



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

Petition 1 of 2009

DOUGLAS KIPCHUMBA RUTTO.....PETITIONER

VERSUS

THE KENYA ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

THE CHIEF MAGISTRATES COURT – EMBU.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Douglas Kipchumba Ruto is charged in Embu Chief Magistrate's Anti-Corruption case No.22/05 with the offences of soliciting a bribe and receiving a bribe. By this application, Ruto has challenged the institution and prosecution of the said charges for being based on audio tape recorder which he alleges is in breach of high rights to privacy, liberty and fair hearing as construed in the constitution. He seeks orders that the criminal case be stayed and quashed or declared null and void. The Respondents have vehemently opposed the petition. The issues that lend themselves for determination are:

1. *Whether this application is properly before this court.*

2. *Whether the Applicant is guilty of inordinate delay.*

3. *Whether the Applicant's rights to liberty has been breached.*

4. *Whether the prosecution's reliance on audio recorder evidence is a breach of the Applicant's right to privacy and fair hearing.*

5. Whether this application is an abuse of the court process.

Ruto approached this court by way of a petition dated 2.1.2009 in which he alleges contravention of his rights under Sections 70, 72, 76 and 77. He therefore seeks the following declarations and orders:-

1. ***A declaration that the institution, prosecution and sustenance in the Chief Magistrate's Court at Embu of Anti-Corruption Case No.22 of 2005 violated and continues to violate the constitutional and fundamental rights of the Petitioner/Accused and the continued hearing of the case in Embu CMCC No.22 of 2005 will simply worsen and prolong the continuing violation of the constitutional rights of the accused.***

2. ***A declaration that the institution, prosecution and sustenance of the anti-corruption proceedings in Embu CMCC ACC No.22 of 2005 is a produce of a nullity warranting the immediate release of the accused person.***

3. ***A declaration that the alleged installation and use of listening device (audio tape recorder) by KACC and its agents to conduct surveillance and to overhear, record or listen to the alleged conversation without any legislative or judicial authority violated the rights of the accused to privacy, fair trial, presumption of innocence as guaranteed under the Section 70(c) and Section 77(1), (2) (a) of the Constitution of Kenya, Article 14, 17 of the ICCPR, Article 50 of the United Nations Conventions Against Corruption, Article 12 of the Universal Declaration of Human Rights and is also unconstitutional, illegal, unlawful, arbitrary and ultra-vires warranting that the entire proceedings in the Embu CMCC ACC No.22 of 2005 be brought to an end forthwith.***

4. ***A declaration that the non-disclosure and/or supply of the alleged tape prior to the trial and even during the trial and disclosing it at the close of prosecution case amounted to a violation of the right of the accused persons enshrined under Section 77(2) (c) namely affording the accused time and facilities for the preparation of his defence.***

5. ***A declaration that the institution and continued prosecution of the Embu***

Chief Magistrate ACC No.22 of 2005 Republic vs. Douglas Kipchumba Ruto violated the provisions of Section 48 of the Evidence Act and Section 8(6) of the Anti-Corruption and Economic Crimes Act 2003 and thus the right of the accused to fair trial and equal protection of the law as enshrined under Section 77 of the Constitution of Kenya.

6. *That in the alternative and without prejudice to the prayer 5 above, a declaration to issue that the use of PW 10 – Christine Bahati Mwamunde and PW 1 – Sgt. Juma Musi as witness and “purported scientific, dio-spectrographic experts” and being employees of the KACC the complaint contravened the provisions of Section 48 of the Evidence Act, Cap 80 and Section 8(d) of the Anti-Corruption and Economic Crimes Act 2003 and thus violating the due process of law, equal protection of the law and the right of the accused person to a fair trial.*

7. *A declaration that the institution, protection and sustenance of the proceedings in the Embu Chief Magistrate’s Acc No.22 of 2005 Republic vs. Douglas Kipchumba Ruto violated Section 35 of the Anti-Corruption and Economic Crimes Act 2003 and is thus unconstitutional, illegal, prejudicial, ultra-vires warranting that the accused person be forthwith released for want of adherence to the laid down legal procedure.*

8. *A declaration that the evidence obtained through entrapment by KACC and its witnesses is unconstitutional and is in violation of the fundamental rights and the freedoms of the accused and/or is otherwise an improperly and illegality obtained evidence, inadmissible in law and having violated the right to the accused, the remedy lies in forthwith termination and/or declaration of the proceedings in the Embu CMCC Acc No.22 of 2005 being a nullity.*

9. *A declaration that a prosecution of the accused founded on entrapment is an abuse of the process and involves state created crime and brings the administration of justice into disrepute and violates the right of the accused under Section 77 of the Constitution of Kenya.*

10. *A declaration that the institution, prosecution and sustenance of criminal case*

i.e. Embu CMCC Anti-Corruption Case No.22 of 2005 is an abuse of the process of the court as it entails using the court to settle score "to fix" the accused and/or using the court for ulterior motive and/or extraneous purposes.

