



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPLI 96 OF 2007

NELSON KIMOTHO GATIMU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The applicant has filed an originating Motion under the provision of Section 72(3) 77 of Kenya Constitution and Section 123 of the Criminal Procedure Act Cap 75 Laws of Kenya.

The procedure to be followed is in accordance with Rules made by the Chief Justice under Section 65 (3) and Section 84 (6) of the Constitution. In this Originating Motion the applicant complains that his fundamental rights and freedoms have been violated between 6th October 2006 and 11th October 2006. He was arrested on charges as disclosed in the charge sheet dated 11/10/2007 which charges are bailable. He was not presented before a court of law within the period of 24 hours as provided for under Section 72 (3) of the constitution. He was not presented to court until 11/10/2006. He submits that the taking of his plea on 11/10/2007 was illegal, and the plea was null and void.

Therefore the continuation of the criminal proceedings in Criminal Case No. Senior Resident Magistrate Criminal Case No. 1572 of 2006 is unmitigated illegality and the said proceedings ought to be terminated and he should have the costs of this suit. On the part of Republic a Replying Affidavit was filed by Isaack Onyango the Criminal Investigation Officer Kirinyaga Police Division. It is admitted that the applicant was arrested on 5th October, 2006 and not taken to court until 11/10/2006. The officer attempts to explain the reasons for delay. That there was a weekend the 24 hours having terminated at 5.25 p.m. on Friday 6th October, and some other facts came up that necessitated further investigations and therefore there was no time to take him to court on 10th October which was a Public Holiday. In his argument the State Counsel Mr. Omwega said it is enough for state to explain the delay which in this case has been well done. He pointed out that under Section 72 (6) the remedy is in compensation. Furthermore the constitutional proviso (Section 72 (2) states

“the burden of prove that the person arrested or detained has been brought before a court as soon as practicable shall rest upon any person alleging that the provisions of this subsection have been complied with”.

Therefore it is clear that the constitution limits to 24 hours or as soon as practicable. The State Counsel

submitted that in the circumstances of this case the applicant was brought before court as soon as practicable. The applicant referred to this court to the decision of the High Court in Nairobi being Misc Criminal Application No. 551 of 2007 Ann Njogu and others Vs Republic. In that case the application concerned the interpretation of Section 72 (3) of the constitution. The learned Judge said “I dare add that the section is very clear and specific that applicants he kept in detention or the calls for up to 24 hours. If they are not brought to court at the tick of the both minute of the 24th hour every minute thereafter of their continued detention is an unmitigated illegality”. The learned Judge found that there was no explanation good or otherwise as to why the applicants were not brought before court within 24 hours offered by the state. The Judge also continued to say that upon the determination that the constitution rights of the applicants have been violated any prosecution against them for any of the events for which attempted charges were being made is null and void. His view was that there is no room for extension of the constitution provided period of 24 hours.

It is to be noted that the court did not consider the provision for “as soon as practicable” I am of the opinion that where an explanation is given why there was delay it shows that the prosecution can be said to have discharged its burden by showing that the applicant was brought to court as soon as practicable.

It is my finding therefore that the state has not violated the constitutional rights of the applicant. The delay is well explained and that the applicant was brought before court as soon as practicable. I dismiss this application and discharge interim order issued on 13/11/2007.

Dated this 13th February, 2008.

J. N. KHAMINWA

JUDGE

13/2/2008

Khaminwa – Judge

Njue – Clerk

Mr. Kimathi for State

N/A for Applicant or his advocate 9.15 a.m.

Ruling read in open court.

J. N. KHAMINWA

JUDGE