



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Crim Misc Appli 855 of 2007

JOSEPH MUTUA KASIVA.....APPLICANT

V E R S U S

REPUBLICRESPONDENT

R U L I N G

Joseph Mutua Kasiva (***applicant***) has filed this application by way of Chamber Summons under Section 72 (3) (b) of the Constitution of Kenya and Section 77 (1) of the same. He prays that:-

- (1) The court may quash his case Criminal Case J24 of 2003 (Makadara) – it being a retrial.***
- (2) That he was not offered bond terms.***
- (3) That the retrial has not commenced and that delay is unreasonable, unnecessary and not justified.***

He has sworn an affidavit in support of the application, in which he states that he was arrested on 27/9/03 and held at Ruai Police Station. He was taken to court on 7/10/03 for plea on a charge of defilement contrary to section 145 (1) of the Penal Code. He also states that he has a right to move this court under Section 84 of the Constitution. In support of his application, he seeks to rely on the decision of ***Albanus Mwasia -Vs- Republic - Criminal Appeal No. 120 of 2004*** which held that at the end of the day, it is the duty of the court to enforce the provisions in the Constitution, otherwise there would be no reason to have the provision in the first place. He also cites the decision in ***Gerald Macharia Githuku Vs- Republic Criminal Appeal 119 of 2004*** which held that the deprivation by the police of the applicant's liberty, resulted that his trial was not held within a reasonable time. He also explained in his oral address to court that he was initially sentenced to life imprisonment and on appeal, a retrial was ordered – that was on 27/9/06. He says he has been to court and complainant never appears and he had complained to the lower court, so he sought leave to file his application in High Court as he has been in remand custody for one year and a month since retrial was ordered. He therefore prays that the case in the lower court be dismissed.

The application is opposed, by Mrs Obuo who appears for the State, urging that the matter should first be addressed before the trial court and she has referred to the decision in ***Maurice Mugicha & 5 Others – Vs- Republic*** in which the court stated that the state must be given an opportunity to explain the delay and coming to the High Court at this stage is premature. She also sought and rely on a High Court decision of persuasive nature i.e. ***David Karobia Kiiru*** which raised similar issues. Unfortunately the learned State Counsel did not give the citations for the two decisions and she did not respond to the question of delay in prosecuting the matter which is pending before the lower court, which is why the applicant in

response still laments about his long stay behind bars.

The question as to whether there is reasonable explanation for the delay in bringing an individual to court within a period of 24 hours is a question of fact. I am keenly alive to the provisions of Section 84 of the Constitution, which gives the applicant an option to file such a prayer before the High Court. Yet wouldn't it be easier and more convenient to raise the same issue before the trial court, which is indeed a tribunal of fact, give the prosecution a chance to explain the cause of delay in bringing the applicant to court, and in the event that the applicant is dissatisfied with the lower court's decision, then move to the High Court. I say this really because the issue at hand is not even a matter for constitutional interpretation so as to justify the applicant exercising his option under Section 84 of the Constitution, it is a simple question of fact ***“why did the police keep the accused in custody for such or prolonged period before charging him.”***

The matter in which the applicant was charged for defilement is pending – re-trial – so he still has a very early opportunity to raise the question of delay in being brought to court, before the trial court. I think that was the spirit of the decision in *Eliud Njeru Nyaga –Vs- Republic Criminal Appeal* 182 of 2006 and indeed it is in that case that a distinction was made from *Albanus Mwasia Mutua* Case which the applicant seeks to rely on. In *Albanus Mwasia Mutua* case Criminal Appeal 120 of 2004, the appellant had raised the question of being held in police custody beyond the legally recognized at the earliest opportunity available which was before the trial court. Indeed the provisions of Section 72 (3) (b) are that-

“(3) A person who is arrested or detained

(b) Upon reasonable suspicion of his having committed a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before the court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

It is this burden which in my view should be addressed by the prosecution at the first instance as a question of fact, before the trial court, which is a tribunal of fact.

The Constitution is silent as to who should initiate the explanation for the delay – would it be the trial Court? If that were to happen then doesn't that turn the court's role thus an inquisitorial one? Would it be the prosecutor and how would that fit in with the adversarial system? Would it be upon the Accused to raise it? – then again what about the accused who is not aware of those provisions of the Constitution and what about the long repeated refrain about ignorance of the law not being a defence?

To my mind, since the applicant has already raised the issue here and since he has a matter pending before the trial court, he should raise the same at the earliest available opportunity, so as to give the police or prosecution a chance to give a factual explanation to that tribunal of fact. If he is dissatisfied with the trial court's decision, he then applies to High Court. It is true that applicant has rights which must be given effect in the trial process, and the trial magistrate would be aware of that, as would the prosecution.

As regards the delay in prosecuting his case, applicant has ***simply*** said it has taken a long time – he claims to have complained to the lower court about this – he did not attach any copy of ruling from the trial court to confirm that the issue had been raised and addressed by the trial court, nor has he attached any copies of proceedings of the trial court to confirm how many times he has appeared in court for his re-trial and I am therefore unable to know why his case has been adjourned many times or not proceeded at all. The upshot of all this is the following:-

(1) *The main prayer seeking for dismissal of the case in the trial court is dismissed.*

(2) Applicant to appear before the trial court on the next scheduled date and lodge his complaint, to be dealt with by the trial court at the very beginning.

Dated and delivered at Nairobi this 14th day of March, 2008.

H. A. OMONDI

JUDGE.