11. A declaration that on the whole institution "prosecution and sustenance of the proceedings in Embu Chief Magistrate's Court Anti-Corruption Case No.22 of 2005 is a nullity and being so an order do issue for the immediate release of the accused person unless he is otherwise lawfully held.

12. Pending the hearing and determination of this petition there be a stay of proceedings in the Embu Chief Magistrate's Court Anti-Corruption Case No.22 of 2005.

13. Any such other orders as this Honourable Court shall deem just.

Ruto was represented by Mr. Arusei. The petition is supported by Ruto's affidavits dated 2nd January 2009 and 13th March, 2009, arguments dated 6th April, 2009 and Lists of Authorities dated 13th March, 2009, 6th April, 2009 and 28th April, 2009.

The petition was opposed and Francis Kidogo, Chief Inspector of Police who is the investigator in the criminal case Swore an affidavit dated 15.1.2009. Mr. Murei who is counsel for the Respondent also filed a notice of preliminary objection 19.2.2009, List of Authorities dated 12.3.2009.

Briefly, the facts underlying this case are that Ruto worked as a District Officer Mbitini Division of Makueni. His mandate involved maintaining law and order and he was involved maintaining law and order and he was involved in adjudication of a long standing land dispute and that a member of his Divisional Relief Committee, Gabriel Muteti went to make false accusations against him on 15.2.2005; and that on 17.2.05 when distributing food relief in Matiliku he went for lunch with the said Gabriel Muteti. One of the complainants purported to pay for his lunch and it is then the KACC officials stormed in and demanded the Kshs.4,000.00 he had allegedly been given. He was arrested on 17.2.2005 and presented in court on 18.2.2005. Later, the charges in the Nairobi Court in Chief magistrate Cr.10/05 were withdrawn, he was transferred to Embu Police Station and presented to court at 12.30 p.m. on 9.02.2005. The hearing in the Embu court commenced and on 5.12.2008 Ruto was called upon to defend himself against the charges. He then filed this petition on 2.1.2009.

In opposing the petition the respondent contends that there has been inordinate delay in bringing this petition, that the petitioner was presented before the court within reasonable time despite them having to travel to Nairobi and then Embu and

that the petition is incompetent having failed to follow procedure under the Rules promulgated under Section 84(6) of the Constitution. As regards evidence of entrapment, the respondent contends that it is admissible in this case as there is ample authority to the effect that tape recorded or audio evidence supported by their transcriptions are admissible in evidence.

Analysis

1. Whether the petition is properly before this court.

This petition was brought under section 84 of the Constitution. Under Section 84(6), the Honourable the Chief Justice has promulgated Rules, the Constitution of Kenya. (supervisory jurisdiction and Protection of Fundament Rights and Freedom of the individual) High Court Practice and Procedure Rules, 2006. The said rules guide parties on how to approach the court in Constitutional applications.

Ruto alleges breach of his rights under Section 72(3) (b) which guarantees right to liberty of the individual because he was produced in court after 24 hours of arrest. Section 72, 3(b) reads as follows:-

“(3) A person who is arrested or detained:-

(b) Upon reasonable suspicion of his having committed, or being about to commit a criminal offence, and who is not released shall brought before a court as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from the commencement of his 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 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 sub-section have been complied with.”

The Applicant also alleges that the audio evidence taken from him has violated his right to privacy. Rule 23 of the Rules made under Section 84(6) provides that if any constitutional issues arises in a matter which is before the High Court, that court will hear and determine the matter as a preliminary issue. Rule 24 then requires that if such an issue arises before a subordinate court, that court will frame the issues and refer it to the High Court under Form D for hearing and determination. Rule 25 then provides that if a person alleges contravention of his rights in a matter pending before the subordinate court the court shall consider the said issue and if it finds that it is not frivolous or vexatious, will frame the issues and refer the same to High Court for determination. The Presiding Officer will frame the questions and a Reference shall be made in terms of F to the schedule. Ruto came directly to the High Court when he filed this petition and must have come under Rule 11 and 12 of the Rules LN 6/06. The Rules were promulgated for a purpose and cannot be generally ignored. The issues herein arise in subordinate court and procedure under Rule 25 and 26 should have been followed so that that court could be able to sift

through the issues and determine whether there are substantive issues worth referring to the High Court for consideration. The rules were meant to ensure that no frivolous or vexatious matter are brought to the High Court and are nipped in the bud at an early stage. That way the precious time of the court and unnecessary delay and clogging of the system with frivolous cases is avoided. It will also create consistency and conformity to procedure and deter some applicants from taking shortcuts. The Rules were not meant to beautify the Books, and must be used for the business they were promulgated. The Court of appeal stated in **JAMES KARUME NJENGA VS SPEAKER OF NATIONAL ASSEMBLY CA 192/1992**,

“where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should have been strictly followed.”

