



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Criminal Case 27 of 2007

REPUBLIC PROSECUTOR

VERSUS

WILLIAM CHESIR KIPKORE ACCUSED

R U L I N G

The Accused William Chesir Kipkore was arraigned in this Court on 12th July, 2007 and charged with the offence of murder contrary to the provisions of Section 203 as read with Section 204 of the Penal Code.

In the Charge Sheet it was alleged that on the 28th February, 2007 at Kabasiran Village, Mon Location in Marakwet district within the Rift Valley Province, jointly with others not before the Court murdered one Joel Kiplimo Kaino.

At the hearing, the Accused's Counsel, Mr. Sirtuy made an application that the proceedings be declared a nullity from the time the Accused took his plea and he be ordered discharged/released on the ground that the Accused upon his arrest on 19th March, 2007 was held in police custody for a period of 107 days in violation of the provisions of Section 72 (3) of the Constitution.

Section 72 (3) (b) of the Constitution provides that:-

“3. A person who is arrested or detained –

(a) -----

(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 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 a Court as soon as reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

Mr. Sirtuy cited the Court of appeal decision of **ALBANUS MWASIA MUTUA –V- REPUBLIC CRIMINAL APPEAL NO. 120 OF 2004.**

Ms. Oundo for the Republic opposed the oral application. The first issue was a point of law. She questioned the manner in which the application was made to the Court. Ms. Oundo submitted the Accused ought to have filed a formal application under the provisions of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.

Rule 11 of the said Rules reads as follows:-

“11. Where contravention of any fundamental rights and freedoms of an individual under Sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.”

Ms. Oundo submitted that the correct procedure under the aforesaid provision is to make a formal application and that it was improper for an oral application to be made in the circumstances. Mr. Sirtuy on his part stated that strictly he did not make an application but an objection against the prosecution on a point of law. He said that in the Court of Appeal cases of **ALBANUS MUTUA** and that of **PAUL MWANGI MURANGA –V- REPUBLIC CR. APPEAL NO. 35 OF 2006**, no formal applications were made but the issue raised was a point of law even at the Appellate stage.

I have considered the submissions by both Counsel. I think that our jurisprudence is at a threshold in the light of the decision in **ALBANUS MWASIA MUTUA** by the Court of Appeal. It was a jurisprudential milestone in our country never seen before. It has given a long overdue jolt to the criminal justice and penal systems that the provisions of this Constitution of Kenya are the Supreme law of the land under Section 3 thereof and that the Fundamental Rights and Freedoms of the Individual are not matters to be taken lightly. Without such enforcement there can be no Rule of law.

Having said that, it is my view that both the aforesaid cases were Appeals in the Court of Appeal. The Court of appeal is usually moved by way of filing a Memorandum of Appeal.

This is a formal process. Any points of law taken and set out in the Memorandum of Appeal when presented in my view amount to a formal process. It is my humble view that the taking of points of law in the Court of Appeal cannot be said to be made “orally”. The issues are part of the grounds of appeal. They are underpinned on pleadings which is a formal procedure. It is to be noted that Appeals in the Court of Appeal are second appeals and only points of law are taken in any event. This view is my own and subject to the superior jurisdiction and views of the Court of Appeal. It is only given in passing.

I, therefore come back strictly to the jurisdiction of this Court. The Court has to ask itself whether it is mandatory that there be a formal application under the aforesaid High Court Practice and Procedure Rules or whether in the High Court all the Accused has to do is rely on the record i.e. the Charge Sheet (in respect of date of arrest) and the proceedings (as to when he was first arraigned in Court to take his plea) and calculate the number of days when the Accused was confined or detained to determine whether his being so held was unconstitutional and if he should be released.

The aforesaid Rules are made by the Honourable Chief Justice under powers given to him under Section 84 of the Constitution. Section 84 (1) provides that:-

**“84 (1) Subject to sub-section (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter, which is lawfully available, that person (or that other person may apply to the High Court for redress.
.....”**

Sub-rule 6 provides that:-

“(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this Section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).”

