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

Criminal Appeal 528 of 2006

JOHN WAINAINA KIONGO ……...……. APPELLANT

-AND-

REPUBLIC ……..…… RESPONDENT

(An appeal from the Ruling of Principal Magistrate M. W. Murage dated 3rd October, 2006 in Criminal Case No. 413 of 2006 at Kikuyu Law Courts)

JUDGMENT

The appellant had been charged in a first count, with the offence of stealing by agent, contrary to s. 283 of the Penal Code (Cap. 63). The particulars were that the appellant, during the month of July, 2003 at Sigona Village in Kiambu District, within Central Province, stole four share certificates and two title deeds namely, Kenya Commercial Bank Share Certificate No. 000107416; Kenya Airways Share Certificate No. 0017266; Sigona Share Certificate No. 0015; Neema Share Certificate No. 2773; Title Deed for land parcel no. Kijabe/Kijabe/3071; and Title Deed for land parcel No. Muguga/Sigona/103 the property of ***Hannah Wanjiku Waweru*** which had been entrusted to him to retain for and on account of the said ***Hannah Wanjiku Waweru***.

The appellant had been charged in the second count with the offence of obtaining money by false pretences, contrary to s. 313 of the Penal Code. The particulars were that the appellant, between July, 2003 and December, 2003 at Sigona Village aforementioned, with intent to defraud, obtained Kshs.800,000/= from one ***Hannah Wanjiku Waweru*** by falsely pretending that he was in a position to process four visa for her children, to enable them to travel to the U.S.A.

This matter came up for plea-taking before the learned Principal Magistrate, on which occasion the appellant was represented by advocates. The substance of the charges and every element thereof was stated to the accused, in a language that he understands, and when asked to admit or deny the truth thereof, he replied in respect of each count, "*Not guilty*". Learned counsel ***Mr. Kamangu*** thereupon asked for the charge sheet and witness summonses; and he applied for bond for the appellant herein. The Court on 12th April, 2006 made orders that the charge sheet and witness summonses be supplied to counsel; and she admitted the appellant to bond carrying a value of Kshs.500,000/= and supported by surety on those same terms. The Court, on that occasion, set a hearing date, namely 15th May, 2006 with a mention date on 26th April, 2006.

On the specified mention date, the appellant herein was absent. The Court made a production order for the following day, 27th April, 2006, and confirmed the hearing date as earlier directed, namely 15th

May, 2006. On the mention date, the appellant herein was present in Court. The Court directed that there be another mention on 11th May, 2006, ahead of the scheduled hearing date, ***15th May, 2006***. On 11th May, 2006 the appellant was present, and the Court reconfirmed hearing for ***15th May, 2006***. The appellant, after the learned Magistrate had made the said orders, informed the Court*: "I am unwell*". This led the Court to make a further order that the appellant be accorded medical attention while in remand.

On the scheduled hearing day, 15th May, 2006 the accused was present with his advocate, Mr. Ondieki. Before hearing could proceed, learned Counsel made certain applications, as follows:

"I seek variation of bond terms. The bond is high. Accused is unwell. His disc is dislocated. He requires specialized treatment [at] Kenyatta National Hospital. I seek witness statement and exhibits to be able to proceed."

To the foregoing applications, ***I.P. Kilonzo***, the prosecutor said:

"We have no objection to providing witness statement. We will give him copies of exhibits. Accused was treated at [the] clinic. He is under treatment. No objection to the application."

This amounted to a request for adjournment, which the learned Magistrate allowed; she said:

"Adjournment granted. Witness summons and copies of exhibit [be provided]. Accused be accorded proper medical treatment and, if need be, be referred to Kenyatta National Hospital."

As regards the application for variation of bond terms, the learned Magistrate refused this; she ruled:

"The bond terms are fair."

She then ordered that hearing would proceed on ***29th June, 2006***, to be preceded by mention on 29th May, 2006.