Again in the **HARKIKISSOON VS ATTORNEY GENERAL OF TRINIDAD AND TOBAGO (1979) 3 WLR 62**, the Court said that parties must adhere to the laid down procedures but not flock to the constitutional jurisdiction for resolution of any administrative dispute. These cases do emphasize the fact that procedure laid down by statute or the constitution be followed. In my considered view having failed to follow the laid down process in the Rules made under the Constitution, application is premature and incompetent and is for striking out.

2. Whether the applicant is guilty of inordinate delay.

Ruto was charged on 18.1.2005. The hearing commenced thereafter and the court ruled that he had a case to answer on 5.12.2008. It is then that he filed this petition to challenging the admissibility of audio tape evidence and alleged violation of his right to liberty. So far, no explanation has been given for the 4 year delay in filing this petition. The alleged violation of any had been in existence since 2005 when the charges were preferred. In the case of **JOB KIPKEMEI KILACH VS KACC AND TWO OTHERS HC.MISC.1076/07** the Applicant moved the court for constitutional orders to quash the charges he was facing after the matter had been heard and was pending ruling. The court declined to grant the stay on account of there having been inordinate delay. Similarly, this court has declined to grant a stay in **COLLINS YUDA OCHIENG OWAYO VS KACCC MISC.1148/07 WILFRED KARUGA KOINANGE VS REPUBLIC HC. MISC.1140/07** for the same reasons. It is questionable why the Applicant waited that long to seek this court's intervention. It can only be concluded that this petition is made in bad faith to enable the petitioner avoid making his defence and to delay the matter or try and derail the criminal process hoping the court will arrive at a different decision. This petition is an abuse of the court because nothing stopped Ruto from raising the constitutional issues once he appeared before the court. In the case of **ANARITA KARIMI NJERU VS REP. NO.1 (1979) KLR 154**, the court's attention was drawn to a text and commentary on the Indian Constitution where the author said:-

“In the U.S. it has been established that constitutional questions must be raised ‘reasonably’ that is at the earliest possible moment. As a result of this rule, a constitutional right may be forfeited in a criminal as well as civil case by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it.”

Even in Kenya, we do uphold the above principle. Alleged Constitutional contraventions must be raised at the earliest possible time. The applicant lost that precious time when he failed to raise the issues in the lower court where he appeared in 2005. There is an unexplained inordinate delay in filing this application and this court would not grant the orders sought even

on that ground alone.

Ruto also complains that his right to liberty and fair trial have been violated because he was not produced in court within the 24 hours required by Section 72 (3) (b) of the constitution and he therefore can not get a fair trial. The protection under that section is not absolute. The proviso states that the one alleging that the accused or applicant was presented in court within time should explain. Chief Inspector of Police, Kidogo has sworn an affidavit in which he denies that him and his tem presented Ruto to court after 24 hours.

