**REPUBLIC OF KENYA**

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

**Miscellaneous Application 77 of 2008**

**KEVIN ATSENGA LUMUMBA……...…..……APPLICANT**

**V E R S U S**

**ATTORNEY GENERAL (Representing the office of the President Kenya**

**Police Department) …….....…… RESPONDENT**

**R U L I N G**

This is a Chamber Summons application dated 6th February, 2008 filed under Section 389 of the Civil Procedure Code rules 2, 3 and 12 of the Criminal Procedure Rules *(Directions in the nature of Habeas Corpus)*.

The prayers sought were that:

***(1) Directions in the nature of Habeas Corpus do issue to IP Sharma Boy the Officer Commanding Station of Kayole Police Station and IP Stephen Kyenze of Soweto Police Post do appear in person or by their authorized agents together with the original of any warrant of arrest to show cause why Kevin Atsenga Lumumba should not be released forthwith, having regard to his constitutional rights as enshrined in Section 72 (3) (b) of the Kenya Constitution as particularly explained in the decision of*** *Albanus Mwasia Mutua –Vs- The Republic, Criminal Appeal No. 120 of 2004.*

***2. Kevin Atsenga Lumumba, who is illegally detained in custody of Kenya Police (Kayole Police Station/Soweto Police Post) be set at liberty forthwith. The first prayer had sought for the production of Kevin Atsenga Lumumba be produced before this court at such time that this Court may direct – this was done – the subject has been produced before this court the hearing of the application.***

The affidavit in support of the application is sworn by Beatrice Achitsa Ekessa who depones that the subject lives with her and was arrested on 30th January, 2008 and has remained in custody since that date with no charges being brought against him in a Court of Law.

She visited the said Kevin in the cells at Kayole Police Station and found that he was held there on suspicion of having committed defilement.

The police were holding him in-communicado and had refused to release him whether unconditionally or on bond.

The police officers dealing with the case involving the subject are the OCS Kayole Police Station (IP

Sharma Boy and IP Stephen Kyenze who is in charge of Soweto Police Post. She is apprehensive about the safety and welfare of the subject herein as his constitutional rights are being violated.

At the hearing of the application Mr. Lubulellah appeared for the subject whilst Miss Nyamosi acted for the State. Mr. Lubulellah informed the court that after service of the court's order drawn on the officers concerned, the subject was taken to Makadara Law Courts on 8/2/08 and purported to have been charged with an offence of defilement, whereupon Mr. Lubulellah appeared before the Magistrate's court and informed the learned magistrate that the High Court was seized of this matter – so even the plea was not taken.

It is Mr. Lubulellah's contention having been served with the court's order on 7th February, 2008, it was dishonest and an abuse of this court's process for the OCS Kayole Police Station to purport to have the subject charged in a sub-ordinate court so as to pre-empt the application before this court and that if such avenues were made available, police officers would always answer to every application of this nature by rushing to court and having an individual charged and thereby defeat the application and the role of this court.

He maintains that this kind of conduct means that the police officers had an interest in holding the accused incommunicado for so long. He refers to the decision in ***Albanus Mutua Mwasia's case Criminal Application No. 113/04*** which places an obligation upon this court and the sub-ordinate courts to look out for acts in violation of an accused's constitutional rights in the hands of police officers.

Mr. Lubulellah maintains that any criminal proceedings commenced against any suspect in circumstances that constitute a violation of that suspect's right is null and void even where a suspect were to plead guilty, the proceedings and plea of guilty would be rendered void. Learned counsel for the subject submits that the provisions of Section 72 (3) (b) is mandatory as regards the burden of proving compliance – that it is upon the persons holding him in custody. Why does he go into all this? Mr. Lubulellah says it is because the subject was not brought to court within 24 hours and the charges for which police wish to prosecute the subject for, do not carry a death sentence to justify his prolonged stay in custody.

