



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appli 36 of 2008

ANDREW MBAYIZA APPLICANT

-VERSUS-

REPUBLIC RESPONDENT

RULING

The applicant came before the Court by way of Chamber Summons dated 22nd January, 2008 and brought under s. 351 of the Criminal Procedure Code (Cap. 75, Laws of Kenya). He claimed that his constitutional and fundamental rights as provided for under s. 72 (3) of the Constitution of Kenya, had been violated after he was arrested and detained in connection with a criminal charge, as he was not brought to Court within 24 hours of being held in Police custody.

The application is supported by the applicant's affidavit in which he avers that he was arrested on 19th May, 2007 and held at Kileleshwa Police Station for five days, before being brought to Court on a charge of theft contrary to s. 275 of the Penal Code, and on other charges as well. He appeared before the Court at Kibera Law Courts, on 24th May, 2007 and pleaded not guilty and, since then, has been remanded in custody. The applicant avers that the trial Court had granted bond terms so he may be tried while enjoying personal liberty, but he was unable to partake of the same, on account of impecuniosity.

The applicant avers that he is ailing, and the custodial conditions have made his health status deteriorate. He depones that on account of his remand in custody, his family and dependants have suffered.

The averments in the affidavit formed the basis of the applicant's submissions in Court. Regarding his health status, the applicant produced a letter dated 10th December, 2007 from Kenyatta National Hospital, which showed that he had undergone appendicectomy and which recommend that "*the patient be put on soft light diet*". It was the applicant's contention that the prison authorities were not providing him with the diet approved by the nutritionist.

In response, learned respondent's counsel, **Mr. Makura** urged that the application was both premature and misconceived, and should be struck out.

Mr. Makura made submissions on the terms of s. 72 (3) (b) of the Constitution, which required that even where there had been delay in bringing an accused person before the Court, this by itself, was not

inexorably a violation of the accused's trial rights, and that there may be a valid explanation for the delay which the Constitution itself provides for; and the prosecution is to be accorded an opportunity to provide an explanation, if there is. Learned counsel urged that the application failed to provide detailed facts on the circumstances of the detention, and that in any case, the same should have been stated before the trial Court. Counsel submitted that if it is bail/bond terms that lay at the core of the instant application, then it should have been differently conceived.

After reading the applicant's Chamber Summons and considering it in the light of the supporting affidavit, I have come to the conclusion that the applicant's application has mixed up the question of the constitutional right to be charged in Court expeditiously (s. 72 (3) of the Constitution), with the right to bail/bond. On account of this ***mix-up***, the application fails to make a ***bona fide***, focused prayer to be determined on the basis of the Constitution. Since claims founded on the fundamental-rights guarantees of the Constitution frequently have ***qualifications***, a proper constitutional application has to bear factual evidence that would fully ***illuminate the constitutional grievance***. In this case, the larger part of the supporting affidavit is devoted to unaffordability of the bond terms granted by the trial Court; to the applicant's impecuniosity; to the applicant's personal and family hardships occasioned by his being held in custody.

Is the real gravamen, that the applicant needs to be released on less rigorous bond terms? Or that his constitutional rights have been violated? At paragraph 20 of the supporting affidavit he depones:

“THAT, though the delay by the Police to arraign me in Court so that my trial can begin has not resulted in any prejudice, this Court should not disregard the failure by the prosecution to abide by the Constitution”.

From the applicant's evidence and from his submissions, it is clear that he lacks a focused claim based on s. 72 (3) or s. 72 (5) of the Constitution which are shown on the application's caption. ***Bona fides*** lies at the root of any application by which a party moves this Court to determine questions of rights; and this, in my assessment, is not the mark of the applicant's claim founded on the Constitution, in the instant case.

On the facts of this case, I have come to the conclusion that the proper concern of the applicant would be in the nature of ***bond terms***; and on this point, a proper application has to be made before the trial Court, in the first place.

Consequently I dismiss the application.

Orders accordingly.

DATED and DELIVERED at Nairobi this 5th day of March, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

Applicant in person