



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO. 860 OF 2007

FAN XI1ST APPLICANT

FEI XU.....2ND APPLICANT

LIM CHEE SENG.....3RD APPLICANT

MI ZHAO.....4TH APPLICANT

-VERSUS-

THE ATTORNEY-GENERAL

For Immigration Department.....RESPONDENT

RULING

The four applicants came before this Court by way of an Originating Notice of Motion dated 11th December, 2007 and brought under ss.72, 77 and 78 of the Constitution of Kenya and “all other enabling provisions of the Constitution and the law.”

The applicants seek that this Court do declare null the charges and proceedings lodged and commenced against them in Nairobi Chief Magistrate’s Court Criminal Cases No. 1980 of 2007; 1981 of 2007; 1982 of 2007; and 1983 of 2007. They pray that the said charges and proceedings be quashed, and they be discharged and their cash bails released. As an interim measure, the applicants pray for orders of stay of the proceedings aforementioned.

The general grounds founding the application may be summarized as follows:

- i. the applicants’ constitutional rights as envisaged under ss.72(3) and 77 of the Constitution have been violated;
- ii. the applicants were arrested on 1st December, 2007 and brought before the Court for plea-taking on 4th December, 2007 without any reasonable cause for the delay, when the offences stated in the charges were only misdemeanours;

- iii. the applicants were not afforded a fair hearing within the time prescribed in law and the Constitution;
- iv. the Police and Immigration officials had no reason to detain the applicants beyond the statutory period, irrespective of the intended charges, or the supposed weight of the evidence in hand;
- v. the applicants' continued detention beyond the prescribed limit of time, amounts to a violation of their constitutional rights and led to nullity of the charges and proceedings;
- vi. the charges and proceedings mounted against the applicants are invalid, irrespective of the nature of the charges or of the evidence in hand;
- vii. the applicants are entitled to be released and discharged forthwith;
- viii. the breach of the applicants' constitutional right by the Police and Immigration officials is incurable, and renders the criminal proceedings a nullity.

The evidence to support the application is given on behalf of all the applicants by the 1st applicant, in his affidavit sworn on 11th December, 2007. He depones as follows. The applicants were arrested by Immigration officers on 1st December, 2007 at Studio House, along Argwings Kodhek Road in Nairobi. They were then confined at Kileleshwa Police Station for two days, 1st and 2nd December, 2007 and then transferred to Nyayo House confinement cells for the whole day on 3rd December, 2007. Throughout this period, the applicants were denied Police bond. On 4th December, 2007 they were brought before the Nairobi Chief Magistrate's Court, and each one charged with an offence under the Immigration Act (Cap.172). It is only then that the applicants were granted bail, by the Court. The deponent believes to be true the advice the applicants received from their advocate, that they had not been brought before the Court within the required time, by the terms of ss.72 and 77 of the Constitution; and consequently, their rights to fair trial had been infringed, and this rendered the charges and the criminal proceedings a nullity; and they were now seeking discharge from the trial proceedings, and the release to them of their passports and their work permits. The deponent avers that at all material times, the Police and the Immigration Department had no reasonable cause to arrest and charge them in breach of their constitutional rights.

A Senior Immigration Officer, **Carlos Maluta**, responded to the applicant's evidence by affidavit dated 22nd January, 2008. The content of this affidavit may be summarized as follows.

The deponent depones that "information was received in the office from members of the public indicating that the foreigners were working and operating business at Studio House." On the basis of such information, the deponent "mobilized officers and raided the said premises where the applicants were arrested with documents and other evidences linking them to the various immigration offences." At the time of their arrest, the applicants "did not produce their valid passports or any other documents to ascertain their immigration status in the country." The deponent, therefore, proceeded to have the applicants held at Kileleshwa Police Station "*pending further investigations on their nationalities and their respective immigration status.*"

The deponent states that he would immediately have arraigned the applicants in Court, but for the fact that it was a weekend; he could also not have them released on bond, "*as they did not have their identification documents.*"