I now come to the Rules themselves. Through L. N. No. 6 of 2006 the Chief Justice published and made the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. Rule 11 as shown earlier states that:-

“11. Where contravention of any fundamental rights and freedoms of an individual under Section 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.”

Rule 12 sets out the manner the application is to be presented and that is by way of filing a petition. The rule reads:-

“12. An application under Rule 11 shall be made by way of a petition as set out in Form D in the Schedule to these Rules.”

However, for matters which are already before or pending before the High Court, a specific provision and exception is made under Rule 23.

Rule 23 provides that:-

“23. Where a constitutional issue arises in a matter before the High Court, the Court seized of the matter may treat such an issue as a preliminary point and shall hear and determine the same.”

This is an expressly made provision special to matters pending in the High Court.

I therefore hold that while it is mandatory for applications raising constitutional issues in respect of causes of actions outside judicial proceedings or which arise in matters before the Subordinate Courts, to be by way of petition. In the High Court when any constitutional issue arising the Court may deal with the matter within the same proceedings as a preliminary point or question. The Accused herein therefore is not obliged to file a formal application to raise the question he has taken up.

It is my view that there is a distinction between an objection raised as preliminary point of law in civil matters generally and the preliminary point envisaged in Rule 23 herein. The objection on preliminary points of law in civil matters (and perhaps even in constitutional matters) are those which were described by Sir Charles Newbold P. in the Court of Appeal case of MUKISA BISCUIT MANUFACTURING CO. LIMITED –V- WESTEND DISTRIBUTIONS LTD (1969) E.A. 697 at p. 701 – when he said:-

“ A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is in the exercise of judicial discretion.”

In the Constitutional issue raised herein the aforesaid principles are not strictly applicable. The Accused has raised matters of fact regarding the date he was arrested and number of days he was detained. The Court has to make an enquiry on the said facts. Under Section 72 (3) (b), the Prosecution, if opposed to the application has a right to respond and prove that the allegations are untrue or have some justification for the delay. The Section provides, inter alia:-

“..... the burden of proving that a person arrested or detained has been brought before a

Court as soon as reasonably practicable shall rest upon any person alleging that the provisions of this Section have been complied with.”

It is my view therefore the question of the date of arrest, length of alleged detention and if true, whether those facts justify or explain the delay so that the Court can exercise its discretion under the aforesaid provision as to whether to accept the reasons given or not, are matters of fact that give rise to contest and controversy. They are matters of fact that need to be proven.

While the Accused may wish to merely rely on the record and possibly the Court can determine the date of arrest, date of arraignment and length of detention, the State Counsel representing the State may not always have the full facts leading to the alleged detention and may require evidence to be tabled by the arresting officer, investigating officer or otherwise. The State Counsel may be inhibited by the rules against admissibility of hearsay evidence in giving facts from the Bar.

As a result, it is my view that in appropriate cases where the facts are contested or disputed then the High Court should consider directing the parties, to present their evidence by way of affidavits. This will lead to a fair determination of the matter and prevent embarrassment of the State Counsel or even the Applicant’s Counsel (in this case the Accused’s Counsel) in turning into a witness susceptible to cross-examination.

It is also my view that treating a constitutional issue in a matter before the Court as a preliminary point means that the Constitutional issue must be heard immediately it is raised and takes priority over the hearing at hand or other proceedings. The Court must stop in its tracks once a constitutional issue is raised and inquire and determine whether the complaint or issue is a constitutional one and thereafter take appropriate action.

In the present case, therefore, I do hold that the issue raised by Mr. Sirtuy is a Constitutional issue and it is hereby treated as a preliminary point to be heard forthwith before any other step is taken. The next step is to determine whether the facts are seriously disputed such that there is need to order that the evidence be tendered through affidavit evidence or not.