On the mention date, learned Counsel ***Mr. Ondieki*** brought a new application, namely that the accused who had been arrested on ***27th April, 2006*** had been charged in Court on ***5th May, 2006***, and there had been a delay which, under the Constitution, dictated that the appellant herein be set free and the charge against him withdrawn. ***Mr. Ondieki*** submitted that, by virtue of s. 83(3) of the Constitution, the accused's rights to a fair trial had been violated; and he asked the learned Principal Magistrate to refer the matter to the High Court; he submitted that s. 84 (4) of the Constitution implied that trial in the Magistrate's Court would be stayed, pending referral to the High Court.

To this application, the prosecutor requested more time to enable him to reply, which he did on 22nd June, 2006. He now gave information that the day of the appellant's arrest, 7th April, 2006 was later followed by a public holiday, on Friday 10th April, 2006. He urged that whereas the trial Court was empowered to refer a case to the High Court, by virtue of s. 67 of the Constitution, there existed no grounds in the instant case, for making such a reference. On the facts, the prosecutor urged, the accused had committed on offence, and had been lawfully detained; and in these circumstances there was no question for interpretation, meriting referral to the High Court. The prosecutor urged that the appellant's constitutional rights had not been infringed, and that the trial Court had the full competence to hear and dispose of the matter. He called for the trial process to proceed according to schedule.

In his response, learned Counsel ***Mr. Ondieki*** urged that the application had raised substantial issues of law which warranted reference to the High Court for interpretation.

The learned Principal Magistrate reserved ruling, which she gave on 11th September, 2006 and which has given rise to the instant appeal. The substance of the ruling may be set out herein:

"**An application has been made on behalf of the accused to have this matter referred to the High Court …. The application is based on [the] provisions of section 67 of the Constitution which empowers [a] Subordinate Court to refer any question as to the interpretation of [the] Constitution involving a substantial question of law. The issues for reference are based on section[s] 70-84 of the Constitution.**

"…… **Counsel [for the] accused has argued that [the] accused's rights to a fair trial [have] been violated since he was arrested on 7th April, 2006 and was only taken to Court on 12th April, 2007. He was arrested on Friday and was charged on a Wednesday, two days later than he should have been charged. That does not invalidate the due process under which the accused has been brought to Court. [The] accused is before the Court because of a criminal offence. His rights as envisaged in the Constitution cannot be a justification and a green-light to commit [an] offence with impunity. An offence was committed and the due process of law must be followed.**

"**Whereas the Court has a duty to safeguard the fundamental rights and freedoms of the individual, [these rights and freedoms] must be seen in [a broader context, in relation] to the society. An individual cannot commit an offence and then hide under the Constitution for protection. [The] rights of all other stake-holders and [of] society at large must be considered ….**

"**Lengthy submissions both oral and written, were presented to the Court. I have carefully considered them, [together with] the authorities cited. I have considered the issues raised for reference to the High Court, as to the interpretation of the Constitution. I find no substantive question of law, for reference. I find no merit [in] the allegation of contravention of [the] fundamental rights and freedoms. I am, therefore, unable to frame the question that ought to be determined by the High Court.**

"**In the circumstances, I decline to refer this case to the High Court under s. 67(1) [of the Constitution]. I am not obligated to refer the matter if [am of the opinion] that no substantive question of law is [raised]. The application, therefore, is rejected in its [entirety]. I, therefore, order that this matter proceed [to] hearing forthwith, without any further delay. [The accused, however,] has [a] right of appeal.**

"**No stay is granted. Therefore, the matter will be fixed for hearing unless [the] High Court orders otherwise."**

Although this Ruling was the trial Court's final expression of its authority, learned Counsel ***Mr. Ondieki*** still challenged the learned Magistrate's decision, in my opinion, somewhat improperly – since the appeal avenue was left open. Counsel thus remarked:

"**[The] Court cannot force us to take a date. This Court is biased, and you [a reference to the learned Magistrate] should disqualify yourself. Why are you in a hurry to hear this matter?"**

It is unsurprising the learned Magistrate thus responded:

"The argument raised by Counsel is not based on any law. It is out of disrespect for the Court. I hereby cite Counsel for contempt of Court."