On 3rd December, 2007 which was a Monday, the deponent had the applicants transferred from Kileleshwa Police Station to the Immigration Department, at Nyayo House, "*where investigation on their nationalities and immigration status proceeded.*"

The deponent avers that the applicants were not in the country without passports: "*on 3rd December, 2007 at around 3.00 p.m. the passports of the Applicants were brought [into] the [Immigration] office.*" The deponent perused the said passports, and extracted their particulars; he deposes: "*It is from the*

particulars as contained in the respective passports that I was able to ascertain [the] respective nationalities of the applicants and their immigration status.”

It is deponed that it was not possible to release the applicants on bond from the time of their arrest, because they produced no Kenyan surety.

The deponent gives his reason for detaining the applicants for as long as he did, before bringing them before the Court: *“...the delay in [arraigning] the Applicants in Court was reasonable as they were arrested on a weekend, and at the time of their arrest they did not possess their identification papers or passports to ascertain their nationality and their immigration status in the country.”*

Apart from what emerges from the interstices of the depositions, the deponent expressly conveys the picture that the applicants were *lawfully* in the country; he avers (para.17):

“...the issuance of their work permit/entry permit will depend on the strength of their respective applications after... due consideration by the department. The outcome will be communicated to them.”

The 1st applicant swore a further affidavit on 30th January, 2008 in which he depones, in summary, as follows.

The deponent restates that the Immigration Officers and the Police arrested and detained the applicants on a Friday and did not take them to Court until four days later. In the meantime, the applicants' advocate, **Mr. Willis Odede Nyende** had kept visiting Kileleshwa Police Station, on 2nd and 3rd December, 2007 for the purpose of securing their release on bail – but his requests were rejected by the Police. Strenuous efforts made by the applicants' advocate on 3rd December, 2007 to have them released on bail from Nyayo House, were similarly rejected, without any reason assigned, by the Immigration officials. By 3rd December, 2007 as the applicants were held at Nyayo House, *“the statements had been recorded, charges drawn and stamped for presentation to Court.”* The Immigration officials, on 3rd December, 2007 took the applicants to the Jomo Kenyatta International Airport Police Station, where they spent a fourth night in custody. In the meantime the applicants' advocate still strove to have the applicants released on bond terms, but again, his requests were refused, without any reason given.

The deponent believes to be true the advice received from the applicants' advocate, that once the charges were drawn and finalized on 3rd December, 2007 and the Immigration officers were now ready to bring the applicants before the Court on the following day, they ought to have released the applicants on bond, and there was no reason for detaining them until the following day, especially as the applicants were ready to comply with the condition that they do appear in Court.

The deponent avers that at the time the applicants were arrested and detained, they had “all [their] identification documents – passports and entry permits.”

The deponent believes to be true the advice of his advocate, that “in the event the Immigration [officials] had not investigated and completed their case they ought not to have arrested [the applicants]”; in the alternative, these officials should have taken the applicants before the Court timeously, and then sought time for further investigations.

The deponent avers that, in the period of the detention of the applicants, the question of a Kenyan surety as a basis for their release did not arise, as they had with them their advocate, a Kenyan, and a personal assistant, one **John Onyango**, also a Kenyan – and these men had been ready to do anything required of them as surety.

It is on the basis of the evidence above-summarised, that learned counsel **Mr. Nyende**, and learned State Counsel **Mr. Makura**, appeared before me to canvass the issues raised in the application.

Mr. Nyende submitted that the applicants' constitutional rights had been violated, by unjustified continuous detention that preceded the belated production of them before the Court. Counsel urged that the intended charges were misdemeanours, under the Immigration Act (Cap.172, Laws of Kenya) and, by virtue of the main provision in s.72(3) of the Constitution, the applications ought to have been brought before the Court within 24 hours. Counsel urged that the Immigration and Police authorities, in the manner in which they detained the applicants, failed to comply with the terms of s.36 of the Criminal Procedure Code (Cap.75), which thus provides:

“When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence, the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable....”

