



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC.CRIMINAL APPLICATION NO. 831 OF 2007
(In the matter of an intended appeal)

HILDA KAMBURA MIRITI.....APPLICANT

-Versus-

REPUBLIC.....RESPONENT

RULING ON A PRELIMINARY POINT

The applicant comes before this Court by way of an Originating Notice of Motion – dated 28th November, 2007.

The applicant asks that the prosecution pending before the Magistrate’s Court in Criminal Case No. 2021 of 2006 be terminated, by being declared null and void, for violations of ss.72(3) and 77(1) of the Constitution.

It is being asserted that the applicant had been detained for a longer period than he should have been – and that, therefore, the trial itself became illegal.

From the proceedings before the trial Court, counsel had complained before the trial Magistrate, who thus recorded:

“Mr. Orina for the accused – the accused person was arrested on 26th Oct. 2006. She was arraigned in Court. On 30th Oct 2006 she was brought to Court after 72 hours. Section 72(3) of the Constitution clearly states that the accused would be brought to Court within 24 hours..... During the plea of the accused person the Prosecution did not advance any explanation. The Constitution says the proceedings are a nullitywe urge the Court to discharge the accused person unconditionally”.

To those remarks by learned counsel **Mr. Orina**, the learned Magistrate made a ruling.

It is not clear however, that learned counsel stated the applicant’s case with sufficient clarity before the trial Court – as I notice from the record.

It is clearer that lack of clarity was prevailing, as emerges from the following ruling by the trial Court:

“If this Court were to consider this aspect from the very circumstances of the case, there is

no prejudice that has been occasioned given that *the delay was not overly undue. It fell in the ambit of the proviso to section 72(3).*”

The learned Magistrate proceeded to dismiss the objection raised by the applicant herein.

I note that the authority to prosecute suspects in criminal incidents is clearly stated to be a *constitutional* authority. By virtue of s.26 of the Constitution, crime is required to be prosecuted, and the process is to be managed by the Attorney-General, whose office is itself a constitutional office.

When, against that background, a *competing constitutional claim* is made, then this Court is to reconcile the relevant provisions, and to declare the valid position as a matter of the operative constitutional law.

In the instant matter, competing claims being made under the Constitution, have been placed before this Court. It is for *the Court* to state the valid law, and if any party disagrees, then such a party must go on *appeal*.

How does this Court reconcile apparently-competing claims both being attributed to *one and the same* constitutional document? In the first place, I hold that a *rule of practice* for the proper judicial determination of such matters, ought to be observed. In the context of competing claims under the Constitution, any party making a claim has a *duty of clarity*; such a party must clearly set out the governing constitutional provisions, and must accurately describe the nature of his or her claim. Only on that basis is the Court able to resolve the question, and to declare the operative form of the constitutional law.

In the instant case, the proceedings show clearly that counsel for the applicant, when he appeared before the learned trial Magistrate, left a *confusing picture*. He did not clarify that s.72(3) of the Constitution specified that delay in bringing an accused to Court *could be explained* – and this would give *legality* to the delay occasioned. He did not, from the record, advise the Court to create an *opportunity for such an explanation*.

However, even though the Court was not apparently properly guided on that point, still, the learned Magistrate recorded that the delay in question, in bringing the accused before the Court, was not too long. Where did she get that detail from? It all means an opportunity should have been expressly provided for the relevant explanation to be given. There is no express record showing that such an opportunity was created.

Whether or not there is a proper explanation for delay in bringing an accused to Court, is a *question of fact*; and in the proper conduct of a litigious matter, such a question must be dealt with in the first place by the *tribunal of fact*, which is the trial Court. So this particular matter was not properly laid, *bona fide* and with proper details, before the trial Court.

I will, therefore dismiss the instant application *in limine*, and direct that the factual questions be laid before the trial Court, which shall determine the matter, and give directions. Only if the directions raise wider constitutional issues, and cause disagreement, may the applicant come before the High Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 6th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Orina

For the Respondent: Mr. Makura