



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Revision 9 of 2009

1. FIDELIS MWENDWA NGEI

**2. SUSAN NDUNGE NGEI
ACCUSED**

VERSUS

REPUBLIC

REVISION

1. The advocate for the accused persons in Machakos CM'S Court Criminal Case no. 3179/2008 protests that the trial magistrate refused to allow the accused persons an opportunity to raise constitutional issues in the High Court under Section 72 (3) of the Constitution. That this court invoking its powers under Sections 362 and 364 of the Criminal Procedure Code should call for the record and examine it as to the proprietor of that order.

2. I have now called for the record and I note as follows:-

The accused persons were charged with the offence of assault causing actual bodily harm Contrary to Section 251 of the Penal Code. They appeared before the then Chief Magistrate, Hon, Florence Muchemi on 15/12/2008 and pleaded not guilty to the charge laid against them.

3. On 26/6/2009, the advocate for the accused persons applied that the matter should be referred to the High Court to determine the Constitutional issue of detention beyond the lawfully prescribed period. The prosecutor opposed the application and in a Ruling delivered the same day, the learned trial magistrate declined to allow the defence the opportunity to ventilate the issue in this court.

4. To my mind, the issue is not one for debate. The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 provide at Rule 11 as follows:-

“11. Where contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.

5. Crucially Rules 24, 25 and 26 then provides as follows:-

“24. Where in proceedings in a subordinate court a question arises as to the contravention of any of the

provisions of sections 70 to 83 (inclusive) of the Constitution, and the presiding officer is of the opinion that the question raised is not frivolous or vexatious, he may refer the question to the High Court in Form E set out in the Schedule to these Rules.

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.”

6. In this case, the learned trial magistrate failed to follow the above procedure and instead merely declined to allow adjournment of the proceedings without determining whether in fact there was an issue to refer to the High Court for determination.

7. In the event, I will set aside the Ruling of 26/6/2009 and instruct the learned magistrate to comply with Rules 25, and 26 which I have reproduced above.

8. Orders accordingly.

Dated and delivered at Machakos this 9th day of October 2009.

ISAAC LENAOLA

JUDGE