Counsel urged that at the time of plea-taking no reason had been stated as to why the applicants had remained in detention for four days; and only much later, and in response to the instant application in the High Court, does an Immigration official, **Carlos Maluta** swear in his affidavit that he had some reason for keeping the applicants in detention. This reasoning, **Mr. Nyende** urged, was frivolous; for there was nothing to stop the Immigration officials from bringing the applicants before the Court, and then seeking more time to conduct any remaining investigations; or alternatively, they could have released the applicants on bond.

Learned counsel submitted that certain aspects of the respondent's evidence were not truthful: at one remove [**Maluta's** affidavit, para.5] it is stated that the applicants had been arrested with certain documents; at another remove [*ibid.*, para.6] it is averred that “*they did not produce their valid passports or any other documents*”; then later the puzzling statement is made that, from these applicants continuously held in custody, “*the passports ...were brought [into] [our] office*” (para.10). But assuming, then, that indeed, the Immigration officials were possessed of all the documents they considered to disclose offences, then why did they continue detaining the applicants and not taking them to Court? ? learned counsel posed. Although the deponent Immigration-official avers that the applicants' passports were not valid ? counsel noted ? he did not specify *what* rendered those passports invalid; and so the deposition in this regard, appeared to have no basis. Learned counsel contested the validity of the Immigration official's averment that it was reasonable not to bring the applicants to Court immediately (affidavit, paras.8, 9), because the arrests took place as the weekend was approaching. **Mr. Nyende** spoke from the facts confirmed in all the depositions tendered in this matter: the applicants were not brought before the Court even when the new week started, on Monday, 3rd December, 2007. It also emerges as a fact that on 3rd December, 2007 all the charge sheets had been prepared and the ground for charging the applicants had been laid, yet they were not even at this stage, released on bond – and they were kept in the dark as to possible explanations.

Learned counsel questioned the *bona fides* of the Immigration official's averment, that it had not been possible to release the applicants on bond because they lacked Kenyan sureties. First of all, by the terms of s.36 of the Criminal Procedure Code (Cap.75) there was no requirement that there be any sureties at all; secondly there were two Kenyans present, ready and willing to give surety if need be, and their express and persistent request that bond be granted, was rebuffed by the Immigration officials.

Not only did the Immigration officials blatantly refuse to release the applicants on bond, and decline to bring them before the Court temuously, counsel submitted, but they also would not demonstrate clearly, leaving no doubts in the Court's mind, that there existed *proper reasons* for the delayed arraignment of the applicants in Court. Consequently, counsel urged, the four days of detention of the applicants before they were brought before the Court, rendered the charges now laid, and the proceedings of trial thereafter, a nullity.

In support of his argument, learned counsel cited the persuasive authority, *Mohamed v. Attorney-General & 3 Others* [2003] KLR 338. Relevant passages in that decision by *Etyang, J.* may be set out here:

i. [at pp.341 – 342] –

“[The applicant] ought to have been informed [of] the reasons for her arrest in a language that she understands. If she was arrested upon reasonable suspicion of her having committed or [being] about to commit a criminal offence punishable by a term of imprisonment or fine, then she ought to have been taken to court within 24 hours, or an apprehension report ought to have been filed with the Court and the police officers concerned could even have gone to court to seek authority to keep her in police custody a little longer. This was not done.”

ii. [at p.342]

“The Court cannot give Police officers authority to hold suspects unlawfully at Police stations or elsewhere a minute longer, for this violates the fundamental rights and freedoms of an individual [as] expressly enacted in the Constitution of Kenya.

“The better and legal option is for the respondents to bring [the applicant]] to Court and charge her with a criminal offence and then apply for her to be remanded into their custody to enable them to complete their investigations, or to release her forthwith on a police bond and then compel her to report back to the Police station on a particular date and time as provided under section 22(1) of the Police Act (Cap.84), Laws of Kenya)....”

