 24, 25 and 26 were promulgated. They are not for decoration of the books but must be put to use as intended.

In sum, I find that this petition to be both incompetent and without merit and it is hereby dismissed with costs to the Respondents

Dated and delivered at Nairobi this 25th day of September 2009.

R.P.V. WENDOH

JUDGE

Delivered in the presence of:-

Mr. Matheka holding brief for Mr. Kinga for the Applicant

Mr. Obiri for Respondent

Muturi – court clerk