

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Misc Appli 2 of 2008

JOHN MURIITHI NGARI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Constitution of Kenya (Supervisory Jurisdiction and protection of Fundamental Rights and Freedom of the individual) High Court Practice and procedure. Rules 2006 makes provisions for the procedure to be followed by a party who wishes to invoke jurisdiction of High Court under Section 65 of the Constitution of Kenya. Under Section 67 thereof where a question as to the interpretation of this constitution arises in proceedings in a subordinate court and the court is of opinion that the question involves a substantial question of law, the court may and shall if a party to the proceedings so requests, refer the question to the High Court. Again the provisions of Section 84 of the constitution deals with the enforcement of protective provisions of Section 70 to 83 inclusive, namely where a person alleges that any of the provisions of Section 70 -83 has been, is being or is likely to be contravened in relation to him then without prejudice to any other action with respect to the same matter which is lawfully available that person may apply to the High Court for redress.

In this reference the trial Magistrate has referred this matter to the High Court where the complaint is that the rights of the accused person John Muriithi Ngari were contravened where he was held in police custody for 5days from 11/10/2007 to 15/10/2007 both inclusive and was not brought to court within 24 hours as provided under Section 72 (3) of the constitution. At the hearing the Applicant was not present but the state counsel made submissions. The authority of the case of:-

1. Gerald Macharia Gichuki vs Republic 2007 KLR
2. Ann Njogu & 5 others vs Republic
3. Ronald Manyonge Chepkui vs Republic 2007 KLR are referred to.

I have perused the first authority referred to above. The issue was the alleged violation of the applicant's right of freedom of expression and assembly by putting on trial the applicants for running an NGO without licence. The three Judge bench hearing the matter made a finding that the reference did not fall under Section 67 (1) and stated that if "the Applicant's complaint was that their freed of expression and his freedom of assembly and association as enshrined in section 79 and 80 of the constitution respectively have been breached then the only recourse is to seek redness pursuant to the provisions of section 84 of the constitution".

In the case of Gerald Macharia (Criminal Appeal No. 1191/04), this was an appeal against the sentence of death. One of grounds of appeal concerned the violation of appellants' rights under Section 72(3) of the constitution. In that appeal there was 3 days period between arrest and production before a court. The court of appeal noted that no attempt was made by the Republic upon whom the burden lay to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.

It is to be noted that this matter was raised in an appeal not on a reference from the lower court. The

third authority is a decision of the High Court. The applicants filed an Originating Motion as provided under the Rules. The complaint was regarding breach of Section 72 (1) and 77 (1) of the constitution. The High Court (Hon. Justice Mutungi) found that the rights of the applicants under 72 (3) were being violated. The court had this to say. "I dare add that the Section is so clear and specific in that the applicants can be kept in detention of cells for up to 24 hours. At the tick of the 60th minute of the 24th hour if they have not been brought before a court every minute thereafter of their continued detention is an unmitigated illegality". It is therefore to be seen that when it is alleged that human rights are being violated under provisions of part 5 of the constitution, it has nothing to do with the interpretation of the constitution under section 67 (1) thereof but the issue is of enforcement of the rights. The decisions above show that remedy was granted by declaring the violation illegal null and void and setting the complainants free.

It is my finding therefore that the applicant herein has not followed the right procedure. This reference is not competent and the same is dismissed.

Dated this 18th February, 2008.

J. N. KHAMINWA

JUDGE