Learned counsel submitted that the safety measures for an accused person, which are enshrined in s.72(3) of the Constitution, and specifically provided for in statute law (notably s.36 of the Criminal Procedure Code, and s.22 of the Police Act), were not observed by the Immigration and Police authorities in the present instance, with the consequence that the applicants suffered prejudice.

Mr. Nyende cited several authorities on the judicial approach to prolonged confinement of accused persons prior to charge, in relation to s.72(3) of the Constitution. He relied on the Court of Appeal decision in *Albanus Mwasia Mutua v. Republic*, Crim. Appeal No. 120 of 2004, in which the following passage occurs:

“The jurisprudence which emerges 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 rights 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 import of the foregoing passage is that, it leaves room for relevant *matters of fact* to be placed before the Court, before a decision is reached that, indeed, there has been a violation of the accused’s rights as guaranteed by s.72(3) (b) of the Constitution. That such was the intent of the Court of Appeal, in its decision in the *Albanus Mutua* case, is clear from a later decision of the same Court, *Eliud Njeru Nyaga v. Republic*, Crim. Appeal No. 182 of 2006, in which the following passage occurs:

“...it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal....

“[In] Mutua’s case the prosecution had had an opportunity to explain the cause of the delay but failed to offer an explanation. In the appeal before us the ground raising the violation of the constitutional right was raised only on the morning of the hearing when the Court granted leave to [counsel] to file the supplementary memorandum of appeal out of time. We are,

accordingly, unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity and, therefore, that there was no reasonable explanation for the delay. Even section 72(3) of the Constitution, which deals with the period of bringing an accused person to Court recognizes that there can be a valid explanation for failure to bring an accused person to Court as soon as reasonably practicable. By filing their complaint about the delay only on the morning of the hearing the appellant clearly deprived the prosecution of an opportunity to offer an explanation, if any...

It was learned counsel's contention that the Immigration authority had had plenty of time to explain the prolonged detention of the applicants, all through from the times of detention when he had sought the applicant's bonding and release, to the time of plea-taking; but none of such opportunity had been used, and only so belatedly was **Mr. Carlos Maluta** now making depositions to the effect that he had some reasons for such detention; besides, counsel urged, the claim that the Immigration Department had any such reasons at all, has been made in contradictory averments – and so they should not be believed.

Learned State Counsel **Mr. Makura**, however, set store by the said affidavit of **Carlos Maluta**, and on that basis opposed the application herein. But he acknowledged the common averment in all the depositions, that the applicants' four-day detention was *not* consonant with the requirement of s.72(3) of the Constitution.

The thrust of **Mr. Makura's** submissions was a justification of **Mr. Carlos Maluta's** deposition, that there was reason to the prolonged detention of the applicants, before being brought before the Court. So counsel put stock in the averment that the arrest of the applicants took place at the beginning of a weekend; that the applicants were foreigners; that their nationality was unknown; that their immigration status was unknown – and that the Immigration authorities required time to establish all such details. Counsel also urged that the “delay was not inordinate”, and perfectly fell within the exceptional situation contemplated in s.72(3) (b) of the Constitution. This, however, is a point strongly contested by counsel for the applicants; and **Mr. Nyende**, on the question brought to this Court's attention a recent decision of persuasive authority, **Ann Njogu & 5 Others v. Republic**, High Ct. Misc. Crim. Application No. 551 of 2007, in which **Mr. Justice Mutungi** thus held:

“I dare add that [s.72(3) of the Constitution] is very clear and specific – that the applicants can only be kept in detention...for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the Court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants.”

The **Anne Njogu** case, **Mr. Makura** submitted, did not detract from the principle stated in both **Albanus Mwasia Mutua v. Republic**, Crim. Appeal No. 120 of 2004 and **Eliud Njeru Nyaga v. Republic**, Crim. Appeal No. 182 of 2006: delay in bringing the applicants before the Court would not be unconstitutional or unlawful if an explanation for the same is forthcoming.