The Applicant contends that on 17.2.2005, he was arrested at 1.30 p.m. and held till 8.2.2005 at 3.30 p.m. when he was presented to court and that is over 24 hours. On the contrary CIP Kidogo depones that Ruto was arrested at a bus state in Emeli about 2.30 p.m. brought to Kamukunji Police Station where they arrived at 7.30 p.m. and recorded in the O.B. abstract 52/17/202/05 (FK 1). That he was then taken to court next day at 9.16 a.m. and plea taken at 10.30 a.m. that is less than 24 hours. As regards the plea taken in court, both depones that on 8.11.2005 at 9.30 a.m. the charges facing him in Nairobi CRC 10/05 were withdrawn. And he was ferried to police station and presented to court at 12.30 p.m. on 9.12.2005 at 12.30 p.m. within a period of over 24 hours. Again CIP Kidogo disputes that the petitioner was arrested at 10.00 a.m. on 8.12.2005, travelled to Embu where he was booked in the OB at 1.40 p.m. and the next day at 9.12.2005 he was booked out of custody at 8.25 a.m. and taken to Embu Law Court at 8.30 a.m. He exhibited the OB as FK2. I have seen the OB extracts which seem to confirm the Respondents to the truth. In any event even if there was a delay in producing the petitioner before the court, there was torture of the petitioner from the place of arrest to Nairobi in the first instance. By the time they reached Nairobi, the courts were not sitting. Again in respect of the transfer to Embu court, it took time to transfer from Nairobi to Embu. By the time of arrival in Embu, it was too late for the police to arraign the petitioner before the court. The petitioner relies on the case of **ANN NJOGU -VS- REP. HMISC 551/07**, for the proposition that once the police delay in presenting an accused before the court within 24 hours, the accused is entitled to an automatic acquittal. This case is of pervasive value and is not binding on this court having been determined by a Judge of co-ordinate jurisdiction. My view is that the protection under Section 72(3) (b) is not absolute as the Respondents have a duty to explain satisfactorily whether the delay was justified. Counsel also relied on the cases of **ALBANUS MUASYA MUTUA -VS- REP.CA 120/00** where the court of appeal held that the unexplained delay in presenting the accused before the court within the prescribed time of 14 days was a violation of his rights and the accused was discharged. In the instance case, if there was any delay, it was for less than a day. It was for actually hours. An explanation has been given, that the Police and petitioner had to travel a distance before getting to the courts. In any event, even if the court were to find that the Applicant's rights were violated, it would not be reason to quash the current proceedings Ruto faces. Firstly the current charges are different from the allegations of breach of fundamental rights. They involve two jurisdictions all together. There is an allegation of commission of an offence with complainants in the criminal case who allege that their rights have been violated and need protection from the state. The case should be heard to determine whether indeed an offence was committed. The rights of Ruto cannot override those rights. That is why the frames of the Constitution included Section 76(6). It provides as follows:-

“S. 72 (6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that person”.

If it is established that the Respondent unlawfully detained Ruto, then the petition could only be entitled to

compensation after he proves it in civil court. It cannot be done in this constitutional application.

The applicant has presented a list of authorities before this court on whether tape recorder or audio listening devices are admissible. In this country, there is no law banning the use of listening devices or entrapments. It is the Applicants contention that by police setting up a trap they lured the petitioner to commit an offence. In **BRANNAN –VS- PEEK (1) KB 68**, Lord Goddard said:-

“It can not be too strongly emphasized that unless, an Act of Parliament provides for such a course of conduct and I do not think any Act of Parliament does so provide, it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person maybe detected . That conduct is more reprehensible”. In another case **R – VS- PETHIG (1977) 1 HZLR 448** Mahon J. said: (Page 453).

“The question is whether the accused without encouragement would have committed the specific offences charged in the indictment.”

The courts have held that evidence of entrapment is unacceptable as such evidence compromises the petitioner's right to a fair hearing. Whether or not the said evidence is admissible in my view, is an issue that should be handled by the criminal court and should not necessarily be determined by this court. The admissibility or otherwise of evidence is really a matter for the trial court. In fact from the submissions, counsel was trying to analyse and question the evidence of the complainant in the criminal court. This court is not sitting on appeal by the decision. An appeal can only be lodged after a decision of the criminal court is made. It is not known whether the audio evidence is the only evidence available as against the petitioner and despite the authorities cited, it is my view that the objection to the admissibility of that evidence should have been raised before the criminal court for that court to consider and make a decision.

The petitioner also challenges the competence of the charge. That it is defective because it does not accord with the evidence. Again that is a matter for the trial court to deal with. The criminal procedure code has provisions which deal with the competency of a charge and an accused person can apply for its being struck out or dismissed if it does not disclose an offence. The applicant does not need to file a constitutional Reference for this court to determine that. The constitutional jurisdiction is restricted to the court's determining whether there are violations of one's right but where there is procedure provided under statute. The parties must adhere to that procedure. I do agree with the case of **HARRIKISSOON –VS- ATTORENY GENERAL, TRINIDAD & TOBAGO** (Supra) where the court observed that by unnecessarily invoking the constitutional jurisdiction even when it was not necessary to do so the said jurisdiction was being trivialized. I think that is the position here. I do find that the proper forum for the petitioner to articulate his case is before the criminal court where the case has already been substantially heard.

Apart from the originating summons being incompetent, and unmerited, there was unexplained inordinate delay in bringing this application and the same is dismissed with costs to Respondent. The petitioner should go back to lower court to proceed with the criminal case to its conclusion.

Orders accordingly.

Dated, Read and delivered at Nairobi this 15th day of December, 2009

R.P.V Wendo

JUDGE

Present

Mr. Arusei for Petitioner

Court clerk - Muturi