



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Miscellaneous Criminal Case 51 of 2009

LAWRENCE KEBO KOKOI:.....APPLICANT

VERSUS

REPUBLIC:.....RESPONDENT

R U L I N G

The applicant **LAWRENCE KEBO KOKOI** is the accused person before the Chief Magistrate's Court at Eldoret with the offence of defiling a three (3) year old child. He applied to stop the proceedings of that case while he pursued this application which is an originating Summons brought under sections 72(1) 72(3)(b) and section 77(1) of the Constitution of Kenya and section 123 of the Criminal Procedure Code in which he states that he was kept in plateau Police Post for more than 24 hours before being arraigned in court as he was arrested on 14th February 2009 and was brought to court on 19/02/2009 and such arrest and detention at the said Police Post were gross violations of his constitutional rights to freedom and liberty and that the institution of Eldoret Criminal case No. 1100/2009 is a further violation of his constitutional rights and freedom. He deponed in a supporting affidavit that in addition to being arrested and detained as above the police at the said Plateau Police Post took away his following items:-

- (i) Cash 21,750/=
- (ii) Voters card
- (iii) ID Card
- (iv) Job Card
- (v) Safari Boots and
- (vi) Long sleeved black jacket

And that he knows that it is against the law for the police to retain his documents and money listed above and so he believes that the prosecution have to explain why his documents and money were not given to him. He adds that he believes that according to the constitution he must be given his documents and money before the alleged Criminal case is heard in court as according to him that is the requirement of the law and his further belief is that he has a reason to launch the application before this honourable court and finally that what he deponed to was true to the best of his knowledge and information. The Applicant reiterated pretty much the above in his oral submissions before court at the hearing of his application adding that policemen at Plateau Police Post beat him up and broke his right arm and that despite an order

from the lower court that his effects be returned to him the police had failed to do so. He concluded that the averments in the affidavit sworn by Sergeant Benard Wanjala in opposition to the application were all untrue and he wanted to see that policeman.

In opposing the application Mr. Omutelema learned counsel for the Republic relied on the sworn affidavit of No.58551 Sergeant Benard Wanjala the Plateau Police Post Officer in charge at the time material to this case. He deposed that as such officer he was conversant with the matters in issue herein hence competent to swear on them. He swore that the applicant was rearrested at about 12:40 a.m on 15th February a Sunday by Plateau Police when he was brought by members of the public who had arrested him on allegations of having defiled a three year old child. He said that when the Applicant was brought to the police post he had an injury on his face and on his leg which were minor and which were reflected in the Occurrence Book as entry number 2 of 15.02.2009 and that those injuries were inflicted by the members of the Public who had arrested the Applicant. He stated further that the mother of the child /complainant was asked to take the child to hospital the morning of 15.02.2009 which she did. At the Moi Teaching and Referral Hospital staff advised her that the P3 form would be filled on the Wednesday as that was when such forms are filled at that hospital and so the mother went away and took the child back on the said Wednesday which was 18th February 2009 and the P3 form was filled and returned to the Police Post on the same date and the Applicant was escorted to Eldoret Police Station as the cells at Plateau Police Post are temporary, and cannot hold prisoners for long times.

He added that the Applicant was then taken to court on 19.2.2009 and charged under Eldoret Chief Magistrate's Criminal Case No. 1100/2009 with the offence of defiling a three (3) year old child. He swore that when the Applicant was brought to the Police Post by the members of the Public he had neither money, identity card, voters' card, job card, shoes, jacket nor was he assaulted by any police officer. Sergeant Benard Wanjala then concluded that the delay was caused by waiting for the P3 form and the same was not inordinate. Mr. Omutelema the Senior Principal State Counsel for the state in opposing the application relied on the affidavit sworn by Sergeant Benard Wanjala adding that the explanation given for the delay is reasonable and the delay in obtaining the P3 form which is an important document in the sort of charge the Applicant faced was not inordinate. He therefore prayed that the application be dismissed and the case before the Chief Magistrate's court be ordered to proceed.

It is not disputed that the Applicant was arrested by members of the Public and handed over to the police at Plateau Police Post. The Applicant says that he was arrested on 14th February, 2009 a Saturday but he does not give the time of his arrest. May be he was indeed arrested on Saturday 14th February, 2009. However, the police say that the Applicant was handed over to them by members of Public at 12:40 a.m on 15th February 2009 which day was a Sunday. The time of arrest and the injuries noted on the applicant were noted in the Police Abstract as number 2 of the 15.02.2009. That, the applicant did not deny in his submissions in court. He similarly did not deny the explanation given as to the treatment of the complainant and the obtaining of the P3 form. It was not contested that as soon as the P3 form was obtained the Applicant was promptly presented to court and charged accordingly.

To my mind the explanation given for the delay to present the Applicant before court is plausible and I accept the same. Such delay was between Monday 16th February, 2009 and 18th February 2009 which is a delay of two days or twenty four hours. The accused having been arrested on 15th February 2009 at 12:40 a.m, he should have been arraigned in court within 24 hours which was 12:40am, on Monday but courts do not sit at that hour and secondly and more importantly the P3 form which would determine what offence the Applicant would be charged with was not ready until Wednesday. That delay is the type explained in the case of **KAZUNGU KASIWA MKUNZO AND ANOTHER V REPUBLIC Mombasa Criminal Appeal No. 239/2004** where the court noted that delay could be caused by any number of reasons such as the diary of the court or absence of judicial officer. In the present case the delay was due to the process of obtaining a material document. True the Applicant could have been released on a Police Bond but here was an applicant who had been brought by members of the Public who had indeed assaulted him due to the alleged offence he had allegedly committed. Perhaps being held in police custody was for his own safety. In the circumstances of the case I accept the reasons given for the delay and I find that such delay was in any event not inordinate. The prosecution have discharged their

onus as required by the Constitution of Kenya in section 72(3) (b) which is to explain the delay.

There is then the aspect of the injuries on the body of the Applicant and his alleged missing items. I accept the explanation that the Applicant was assaulted by the members of Public who arrested him and inflicted injuries on him. Mob justice is a phenomenon not uncommon in instances where Public find a person in the very act of committing an offence, it being unlawful is a different matter altogether to our public. In this case it is said that the Applicant had defiled a child of 3 years. No reason was given for the police not to have entered into the Occurrence Book any items of the Applicant that, he came with to the Police Post. That is a requirement by the police and I accept their explanation that the Applicant had no such items when he was brought by the Public and that is why the police had nothing to return to him as ordered by the lower court, if indeed the lower court so ordered.

In the circumstances of this case I do not find anything to fault the police on and I do find that this application is lacking in merit and do hereby dismiss the same. Accordingly I hereby order that the hearing of criminal case number 1100/2009 before the Chief magistrate's court Eldoret do proceed to its logical conclusion.

There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER, 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Mr. Chirchir holding brief for Mr. Omutelema for the state

Applicant - present in person

Court Clerk - Paul