The point made by counsel is, indeed, and with respect, a valid one in principle, and should always, I think, be heeded by advocates who, since the ruling in the **Ann Njogu** case, have invariably brought an application before the High Court whenever any delay at all in arraigning a suspect in Court has occurred. So recurrent have such applications been, the Court has had to consider the question, and to give further rulings on practical variables such as should attend the lodgment of grievances of such a kind.

In **David Karobia Kiiru v. Republic**, High Ct. Misc. Crim. Application No. 863 of 2007, this Court made a ruling bearing the following passage:

“[Section 72(3)] of the Constitution is being cited as the basis for terminating a criminal trial which is in progress before the trial Court.

“When, in law, should the High Court put an end to the constitutional function of trying

criminal cases, as a State function authorized by law (s.26 of the Constitution of Kenya)?

“It is clear that such a claim, when rested upon the constitutional document itself, must be thought through carefully: because criminal prosecution is a public-interest, governance process, itself founded on the constitutional document. So, if that process is, as herein the case, being challenged by citing the same Constitution, then conflicts within the provisions of the Constitution become apparent: and in that case, it is within the jurisdiction of the High Court to interpret the Constitution, and to declare what its true meaning is. I hold, therefore, that the reading of a line, or a clause, or a Section of the Constitution [by itself], will not be the answer, when such competing claims emerge: it is for this Court to declare the law of the Constitution, in those circumstances.”

The foregoing background of reasoning, in the *David Karobia Kiiru* case, led to a statement of legal character as follows:

“...the trial Court which is now conducting the trial is the tribunal of fact; and any factual matter which emerges, that might taint the regularity or propriety of the trial process, is to be stated bona fide before the trial Court; the trial Court is then to give an appropriate direction [after hearing relevant representations]. If a question of constitutional interpretation arises, then an application is to be made in the High Court, for the necessary interpretation and direction.”

In the *David Karobia Kiiru* case it was held that the detail and the quality of an explanation for delay to the commencement of prosecution, such as may be proffered in the trial Court, in the terms of the Court of Appeal decisions in *Albanus Mwasia Mutua v. Republic* and *Eliud Njeru Nyaga v. Republic*, is in the first place, and in general, a *question of fact*, “to be placed ...before the tribunal of fact, namely the trial Court.”

This Court believes the foregoing considerations to provide “functional principles to ensure both a fair opportunity to the accused, to assert his or her constitutional rights [on the one hand], and the due performance of the prosecutorial function of the State which itself is part of a constitutional obligation [on the other hand].”

The same question had earlier been considered in *Dickson Ndichu Kago v. Republic*, High Court Misc. Crim. Application No. 639 of 2007, and the ruling of this Court in that case, carries the following relevant passage:

“Such a claim [that there was no explanation for delayed arraignment of the accused in Court] ...should... be placed before the trial Magistrate who has the fullest authority to determine the question, as an inherent part of the trial process; and an accused who remains dissatisfied thereafter, may file an application before the High Court.”

How do the principles above-stated apply in the instant matter, given the *special facts* of this case?

It is not contested that counsel was involved in the events preceding the arraignment of the applicants in Court, from the very beginning – and that is significant. The applicants’ advocate, from the beginning, brought the pertinent constitutional and legal questions before the detaining authority – a fact which is not contested. Learned counsel *Mr. Nyende* recognized that the charges contemplated were in respect of a misdemeanour; and so he sought release of the applicants on Police-granted bond. Although this was a matter subject to the discretion of the Police officers, they expressed no lawful exercise of discretion, as they simply stonewalled, and repulsed all communication regarding the request. It means, intrinsically, that the Police officers deliberately failed to provide *public service* to the advocate or to the applicants, and conduct of this kind, I would hold, amounts to failure to exercise a discretion reposed in the Police officers by law; it is an *abuse* of authority.

The applicants’ advocate, next, asked for a timeous arraignment of the applicants in Court; in accordance

with the terms of s.72(3)(b) of the Constitution; but the Immigration officials paid no heed.

