



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Misc Appli 94 of 2007

REPUBLIC PROSECUTOR

VERSUS

MICHAEL NDAMBIRI NDERI..... ACCUSED

RULING

The Applicant has moved this court by way of a Chamber Application dated 27th November 2007. The applicant seeks that this court will order stay of proceedings in Kerugoya Senior Magistrate's Court Criminal Case No. 611 of 2007 until the hearing and the determination of the second prayer. In the second prayer the applicant seeks the leave of the court to extend time and grant the applicant leave to appeal against the ruling of Senior Resident Magistrate J.N. Onyiego made in Criminal Case No. 611 of 2007 delivered on 17th September 2007. The affidavit in support of the application was sworn by the counsel representing the applicant. He deponed that he was instructed by the applicant to make an application under rule 25 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom of the Individual) High Court Practice and Procedure Rules 2006 hereinafter called the Practice and Procedure Rules. On 6th August 2007 the counsel deponed that he made an oral application before the Senior Resident Magistrate premised on the fact that the applicant had been held in police custody from 30th April 2007 until 7th May 2007 when he was taken before court. That his fundamental right had accordingly been violated. He sought that the Lower Court would refer the matter to the High Court for determination of five issues. Those issues are as follows.

(a) Whether or not the accused person's right and liberty as provided under section 72 (1) has been violated.

(b) Whether or not the accused can be afforded a fair hearing within a reasonable time under section 77 910 of the constitution.

(c) whether or not the accused person's rights to be presumed innocent until proved guilty as provided for under section 77 (2) (a), (b), (c) has been violated.

(d) Whether or not his trial in this case after the violation of his constitutional rights is legal.

(e) Whether or not the proceedings herein and in this case is null and void in view of the foregoing.

The application for referral to the High Court was dismissed on 17th September 2007. The applicant sought leave to appeal against that dismissal which leave was granted. That the proceedings were not supplied to the applicant until 14th November 2007. By that time the appeal was out of time. The application was opposed by the state counsel. In opposition learned state counsel opposed the application on the basis that the applicant had followed the wrong provisions before the learned magistrate. He was also of the view that the application had relied on the wrong rules under the practice and procedure rules. Counsel went through the different rules to show the error made by the applicant. The learned state counsel submitted that the applicant was dishonesty in making the present application for failing to disclose to the court that he had pursued an appeal before Embu High Court being Criminal Appeal 38 of 2007 which appeal he had lost. State counsel drew the attention of the court to the Embu High Court's ruling on that appeal delivered on 18th July 2007. He drew also the attention of the court to the grounds that the applicant relied on that appeal. Those grounds are as follows;-

- 1. That the trial Magistrate did not exercise his discretion judiciously.***
- 2. That the Trial Magistrate contravened Section 57 of Evidence Act which deals with the evidence of bad character in criminal cases.***
- 3. That he relied on extraneous matters/facts.***
- 4. That the Trial magistrate misdirected himself issues he ought to consider before deciding on bail.***
- 5. That he relied on hearsay evidence.***
- 6. That he failed to make any finding on whether the rights of appellant were violated for being held in custody for 8 days.***
- 7. That he failed to take into consideration the counsel submissions and authority submitted.***
- 8. That he failed to appreciate that allegations by DCIO were the basis of the case and were not relevant to the issues of bail.***
- 9. That he failed to appreciate that the appellant is by law presumed innocent unless otherwise proved guilty.***
- 10. That the trial magistrate erred in exhibiting bias against the appellant.***

What is before court is an application for leave to file an appeal out of time. In considering whether leave should be granted it is essential for the court to determine whether indeed the applicant has a right to file such an appeal. As can be seen above the applicant in the Lower Court identified the issues which he required to be referred to the High Court for determination. Essentially the applicant in those issues was saying that his constitutional rights as embodied in sections 72 and 77 of the constitution had been violated. The applicant did indeed appeal before Embu High by Criminal Appeal No. 38 of 2007 and this appeal related to the Lower Court's refusal to admit the applicant to bail. The grounds set out in that appeal amongst others related to the applicant's allegation that his rights under the constitution had been violated by his detention in custody for eight days. It is therefore obvious from the above that the High Court at Embu was invited to make a determination on the issue of the applicant's claim of violation of his constitutional rights. The High Court in Embu having delivered itself of its ruling on 18th July 2007 did consider the issue of that alleged violation. Having made a determination as it did this court cannot sit to hear an appeal from a court of equal ranking. Accordingly the applicant by his application before court cannot be allowed to again regurgitated the same issues before this court. Those issues now are Res

judicata. The applicant's rights now would be to go to the Court of Appeal against the decision of the Embu High Court. In this court's view the Practice and Procedure Rules in particular Rule 11 provides that; a party who alleges contravention of section 70 – 83 of the constitution should file an application directly to the High Court. In other words such a party should not seek the referral of such issues to the High Court. That rule provides as follows;-

“Where contravention of any fundamental rights and freedoms of an individual under sections 70 and 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.”

I find therefore that I am in the agreement with the learned state counsel's submissions and accordingly the application must and does fail.

Dated and delivered at Nyeri this 19th day of March 2008.

MARY KASANGO

JUDGE