The appellant's advocates proceeded to file a petition of appeal against the learned Magistrate's Ruling, in which they state, for the most part, as follows:

(i) that the learned Magistrate misdirected herself on law, by dismissing the application, whereas it is mandatory for a constitutional reference under s. 67(1) of the Constitution [to be made] if a party to proceedings so requests;

(ii) that the learned Principal Magistrate erred in law by holding that the Chief Justice has powers to make rules of practice under s. 67 of the Constitution;

(iii) that the learned Principal Magistrate erred in law and misdirected herself, by holding that there was no substantial question of law and of the Constitution, to refer to the High Court;

(iv) that the learned Principal Magistrate erred in law by holding that the appellant's rights of liberty and protection of the law were not violated by the delay in bringing him before the Court, as he was arrested on 7th April, 2006 and brought to Court on 12th April, 2006;

(v) that the learned Principal Magistrate erred in law by holding that the application was frivolous, when the rights of the applicant under s. 72(3) of the Constitution had been violated;

(vi) that the learned Principal Magistrate erred in law by failing to appreciate that only the High Court has jurisdiction to interpret the constitution;

(vii) that the learned Principal Magistrate erred in law by failing to appreciate that only the High Court has jurisdiction to enforce fundamental rights and freedoms under ss.70-83 of the Constitution;

(viii) that the learned Principal Magistrate erred in law by purporting to take a hearing date in the absence of counsel.

Learned counsel, ***Mr. Ondieki*** presented the foregoing contentions before the Court, and learned State Counsel ***Ms. Gateru*** responded by urging the respondent's case.

Mr. Ondieki submitted that the appeal incorporated just two issues, which were inter-related. One of these is as to what a Subordinate Court is to do where counsel raises an issue in the course of a trial, under s. 67 of the Constitution. In such a case, counsel submitted, the Subordinate Court is not allowed to rule that there is ***no substantial point of law***; the Subordinate Court must refer the matter to the High Court.

Mr. Ondieki queried whether the practice directions made by the Chief Justice as Legal Notice No. 6 of 2006, on mode of enforcement of fundamental rights provisions, can be extended to the operations of s. 67 of the Constitution which empowers the Subordinate Court to refer a matter to the High Court. Counsel's submission on this point was that s. 67 of the Constitution is self-sufficient and runs on its own momentum, and is in no way affected by rules made by the Chief Justice as Legal Notice No. 6 of 2006.

Mr. Ondieki submitted that Parliament has entrusted powers to the Chief Justice under ss. 65(3), 75(3) and 84(6) of the Constitution, but this was independent of the Subordinate Court's competence under ***s. 67*** of the Constitution; hence action by the Subordinate Court under this section was unclogged by technicalities and requirements of rule-making.

Counsel referred to a Constitutional Court decision, ***Githunguri v. Republic*** [1985] KLR 91 in which, with regard to s. 67 of the Constitution, it had been held:

"***It was mandatory for the Chief Magistrate to refer the questions to the High Court. The accused through his counsel had requested that the questions be referred to the High Court and the Chief Magistrate was of the opinion that substantial questions of law pertaining to the interpretation of section 26 of the Constitution were involved."***

The second issue raised on behalf of the appellant was that there had been a violation at s. 72(3) (b) of the Constitution, and that on this account the High Court should terminate the trial taking place in the Subordinate Court.

S. 72(3) (b) of the Constitution thus provides:

"***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 [being] about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before the Court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

The meaning of the foregoing provision, it is clear to me, may be expressed in point form as follows:

(i) a suspect in relation to a criminal case is required to be brought before the Court without undue delay; it has to be done within reasonable time;

(ii) reasonable time in the case of non-capital cases is defined as 24 hours;

(iii) reasonable time in the case of capital cases is defined as 14 days;

(iv) where the reasonable time prescribed is not complied with, then a satisfactory explanation, and a demonstration that there were practical situations occasioning the delay, is required from the detaining person or authority.