In the present case, Ms. Oundo has not disputed that the Accused was detained and was in police custody for 107 days before he was brought to Court as alleged. He was arrested on 19th March, 2007 and only brought to Court on 12th July, 2007. This in fact shows that the Accused was detained for 121 days and not 107 days.

Ms. Oundo from the Bar explained why this happened. She said that sometime in 2004, the Resident Judge at Eldoret, my Predecessor issued an order that before an accused is brought to Court the witness statements had to be completed first and filed together with the information to charge. That following the order the State had to ensure that all witness statements were in place before the Accused was brought to Court. Ms. Oundo submitted that this is what caused the delay and that the State was bound by the practice direction given by the Judge. Mr. Sirtuy did not dispute these facts stated from the Bar. As a result, there is no need for taking of evidence on the question and I am able to make a finding and make decision.

Ms. Oundo referred me to the High Court Case, Criminal Case No. 30 of 2007, **REPUBLIC –V- HENRY KIPNGETICH KOSGEI & ANOTHER** (unreported) in which the same question and situation arose. In his ruling the late Justice Kaburu Bauni had, inter alia, this to say:-

“In this case Mr. Omutelema for the prosecution explained to court the reason why the two accused persons who faces a capital offence could not be brought to court within fourteen days as provided for by the constitution. He told the court that in the year 2004 Justice Gacheche the then Resident Judge issued a Notice to the state Law office to the effect that before an accused charged with murder is arraigned in court the state should first prepare bundles of witnesses statement and file the bundle together with the injunction. He told the court that this is what caused the delay as they were preparing the bundles. Police made all effects to prepare them in time but they were not able

to beat the time.

I have considered the explanation by the learned state counsel. I too made inquiries and did confirm that indeed there was such an order issued. With all due respect to my senior sister judge I feel that this was wrong and not proper. Requirements of presenting committal documents to court was done away with when part VIII of Criminal Procedure Code was repealed by Criminal Law (Amendments) Act count No.5) of 2003. That Act came into effect on 25th July 2003 and since then there is no legal requirement that the state do file any bundles of witness statements with court. I believe that one of the main objectives of repealing that part was to make murder trials faster. If there was need to have witnesses statements filed together with information that requirement would have been put in the law books or our practice rules issued by the Honourable Chief Justice. This has never been done. There is therefore no justification for the court to ask the prosecution to file those statements. In this case, however the court can understand the dilemma the prosecutions were faced with. They could not arraign the accused in court within the stipulated time because the statements were not ready. This confusion was caused by the court and I cannot blame the state office. Thus though I find there was violation of accused's constitutional rights, I still find the explanation by the state caused to be satisfactory in the circumstances. He had to comply with the court's directives though as I have said I feel the directives were not right. For the above reasons therefore I dismiss the preliminary objections on that ground."

In the said case the Accused had been held in custody for two months (60 days). In the present case the period is four (4) months (121 days).

I do hereby agree with the views of my late Brother Justice Bauni regarding the practice direction given by the Court. The same was not provided for in law. On the issue whether this is a justifiable and reasonable explanation for holding the accused beyond the prescribed period, with respect, I beg to differ with my late Brother Judge.

The State may have been bound by the practice direction by the Judge and the Court may have been the one that created the confusion, but this is not good reason to take away the Accused's Constitutional rights to liberty. The Court is not infallible or in the circumstances of this case above the law. The Courts must be the first defenders of the Constitution. The injustice which has been done to the accused must be redressed forthwith. There has been gross violation of the Section 72 (3) of the Constitution. The period of four (4) months is extremely long for any purported reason given and this alone is sufficient ground for this Court to order the release of the accused forthwith.

I hereby dismiss the charge against the accused and order that he be released forthwith from prison custody. He shall be released today unless he is otherwise lawfully held. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF JUNE, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Sirtuy for the Accused

Ms. Oundo for the State

Accused person