



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 106 of 2008

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

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 72 (3) OF THE CONSTITUTION**

**IN THE MATTER OF CRIMINAL CASE NO.1442 OF 2007 AT CHIEF MAGISTRATE'S
COURT NAIROBI**

BETWEEN

DAVID LUKA NJAGI..... APPLICANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

On 20/8/07, David Luka Njagi was arrested by the police for the offence of stealing by servant contrary section 281 of the Penal Code. He was not arraigned in court until 29/8/07, 10 days after arrest. He alleges breach of his right to liberty under section 72 (3) of the Constitution. The Applicant raised that issue before the trial magistrate who heard the complaint and the explanation of the police and the magistrate framed the issues in accordance with Rule 25 of the Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, and referred the matter to this court for determination. The issue for determination is whether the incarceration of the petitioner from 20th August 2007 to 29th August 2007 before he was arraigned before the court for plea, was a breach of his fundamental rights guaranteed by S 72 (3) of the Constitution and if there was a breach, is he entitled to an acquittal.

PC Hassan Aila Ado, the investigating officer in the criminal case **1424/07 REP V DAVID LUKA NJAGI**, swore a replying affidavit dated 9/4/09 in which he deposes that a complaint was made to Central Police Station by one Anderson Njue Ngure the Managing Director of Snow Peak Refrigeration and General Contractors, that there had been a theft by servant committed on 20/8/07. That the Applicant

was arrested on 21/8/07 and arraigned in court on Tuesday 28/8/07 but plea was not taken till 29/8/07 as the court had already taken pleas at the time the Applicant arrived in court. He interrogated the petitioner upon arrest and he started investigations in the various Banks linked to the offence (named para. 7) from where he collected documents (para. 8). That due to the several institutions he had to visit before a decision could be made whether or not to charge the petitioner there was a delay. That the Applicant was given police bond but he failed to raise it. That the delay in arraigning the petitioner in court was due to the investigations that had to be done.

Contrary to what the investigating officer said, the petitioner deponed that he was held from 20/8/07 till 29/8/07, a period of 10 days, when he was arraigned before the court. That he raised the complaint of the delay before the trial magistrate who found merit in his application and referred the matter to this court. That there is no excuse for holding him for so long. That the police should have arraigned him before the court and sought leave to continue with investigations. That the reason for failure to arraign him in court in time was due to the fact that he had been tortured and could not be presented to court. That the documents that the investigating officer claims to have been seeking were obtained after he was arraigned in court and besides they could await the plea. That he was never offered to be released on bond despite requests and that the explanation given by the Respondent is false.

S 72 which guarantees freedom to liberty reads as follows:-

“72 (1) no person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:-

(a) In execution of the sentence or order of a court whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted.

(b) (j)

(2)

(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 reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

(4)

(5)”

According to the Provisions the above section, petitioner should have been arraigned before the court within 24 hours of arrest because he is charged with a bailable offence. Alternatively he should have been released on bond. We have the word of PC Hassan against that of the Applicant that he was given bond but failed to raise it. He was taken to court outside the time allowed. According to the Applicant it was a delay 10 days but the Respondent contends that it was about 6 days because two of the days fell on

a weekend. That is the word of the Applicant against the Respondent. Whatever the case, the petitioner was arraigned before the court outside the 24 hours allowed under S 72 (3) (b) of the Constitution.

Section 72 3 (b) is not absolute but allows the one alleging that there was no delay to explain or justify the delay. When the petitioner raised the complaint before the lower court, an explanation was offered that the delay was due to the nature of the investigations that were being undertaken. A similar explanation has been offered by PC Hassan. The Applicant seems to raise another complaint that he had been tortured and that is why the police did not dare produce him before the court. But that is an afterthought because it was not one of the issues raised before the lower court. Such an allegation would amount to breach of another fundamental right all together under S 74 of the Constitution which is protection against torture or inhuman treatment.. It is the petitioners contention that the failure to arraign him in court within 24 hours renders the charge he faces null and void and he is entitled to an acquittal. I have considered the cases that have been relied upon. The decision in ***DNN NJOGU V REP CR AP 551/07*** that the Applicant would be entitled to an automatic acquittal once there is a delay is not correct in my view because the Respondent have to be accorded a chance to explain. In ***GERALD GITHUKU V REP CA 119/04*** the court of Appeal found that there was an unexplained delay in arraigning the petitioner before the court and that is why one was entitled to release. In this case, the Respondent has endeavored to give an explanation for the delay, that it is due to the investigations that there was a delay. It seems that the bank statement was obtained in September after the arraignment in court but the investigating officer was required to see and study the documents before making the decision to charge. That is a reasonable and a plausible explanation in the circumstances and the delay seems to have been for about 6 days as per the Respondent and 8 days as per the Applicant's computation. This is because 2 days 25th and 26th fell on a weekend.

In addition to the above, even if the Petitioner's right to liberty was infringed, he is not left without a remedy. S 72 (6) reads as follows;

“a person who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that other person.”

Even if this court were to find that the Applicant's right was breached, that would not affect the criminal charge pending before the court. The lower court must continue to hear and determine that case on its merits because that is a totally separate case where there is a complainant, complaining that his property was stolen. It would have nothing to do with the petitioners Constitutional right which is a totally different cause of action. If the court were to declare the criminal charge null, then this court would be infringing on the rights of the complainant in the criminal case. Rights are not absolute and this court has to balance the rights of all persons to the dispute. So that if the Petitioner's rights are infringed due to police omission, he can pursue these rights under S 72 (6) of the Constitution and the criminal charge must continue. If the court were to acquit the Applicant because of omissions of the police it would be doing injustice to the people whose rights were allegedly infringed by the acts of the Applicant.

In conclusion I find that the delay in arraigning the Applicant before the court was not inordinate and there is a plausible explanation that has been given by the police and is reasonable in the circumstances. In addition, the court cannot declare the criminal proceedings as illegal or null just because the Applicant has recourse to compensation. I find no merit in the Reference and the same is dismissed. The Petitioner should go back to have the criminal case in the lower court determined on its merits. Each party to bear their own costs.

Dated and delivered at Nairobi this 11th day of November 2009.

R.P.V. WENDOH

JUDGE

Presence

Mr. Njue for Applicant/Petitioner

Ms Nyongesa holding brief for Mr Mule for Respondent

Muturi Court clerk