



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Miscellaneous Application 20 of 2009

**PETER NZESYA MAITHYA.....
APPLICANT**

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant herein, Peter Nzesya Maithya is also the accused person in Kilungu SRM’S Court Criminal Case Number 284 of 2008. In that case, he had been charged with the offence of assault and the case is pending trial. It is his case that he was arrested on 7.3.2008 and only arraigned in court on 11.3.2008 and that his detention was unconstitutional and a breach of his fundamental rights. In his Originating Notice of Motion dated 3.3.2009, he seeks the following orders;

“(i) declaration that the Applicant’s constitutional rights have been, are being and continue to be violated by his continued prosecution in Machakos Chief Magistrate’s Cr. Case N. 284 of 2008 since the Applicant was arrested on 7.3.2008 and was put in custody until the 11.3.2008 when the Applicant was taken to Court.

(ii) a declaration that prosecution of the Applicant in Machakos CRC No. 284 of 2008 is a violation of the Applicant’s fundamental rights and is illegal, null and void.”

2. The Republic although served with the Motion failed to respond to it and in support of the Applicant’s case, Mr. Masika has argued that section 72(3) (b) of the Constitution was breached and the Applicant was entitled to his orders following the reasoning in Albanus Mutua vs Republic Cr. Appeal No. 120 of 2004 and the subsequent decision of Anne Njogu vs Republic Cr. Application No. 551 of 2007.

3. I have seen the charge sheet in Kilungu SRM’S Court Criminal Case No. 284 of 2008. The Applicant was arrested on 7.3.2008 and taken to court on 10.3.2008. Although the Republic has not said so, I note that 7.3.2008 was a Friday and 10.3.2008 was a Monday. It is obvious that the Applicant could not have been taken to court on any other day than 10.3.2008 and therefore there cannot have been any other reasonably practicable day of taking him to court.

4. Section 72(3) of the Constitution provides as follows;

“A person who is arrested or detained –

- a) for the purposes 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 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 reasonable practicable shall rest upon any person alleging that the provision of this subsection have been complied with.”

5. In Mutua (supra) the court of Appeal held as follows:-

“At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerged from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge. In this appeal, the police violated the constitutional right of the Appellant by detaining him in their custody for a whole eight months and that, apart from violating his right under section 72(3) (b) of the Constitution also amounted to a violation of his rights under section 77(1) of the Constitution which guarantees to him a fair hearing within a reasonable time. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant’s appeal must succeed on that ground alone.”

6. I wholly agree with that proposition but sadly in this case, the right to an acquittal cannot be granted and I have said why. The Mutua case in any event must be understood in its special circumstance which cannot apply to the case before me.

7. In the event, I find no reason to grant the orders sought. Let the Applicant finalize his trial one way or the other. The stay orders granted on 18.3.2009 are discharged.

8. The Motion dated 3.3.2009 is consequently dismissed

9. Orders accordingly.

Dated and delivered at Machakos this 29th day of October 2009.

Isaac Lenaola

Judge

In the presence; Miss Otieno for Applicant

Mr. Wangondu for Republic

Isaac Lenaola

Judge