Mr. Lubulellah further argues that this court has original jurisdiction in all criminal and civil matters under Section 3(1) of the Judicature Act which provides that-

"The jurisdiction of the High Court….. and all sub-ordinate courts, shall be exercised in conformity with –

***(a)*** the Constitution …… as read with Section 69 of the Criminal Procedure Code which provides that-

"***The High Court may inquire into and try any offence subject to its jurisdiction at any place where it has power to hold sittings."***

These provisions are cited as a way of persuading the court in entertaining the complaint regarding the subject's prolonged stay in police custody without reference to what the trial magistrate's court may say in that regard.

Miss Nyamosi, on behalf of the State opposes the application saying the same is already spent as the Respondents have given an explanation as why applicant is in police custody. She relied on the affidavit sworn by CIP Sharma, the OCS Kayole Police Station dated 12/2/08 in which he explains that the subject herein was not charged in court immediately in view of the fact that the minor complainant, Rebecca Wanza was admitted at Nairobi Women's Hospital and taken to theatre and was thus unable to record her statements immediately. He goes on to explain further that it was why after her being discharged from Hospital on 5th February, 2008 that her statement was recorded thus enabling the investigating officer to complete the investigations . He says the delay was not in bad faith and that the same was explained to the trial court vide an affidavit sworn by Eva Cherop (***the investigating officer***) and the trial court accepted that explanation. In fact the subject herein had been produced in court on 7th February, 2008 for

purposes of taking plea, but the magistrate required an explanation. Subsequent to that the subject was produced at the Makadara Court for plea on 8/2/08 but plea was deferred because of this application which was pending in this Court.

The same explanation is repeated in the affidavit sworn by Eva Cherop and dated 8th February and is an annexture to the replying affidavit.

Miss Nyamosi has emphasized that a Habeas Corpus application only requires the Respondent to either produce the subject or give reason as to why the subject is in their custody. She further points out that Constitutional issue which have been raised by the subject's counsel can only be entertained in a Constitutional application and not in an application of this nature. She urges for the dismissal of this application.

To this Mr. Lubulellah's reply is that the court must evaluate the circumstances of each case because when a subject is under investigations, the police have various options open to them and the mere fact that complainant was hospitalized cannot be sufficient cause for why police cannot bring charges against the suspect. He says there is nothing to prove to this court that Eva Cherop's affidavit was accepted by the lower court. Further he contests the proposition that the issues raised are constitutional saying no decided case has been cited to support the position that constitutional issues can only be addressed in a constitutional reference.

From the onset two issues are not contested.

***(1) That the subject herein was arrested on 30/1/08 but not taken to court until 7/2/08.***

***(2) That upon being taken to court, plea was not taken after his counsel objected saying this was an application pending before this court.***

The issue requiring attention is whether the Respondents having produced the subject before the Court or show cause why he should not be released. Although the Chamber Summons is specific as to the provisions of the law under which it is made, namely Section 389 Criminal Procedure Code and Rules 2, 3 and 12 of the same with specific reference to the directions in the nature of Habeas Corpus, the suspects counsel has somehow attempted to sneak in Section 72 (3) (b) of the Kenya Constitution and even cited the Court of Appeal Decision ***Albanus Mwasia Mutua –Vs- Republic Criminal Appeal 120/04.***

On the face of the application what is Habeas Corpus.? It is a writ by which the court commits someone who has detained another to produce the detained individual, and to show cause why that individual may not be set at liberty forthwith.

So that the basis of the physical absence of the subject herein cannot even begin to be argued, as he was presented to this court during the hearing of the application and also to Makadara Court for plea – so that the detaining authority had and has in fact produced the body or person of Kevin Atsenga Lumumba.

Of course this takes us to the second nature of the writ of habeas corpus – now that the subject is within the control and custody of the respondents, is there any lawful reason why he should not be released forthwith. The Respondents say "***yes" because we have already prepared a charge sheet and were ready to charge him in court."*** The subject's counsel says "***No***, he should be released forthwith because his constitutional rights under Section 72(3) (b) of the Constitution of Kenya have been violated and so irrespective of the nature of the charge and attempt at explanation by the police, he must be set free.

I think it is against this back drop that Miss Nyamosi was raising the red flag and saying this is a Constitutional issue that should have been made in a constitutional application and not yet married to the application for Habeas Corpus.

