REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Misc Crim Appli 30 of 2007

ZABLON M. SHIKUNZI …….. APPLICANT

V E R S U S

REPUBLIC ……...…..……. RESPONDENT

R U L I N G

The applicant, **ZABLON M. SHIKUNZI**, was charged with two other accused persons, with the offence of murder. Their trial is still pending before this court in Criminal Case No.7/2005.

Even though the criminal case was still pending, the applicant has moved the court, through a Notice of Motion which was brought pursuant to ***sections 72 (3) (b); 72 (1) (g); 77 (2) (c); 71 (2) (d); 70 (a) and (b);*** and ***72 (6)*** of the Constitution of Kenya.

Although the applicant was not represented by an advocate, at the hearing of his application, this court wishes to commend him for putting forward very clear legal submissions which were backed with legal authorities.

The applicant had four prayers as follows:-

(i) Stay of the proceedings in the murder case until this application is determined.

(ii) A declaration that the police had violated his constitutional rights, by not bringing him to court within the period of time stipulated in section 72 (3) of the Constitution.

(iii) An order that he be afforded an opportunity to continue with the trial from outside the prison walls. For now the applicant is complaining that;

(a) His health status does not allow him to stay in prison for long. The continued stay in jail has caused him a deterioration of his health.

(b) The failure by the prison authorities to provide him with the expensive medication which he requires. His view is that if he were to be allowed to be outside the prison walls, he would be able to work hard, so as to earn the money needed for his medication.

(c) The diet which he is fed on whilst he is in remand was not conducive for his good health.

(d) The prison authorities have no escort which is necessary to enable the applicant be taken to the Moi Teaching and Referral Hospital, Eldoret, where the applicant was due to undergo surgery.

(iv) An order that the applicant be duly compensated for the gross violation of his constitutional rights.

It is the applicant's case that he was arrested on **28/3/2005**, but that he was not taken to court until **5/5/2005**. By his calculations, that was some **39** days from the date when he was arrested.

In the circumstances, the applicant asked this court to nullify the charges against him, so that he may be set at liberty.

When called upon to respond to the application the learned State Counsel pointed out that the applicant was called upon to take a new plea after the consolidation of three cases, all facing the applicant.

According to the learned State Counsel, if the applicant felt that his constitutional rights had been violated, the applicant ought to have taken up the issue before plea was taken.

But in any event, as far as the State was concerned, the applicant's rights under ***section 72 (3)*** of the Constitution had not been violated. The learned State Counsel indicated that they would be calling the Arresting Officer as a witness, who would explain the reasons for the apparent delay in bringing the applicant before the court, following his arrest.

The applicant told this court that he did not have any objection to the arresting officer being called to testify as a prosecution witness.

In the light of the fact that the arresting officer may yet provide the trial court with an explanation regarding the delay in bringing the applicant before the court, I find and hold, that it is premature for this court to determine whether or not the police did take the applicant before the court "*as soon as it was reasonably practicable."*

Should the arresting officer provide sufficient explanation to the court, to satisfy the court that the applicant was taken to court as soon as was reasonably practicable in the circumstances of this case, the court would then hold that the applicant's constitutional rights had not been violated.

In order to provide the State with the opportunity to make available its explanation to the court, it is necessary that the case against the applicant should not be stayed.

Furthermore, it is only if and when the court will have determined that the applicant's constitutional rights had been violated that the court would then determine whether to acquit the applicant or to order that he be appropriately compensated, or to order that the charges facing the applicant be nullified, or also that the applicant be compensated.

Meanwhile, the applicant is reminded that the offence with which he has been charged is not bailable. Therefore, even if the applicant could have a better chance of safeguarding and promoting his good health if he was not behind prison walls, this court cannot grant him bond or bail for the capital offence.

In the light of the medical reports filed by the applicant, it is imperative that the recommendations by the doctors attending to the applicant be complied with. In that regard, the Officer-In-charge of the Kakamega Prison is directed to ensure that the applicant is escorted to the Moi Teaching and Referral Hospital, Eldoret, for the necessary surgical procedures recommended by the doctors who have so far been attending to the applicant. A report should be filed in court within the next 45 days from today, detailing the compliance with this order.