Mr. Ondieki submitted that since the accused had been in custody for nearly six days and was not brought to Court within 24 hours of his arrest, there was a violation of s. 72(3) (b) of the Constitution and, on this account, the subsequent proceedings were a nullity, and the High Court should now declare so.

In aid of the foregoing argument counsel brought to this Court a decision of the Court of Appeal, ***Albanus Mwasia Mutua v. Republic*** Criminal Appeal No. 120 of 2004. ***Mr. Ondieki*** had argued the appellant's case in the ***Albanus Mutua*** case, in which the main issue was that, from the record, it appeared that the appellant had been held for as long as ***eight months*** before being brought before the Court. The Court of Appeal was concerned about the delay, and stated as follows:

"***Even if the appellant had been arrested for other offences on 16th February, 2000 as the charge-sheet shows, was released on bail, and committed the offences now before us on 17th June, 2000 that would not provide an explanation as to why the appellant was not taken to Court on the charges we are dealing with until some eight months later. It is on the basis of this unexplained delay of eight months before taking the appellant to Court, that Mr. Ondieki submitted before us that the appellant's constitutional rights under section 77 of the Constitution were violated, [so] that the subsequent trial and other proceedings were a nullity and that on that basis alone, we ought to allow the appellant's appeal."***

In the instant case, ***Mr. Ondieki*** submitted that the learned Magistrate had erred by not allowing an argument similar to the one in the ***Albanus Mutua*** case, to be raised in the High Court; and that his concern to have the matter placed before the High Court, was for the purpose of having the accused's rights enforced by virtue of s. 84(3) of the Constitution which provides that –

"***If in proceedings in a Subordinate Court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious."***

Mr. Ondieki submitted that his attempt to have the matter referred to the High Court was not frivolous, as it raised substantial questions of law.

Learned State Counsel, ***Ms. Gakobo*** contested this appeal, and urged that it lacked merit and should be dismissed. Counsel urged that under s. 67(1) of the Constitution, there was no obligation resting on

the trial Court to refer a matter to the High Court, just because a party had so requested; the Subordinate Court must first be convinced there was a substantial point of law, before making a reference.

Counsel referred to ***Kiran Shah v. Republic***, H. Ct. Crim. App. No. 1355 of 1998, a case of persuasive authority in which the appellant, after unsuccessfully applying to the Subordinate Court for a reference of a constitutional issue to the High Court, appealed on this point ***inter alia***. ***Lesiit, J***. in her decision of this point stated:

"***The operative words here are, [the] Subordinate Court has to form an opinion that a question involving a substantial question of law exists, before it can refer the matter to the High Court for interpretation …. Where such an opinion has been formed, the Subordinate Court will have no option but to refer the matter to the High Court if any party applied to such Court to do so. The reverse is also correct, that if the Subordinate Court has not formed an opinion that there is a question which needs interpretation by the High Court, the Court is not obligated to send the matter to the High Court even where a party has applied to the Court to do so. The learned trial Magistrate acted within her power to dismiss the application to send the matter [on] constitutional reference to the High Court, having [itself] not formed the opinion that there was a need to do so. That is not to say ….. the party against whom the Court declines to refer a case to the High Court [as] constitutional reference is left without redress if he feels such a question arose. Such a party can directly file a constitutional reference [in] the High Court, on its own motion."***

Ms. Gakobo urged that the Subordinate Court had acted quite rightly when it did not form the opinion that there was a matter to be referred to the High Court, because the delay in bringing the appellant to Court had been properly explained as contemplated in s. 72(3) (b) of the Constitution.

In his response, ***Mr. Ondieki*** urged: "*Our application was on s. 67(1) of the [Constitution] and nothing else"*. And it was under the said s. 67 (1) that counsel submitted, the Subordinate Court had no option but to refer the appellant's matter to the High Court for a constitutional interpretation.