Should the court restrict itself to the writ of Habeas Corpus only? I think not – for two reasons-

***(a) the question of the subject's prolonged stay is referred to as prayer 2 in the application – so I cannot ignore it, as there was no request to expunge that prayer from the application. In any event rules on technicalities such as failing to cite the legal provisions at the title of an application should not be used to administer a fatal blow to an applicant's quest for justice.***

***(b) A similar position was raised in Miscellaneous Criminal Application No. 668/07 Ramadan Singh –Vs- Attorney-General & another whenever the learned judge in the matter observed-***

"***From past experience questions properly belonging in the field of the Court's Criminal jurisdiction have come before me,*** which however, also contain constitutional assertions here and there. This also happens when the High Court is exercising its jurisdiction in the restoration of other kinds of cases……

The court, when determining a substantive claim in a normal sphere of legal disputes, does not abdicate its full and unlimited jurisdiction, just because the Constitution has been referred to. The Constitution as the fundamental law, is the medium within which all Judges of the High Court exercise their jurisdiction regardless of the domain of law involved – probate and administration, commercial cases, torts, contracts, etc."

This caption cited above totally sums up my view on the matter and the proposition by Miss Nyamosi in my considered view, is misplaced. Now having said that then should the Court order for Kevin Atsenga's release forthwith on the basis of supervisory provisions of this Court and with regard to Section 65 (2) of the Constitution which provides-

"***The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a sub-ordinate court ….. and may make such orders …. And give such directions as it may consider appropriate the purpose of ensuring that justice is duly administered by those courts."***

There was an indication by the learned State Counsel that the question of an explanation regarding the delay had in fact been raised before the trial court, and an explanation was given and accepted by the court. Of course there was no formal record of the learned magistrate's court's proceedings or order presented by the State Counsel to this Court.

I think the subject's complaints about being detained for unduly long periods has a constitutional basis in Section 72 (3) of the Court, but that issue should be placed before the trial magistrate who has full authority to determine the question as an inherent part of the trial process – the trial court is the tribunal of fact in this matter and ought to have the **FIRST** opportunity to deal with that question and I think the decision in ***Ben Amos Njau –Vs- Republic Criminal Appeal No. 633 of 2007*** is clear on this.

"***True the accused has rights which must be given effect in the trial process…. of course the trial magistrate would also be aware of them …… the prosecution too…."*** It is clear that nobody has even spoken before the trial magistrate about these rights – and the prosecution has given no explanation for the delay in initiating the trial process.

Does this justify the applicant departing from that form of complaint, before the trial magistrate, and moving even to the High court to stop the magistrate and stop the trial process? My answer to that question is No."

In this current scenario, it is said that in fact an explanation was given for the delay and that the same was accepted by the trial court but this is neither here nor there – since subject's counsel does not wish to confirm or deny that I would identify with Ojwang J. view that "in good legal practice this court should not be placed in a position in which it either usurps the proper first instance fora of lower courts, or off-handedly dishes out belittling orders to learned magistrates, who if given a chance, will exercise their power and discretion.

So let the subject appear before the trial court at Makadara for plea – true Albanas Mwasia's case has its place with reference to one's Constitutional rights, but so does the case of ***Eliud Njeru Nyaga –Vs-***

***Republic Criminal Appeal 182/06*** which is that the Respondent herein will require to give an explanation about the delay ***(if they haven't already given)*** before the trial court, thus if that justification is accepted or rejected to the dissatisfaction of the subject herein he can move to the High Court. To that end then I decline to delve into the merits of why there was a delay in taking the subject to court or order for his immediate release. The bottom line is that Respondent has shown why accused is in custody and he ought to be taken to court for plea without any further delay and at least by 21/2/08.

Subsequently my findings are that:-

***(a) the writ of habeas corpus cannot issue, it is already spent.***

**(b) *subject will not be released forthwith, but to be taken to Makadara Court for plea* on 21/2/08.**

Dated and delivered this 20th day of February, 2008.

Mr Lubulellah for subject.

Miss Nyamosi for Respondent.

H. A. Omondi

Judge