Before concluding this ruling, I wish to make some remarks regarding the authorities cited by the applicant.

In **ALBANUS MUTUA LEMBA Vs REPUBLIC, MACHAKOS HC CR.A. NO.112 OF 2003**, the

Hon. Wendoh J. declared the appellant's trial a nullity, on the grounds that the person who had prosecuted the case before the trial court was not a qualified prosecutor. That decision was founded on the provisions of ***section 85 (2)*** of the Criminal Procedure Code, which, at the material time, required that a public prosecutor (if he was a police officer) should be of the rank of at least an Assistant Inspector.

That case has no application to the matter before me.

In **GERALD MACHARIA GITHUKU Vs REPUBLIC, CRIMINAL APPEAL NO.119 OF 2004**, the court unanimously held as follows:-

"***We have come to the conclusion, after a careful weighing of theses two considerations in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72 (3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable."***

Applying the holdings in that authority to the case before me, I have already found that the State has indicated that they will offer an appropriate explanation to the trial court, in an endeavour to show that the applicant was taken to court as soon as was reasonably practicable.

In **KIYATO V. REPUBLIC [1986] KLR 419**, the Court of Appeal held that there was a possibility that the appellant did not fully understand the proceedings sufficiently because he was given a Somali interpreter, whereas he was a Borana. The court quashed the appellant's conviction, but remitted the case for a retrial.

In **NDEDE V. REPUBLIC [1991] KLR 567**, the Court of Appeal held that notwithstanding the provisions of ***section 348*** of the Criminal Procedure Code, the bar to an appeal against conviction based on a guilty plea was not absolute.

The court observed that before ***section 348*** can apply to a convicted person, it must be clear that the plea of guilty is really such a plea and that the appellant is not prevented or debarred from showing that the plea was not really a plea of guilty or did not amount to a plea of guilty.

That aspect of that authority is not relevant to the application before me. However, at page 573 of the law report, the Court of Appeal expressed itself thus:-

"***We would add that where, as happened in this case at the time of taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of his arrest etc then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court. The court should then put that explanation to the accused and inquire of him if it affects his plea."***

If the court accepts a plea of guilty without considering whether or not the prevailing circumstances were unusual, the decision on the issue as to the voluntariness of the plea may result in a miscarriage of justice.

Those are important issues to be borne in mind, although they are not applicable to this matter, as the applicant did not plead guilty.

In **SWAHIBU SIMBAUINI SIMIYU & ANOTHER VS REPUBLIC, KSM, CRIMINAL APPEAL NO. 243 OF 2005**, the Court of Appeal said that by virtue of the provisions of section 77 (2) of the Constitution and section 198 (1) of the Criminal Procedure Code;

"…….***..in a criminal trial the language of the trial must be understood by the accused person and that right extends to the advocate representing the accused person. If the advocate does not understand the language of the trial; even if the accused himself understands the language of the trial but his advocate does not understand the language, the language must be interpreted to the advocate into English."***

For those reasons, the language used by the witnesses, the interpreter (if any), and the accused person ought to be specified in the record of the proceedings, so that there is no room for dispute over such issues.

Having so said, I find that that authority is not applicable to the matter before me.

Next, I have failed to find any requirement that if a person wishes to assert that his constitutional rights had been violated, he must do so before his plea was taken, as was contended by the Republic herein.

If such requirements were to apply that would limit the enforcement of constitutional rights and freedom to only persons who were facing criminal charges.

I hold that the protection of the fundamental rights and freedoms, as enshrined in the Constitution may be demanded by any individual regardless of whether or not he was facing or about to face criminal charges.

For all the reasons stated herein, I find no merit in the application before me. The same is therefore dismissed.

Delivered, dated and signed at Kakamega this 5th day of May, 2008

FRED. A. OCHIENG

J U D G E