It has not been disputed that the prosecutor did give an ***explanation for the delay*** which had taken place before the appellant, following his arrest, was brought before the Court. The record shows that such explanation was done before the Subordinate Court. There is no record that any inadequacy in the explanation so given, was raised, nor that any defect in the explanation was noted. As already noted in this Ruling, by virtue of s. 72 (3) (b) of the Constitution such an explanation will ***excuse*** a delay in bringing an accused person before the Court.

Although learned counsel ***Mr. Ondieki*** has set store by the Court of Appeal decision in ***Albanus Mwasia Mutua v. Republic***, Crim. App. No. 120 of 2004 as prohibiting ***delayed*** commencement of prosecution following the arrest of a suspect, a careful reading of that case, I think, shows that the Court has a duty to ***assess the relevant circumstances***, before holding that there has been a breach of s. 272 (3) (b). The ***Albanus Mutua*** case, in this regard, is to be read together with other contemporary cases, and I would refer to another Court of Appeal decision, ***David Waiganjo Wainaina v. Rep***, Criminal Appeal No. 113 of 2005 which ***Mr. Ondieki*** also sought to rely on. From that decision I would set out the following relevant passage:

"***In view [of earlier decisions, notably Morris Ngochi Njuguna & Others v. Republic, Crim. Appeal No. 232 of 2006], we think it would be wrong for anybody to contend that where there has been inordinate delay in bringing an accused to Court, then without any further investigation such a person ought to be set free regardless of what had led to his arrest and incarceration."***

Being guided by the foregoing principle, I am not inclined to agree that, because the appellant herein was kept under arrest for several days rather than for twenty-four hours before being brought before the Court, a breach of s. 72 (3) (b) of the Constitution was therefore disclosed, and that, consequently, the criminal trial commenced before the Subordinate Court ought to be terminated. If I were to terminate the criminal trial, as sought by the applicant, I would have compromised the constitutional role of the judicial system to hear a justiciable dispute, in accordance with the law, and to render a just decision. That

cannot, in the circumstances of this case, be done.

The second question was whether the learned Magistrate could properly have refused to refer an application for constitutional interpretation, to the High Court. I have already set out in detail the persuasive opinion on this point, of my learned sister ***Lady Justice Lesiit,*** in ***Kiran Shah v. Republic***, H. Ct. Crim. App. No. 1355 of 1998. S. 67 (1) of the Constitution reserves the vital role to the Subordinate Court; that Court does not have to form the opinion, on any given question, that a substantial point of law has emerged; and thus the Court could very well make its final orders on the point if it finds that no substantial question of law, on the relevant point, exists. If, however, the Subordinate Court makes a finding that a substantial point of law exists, then two alternative courses of action follow: the Court can, ***suo motu***, refer the matter to the High Court, ***or*** do so upon being requested by one of the parties. Learned counsel ***Mr. Ondieki*** has confirmed that the application which he had made before the trial Court was made under s. 67 (1) of the Constitution; and it follows that such an application would be disposed of by the learned Magistrate in the manner just explained herein.

Just as was noted by ***Lesiit, J***. in ***Kiran Shah v. Republic***, H. Ct. App. No. 1355 of 1998, a decision by a Subordinate Court by virtue of s. 67 (1) of the Constitution, in the manner indicated earlier, by no means compromises the rights of a party to apply to the High Court by virtue of s. 84 of the Constitution, for the protection of any specified fundamental rights.

I will, therefore, make orders as follows:

1. ***The appellants appeal lodged by Petition of Appeal dated 25th September, 2006 is dismissed.***

2. ***The orders of stay of trial proceedings made on 25th September, 2006 are hereby lifted.***

3. ***Criminal Case No. 413 of 2006 shall be listed for mention and hearing directions at the Principal Magistrate's Court, Kikuyu on Monday 25th February, 2008 at 9.00 am***.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 20th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court clerk: Huka

For the Appellant: Mr. Ondieki

For the Respondent: Ms. Gakobo