



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

Criminal Appli 66 of 2008

MAQBUL AHMED BUTT..... APPLICANT

V E R S U S

REPUBLIC OF KENYA.....RESPONDENT

R U L I N G

The application by way of originating notice of motion is dated 6/2/08 and seeks orders from this court for a declaration that the Applicant's Constitutional rights have been violated by his continued prosecution in Nairobi Chief Magistrate's Court 625 of 2005.

The applicant also seeks that the hearing of Criminal Case 625 of 2005 be stayed and that his prosecution in the quoted criminal case be declared illegal, null and void. The application is supported by an affidavit sworn by the applicant. The applicant's counsel Mr. Ochako has submitted that the applicant was arrested on 1st June 2006 and held in custody until 14/6/05 thus violating his rights under Section 72 (3) (b) and Section 77 (1) of the Constitution of Kenya.

He says no explanation was given to court as to why there was such a delay and has cited the decision in **Gerald Macharia Githuku -Vs- Republic Criminal Appeal 119 of 2004** which held that failure to bring an accused person to court within 24 hours is a contravention of the rights of an accused person. Mr. Ochako points out that prior to being arraigned before the Chief Magistrate's Court, the matter was brought on 30/3/05 and the court issued a Warrant of Arrest and subsequent to that accused was arrested and brought to court. Mrs Gateru, learned State Counsel has opposed the application on grounds that the applicant has not lodged his complaint about being held for more than 24 hours before the trial court and that the appropriate judicial practice would be for an applicant to raise the matter before the trial court for determination and reference is made to the decision in **David Karobia Kiiru -Vs- Republic H.C. Misc. Criminal Application 863 of 2007** which is of persuasive value.

Miss Gateru further submits that even Section 72 (3) (b) of the Constitution recognizes the fact that a person can be taken to court after the expiry of 24 hours and there can be an explanation for such failure – so this opportunity ought to be given to the prosecution and the matter ought to be raised before the trial magistrate who issued the Warrant of Arrest. Another decision that the learned State Counsel has relied on to support her argument that the application is premature, is the decision in **Eliud Njeru Nyaga -Vs- Republic Criminal Appeal 182 of 2000**. Would failure to present an accused person to court within 24 hours upon arrest automatically result in an automatic acquittal? Mr. Ochako's position is that Section 11 of the Constitution gives this court supervisory power, when read along with High Court Procedural Rules, which provides that where constitutional contravention is alleged, the application will be made

directly to the High Court and that Section 7 of the Procedural rules (which learned State Counsel seems to be referring to, is an option, that the initiative can be from the lower court. Now he says the issue was raised before the lower court but the same was not addressed in the court's ruling.

Section 72 (3) of the Constitution provides as follows:-

“A person who is arrested or detained-

- (a) for the purpose of bringing him before a court, in execution of the order of the court or,*
- (b) upon reasonable suspicion of his having committed or being about to commit 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 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 shall rest upon any person alleging that the provisions of this subsection have been complied with.”*

The applicant said to have been arrested on 1st June, 2005 and kept in custody until 14th June, 2005. His matter is apparently pending in the magistrate's court. Although his Affidavit does not disclose what offence he was charged with his annexure MAB 1 (a) is a Warrant of Arrest showing he was required to be charged in court for obtaining money by false pretences contrary to section 313 of the Penal Code.

His counsel says the question of his prolonged stay was raised in the trial court but the learned magistrate did not address it in the ruling. Of course this comes as a new issue which Mr. Ochako had not alluded to in his initial submissions and it takes the nature of an ambush on the Respondent. Secondly there is no certified copy of the lower court's proceedings and/or ruling, to confirm that the question of delay had been canvassed.

A trend has now developed with a flood of applications of this nature courtesy of the decision in ***Albanus Mwasia Mutua -Vs- Republic Criminal Appeal 120 of 2004*** where section 72 (3) b of the Constitution was addressed and which resulted in an acquittal of an appellant and so now the common refrain is that once an accused person shows that he was not taken to court within 24 hours, it should result in an automatic acquittal and termination of the lower court's proceedings.

In David Karobia's case (*infra*) which is of persuasive nature, the learned Justice J.B. Ojwang was of the view that ***“the trial court conducting the trial is the tribunal of fact, and any factual matter which emerges, that might taint the regularity or propriety of the trial process is to be stated bona fide before the trial court which will then give an appropriate direction.”*** In fact this also gives the prosecution a chance to respond to and explain the cause of the delay. It is only after that if any question of constitutional interpretation arises, then an application can be made in the High Court.

Indeed this approach is fortified by the Criminal Appeal No. 182 of 2006 ***Eliud Njeru Nyaga –Vs- Republic*** – the prosecution would be given opportunity to offer an explanation about the delay and I think this should be done before the trial court as all the relevant facts are before the trial court.

To my mind, in the absence of evidence to the contrary no one has even mentioned to the trial magistrate about the delay nor has the prosecution been given a chance to explain let this first take place. The orders are therefore that-

- (a) It is premature to have this court declare the applicant's constitutional rights violated and I thus decline to make such orders.*
- (b) There is no reason to stay the criminal case pending in the lower court.*
- (c) The applicant shall appear before the trial court on the next scheduled mention or hearing*

date and shall lodge the complaint to be dealt with by the trial court at the very beginning.

(d) The trial court to give appropriate directions and should the applicant be dissatisfied, then an application to the High Court may then be made.

Dated and Delivered at Nairobi this 11th day of March, 2008.

H.A. Omondi

Judge