There is no evidence before this Court that the Immigration officials provided any *satisfactory explanation* before the trial Court, for the detention of the applicants for four days instead of 24 hours, in respect of misdemeanour-charges under the Immigration Act (Cap. 172, Laws of Kenya). The only attempt to provide explanations for the prolonged detention of the applicants is to be found in **Carlos Maluta's** replying affidavit of 22nd January, 2008. The veracity of that affidavit, in my view, stands to question. Just as learned counsel for the applicants has noted, the deponent fails to state what was wrong with the applicant's passports and immigration documents; at what time he received the same; and from whom – and so it is not evident that the applicants were unable to produce such documents. **Carlos Maluta** is unable to explain why on a Monday, a normal working day, he could not bring the applicants before the Court, and continued to detain them in custody. The deponent has exulted in the fact that upon receiving rumorous reports from “members of the public indicating that the foreigners were working and operating business at Studio House” (affidavit, para.3), he “mobilized officers and raided the said premises where the applicants were arrested with documents and other evidences linking them to the various immigration offences” (affidavit, para.5). It is clear that, merely out of public prattle, Immigration officers moved to effect the arrest and detention of the applicants, before conducting any inquiry *at all*, and without care and consideration for the rights and the dignity of the applicants.

The foregoing aspects of **Carlos Maluta's** affidavit, I would hold, show firstly that *no reasons* existed for the arrest and detention of the applicants; and secondly, that the arrest and detention was executed in a thoughtless manner that showed no recognition for the appellants' trial-rights.

Since *explanation* is an exception to the general rule of s.72(3)(b) of the Constitution, regarding the time that may be taken before a suspect is arraigned in Court, it is important to define the *nature of the explanation* that must be given. Firstly, such an explanation is to carry elements of objective reasoning. Secondly, the explanation must make sense, in the light of the special circumstances of the case. Thirdly, the explanation must be made *bona fide*, and not merely as a technicality in aid of the prosecution case. Fourthly, the explanation should show such operational difficulty as may have prevented timeous arraignment of the suspect in Court. Fifthly, the explanation should show clearly that the arresting authority *did* exercise genuine professional care, in conducting the investigations preceding the arrest. These are all factors that will be taken into account, as the Court forms an impression on the circumstances in which arrest and detention had taken place.

The foregoing considerations, in their very nature, are questions of *fact*; and therefore, they fall generally, in the first place, to the *trial Court* which, as was noted in **David Karobia Kiiru v. Republic**, High Ct. Misc. Crim. Application No. 863 of 2007, is in that regard the tribunal of fact. As in the instant case, it may, in certain situations, be possible to identify appropriate or inappropriate explanation, for the purpose of s.72(3)(b) of the Constitution, from an earlier stage, before the suspect is arraigned in Court.

It emerges from the evidence and the submissions, in the instant case, that the Immigration authority had no credible explanation for their failure to bring the applicants before the trial Court within the required time-limit. It is a case of the most blatant transgression of the guaranteed constitutional rights of the applicants, and this comes so clearly through the evidence placed before this Court, such that the Court has an uncontestable evidentiary basis for making appropriate redressive orders at this stage.

It is, accordingly, now declared that the charges as stated in the charge sheets, and the proceedings in each and all of the relevant cases, to wit, Nairobi Chief Magistrate's Court Criminal Case No. 1980 of 2007, Nairobi Chief Magistrate's Court Criminal Case No. 1981 of 2007, Nairobi Chief Magistrate Court Criminal Case No. 1982 of 2007 and Nairobi Chief Magistrate's Court Criminal Case No. 1983 of 2007, are null, in law. The said criminal cases brought against the four applicants respectively, are hereby quashed. Each of the four applicants is hereby discharged. The cash bails upon which the applicants had secured their personal liberty during the pendency of trial, shall forthwith be released to their advocate on record.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 27th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Nyende

For the Respondent: Mr. Makura