REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 836 of 2006

EMMANUEL CHUBAHIRO IMANISHIMWE…….....…… APPLICANT

V E R S U S

REPUBLIC ……..... RESPONDENT

R U L I N G

Emmanuel Chubahiro Imanishimwe (***the applicant***) has filed this application which is by way of Chamber Summons dated 28th November, 2007 in which he seeks that action be taken against the prosecution for violating his fundamental and constitutional rights under Section 72 (3) (b) and Section 77 (1) of the Constitution of Kenya. He further complains that he has been in custody in remand for the last twenty-two months as the bond terms accorded to him were rather harsh.

In his supporting affidavit, the applicant has narrated how he was arrested on 4.2.06 and held at Kiganjo, Kasarani, Gigiri and Kilimani Police Station for a period of eleven (11) days. He was subsequently charged in court on 14/2/06 for being in possession of papers intended to resemble bank notes contrary to section 367 (a) of the Penal Code. He now complains against this delay in being charged before the court and says he has a right to apply to the High Court under Section 84 of the Constitution to seek redress. Further that under section 123 (8) of the Constitution, the High Court has power to oversee any person whose discretion, manner or mode of exercise of his power is questioned.

He has referred to three celebrated decisions in his affidavit although he did not give any copies to the court. These are ***Albanus Mwasia -Vs- Republic - Criminal Appeal 120 of 2004.*** He then says that no attempt has been made by the prosecution to whom the burden rested, to prove to the court that the applicant was brought to court within a reasonable time – Has the prosecution been given that opportunity? He has also made reference to the decision in Criminal Case 119 of 2004 ***Gerald Macharia Githuku –Vs- Republic*** which held that the deprivation by the police of the applicant's liberty was improper. He tops this up with the decision in ***Anne Njogu and five others –Vs- Republic*** which ruled that every minute after the expiry of the permitted time in the constitution is unmitigated since it is a violation of the applicant's fundamental and constitutional right. So it is the applicant's contention that any prosecution against him on the charge is null and void irrespective of the nature of the charge or the weight of the evidence.

The application is opposed by the learned State Counsel who says the applicant is raising factual issues which should be raised before the lower court which is seized of this matter and should that court then find that there are constitutional issues, it will then refer the same to this court. She concedes that the Applicant can come to the High Court under Section 84 of the Constitution but says since the trial court is a tribunal of fact, that is the best forum to address this- reference is made to the decision in David

Karobia Kiiru –Vs- Republic Miscellaneous Criminal Application 860/07 where similar issues were raised. She prays that the application be dismissed.

She points out that the Applicant cannot rely on those grounds to seek variation of bond terms.

That the applicant was held in police custody for a period longer than 24 hours is an issue of fact. Ought the Applicant to address this in the magistrates court or can he come directly to the High Court under Section 84 of the Constitution which provides this:

"***Subject to subsection (6), if a person alleges that any of the provisions of Section 70 – 83 (inclusive) 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.***

(2) The High Court shall have original jurisdiction –

(a) ***to hear and determine an application made by a person in pursuance of subsection (1).***

(b) to determine any question arising in the case of a person which is referred to in pursuance of subsection (3) and may move orders, issue writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 70 to 83."

So that on the face of it – the applicant has a right to come to this court and seek the prayers raised. However he has another option of making those very prayers before the lower court because the operative word in the introductory part of Section 84 is **MAY** not – shall. Applicant does not deny that he has never raised the issue of his delayed arraignment before the trial court – which if he did would then give the prosecution adequate chance to report. Indeed the question of his being held beyond the period recognized by the law is a question of fact. This case can be distinguished from the scenario in ***Albanus Mutua Mwasia's*** case because in Mutua's case, the prosecution had an opportunity to explain the cause of the delay but failed to offer – indeed the appellant in that case had raised the issue of his delay at the earliest available opportunity in the trial court. This was the view considered in Criminal Appeal 182 of 2006 ***Eliud Njeru Nyaga –Vs- Republic.*** As was posed in the decision of ***Dickson Ndichu Kayo -Vs- Republic Miscellaneous Criminal Appeal 639 of 2007*** which is of persuasive authority, who begins voluntarily to justify the extended detention, since the Constitution is silent on this? Should it be the duty of the trial court to consistently inquire from each and every individual who appears before it. ***"Has there been delay in bringing you to court."*** Would we then be departing from our adversarial system to an inquisitorial system – were the court to be expected to always take that initiative.?

No reference was made to the trial court regarding the rights of the accused not to be held longer than the statutory recognized period, no chance was given to the prosecution to explain the cause of such delay – that is an issue of fact which in my opinion ought to be raised before the trial court which has the first opportunity to deal with the question. I don't think there is any justification in the applicant opting under section 84 to move to the High Court when the trial court could easily deal with this matter. Should the applicant then be dissatisfied with the orders of the trial court (***after hearing explanation from prosecution)*** on the question of delay, then he can move to High Court to pursue the same. As for the bond terms the applicant cites section 123 (8) of the Constitution to justify his prayer. However in his submissions to the court, he did not explain why he thinks the bond terms accorded to him were harsh or excessive – indeed he did not even state what the terms were and it would seem the applicant did a "***cut*** and ***paste***" job of his application without due consideration. There is therefore nothing for me to consider.-

Consequently my findings are

(1) The prayer that the applicant be acquitted at this stage is dismissed.

(2) The applicant shall appear before the trial court on the next scheduled mention or hearing date and lodge his complaint to be dealt with by the trial court at the very beginning.

(3) The trial court shall then give the appropriate directions regarding his complaint after hearing the same and if applicant is dissatisfied he shall move the High court by way of an application.

Dated and delivered at Nairobi this 14th day of March,

2008.

H.A. OMONDI

JUDGE