



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

Criminal Revision 1 of 2008

REPUBLIC

v.

TALIB ABUBAKAR & 5 OTHERS –

[Makadara Criminal Case Nos. 5292/07 & 5293/07]

-AND-

REPUBLIC

v.

TALIB ABUBAKAR & 5 OTHERS

[Kibera Criminal Case Nos. 8375/07 & 8376/07]

RULING ON REVISION

This Court's revision jurisdiction under ss.362-367 of the Criminal Procedure Code (Cap.75, Laws of Kenya) was invoked by the Director of Public Prosecutions, by his letter of 14th January, 2008. The essence of the said letter may be summarized as follows.

The accused persons were arrested on 13th December, 2007 at 3.00 a.m., at Eastleigh Estate in Nairobi, and they were arraigned in Court, at Makadara Law Courts, on 17th December, 2007 on charges of being in possession of explosives contrary to s.89(1) of the Penal Code (Cap.63, Laws of Kenya). Before the Court could take plea, a preliminary objection was raised by counsel for the accused persons: that the Police and the prosecution had chosen not to be bound by the requirements of the Constitution and the law, in relation to the charges in question, as directed in another Court, and that in furtherance of the said non-compliance, they were now coming before the Makadara Law Courts as a Court of choice. It emerged that the Magistrates' Court at the Nairobi Central Law Courts had already *refused to admit the same charges* – on the ground that the accused persons were not brought to Court within the period contemplated by s.72(3) of the Constitution.

The Makadara Law Courts Chief Magistrate, on 18th December, 2007, disqualified the Court from hearing the cases in question; she directed that the relevant files be sent to the Chief Magistrate's Court, at the Nairobi Central Law Courts, for directions.

The prosecution then took the case to the Kibera Law Courts, on the same day, and the accused persons were arraigned before the Chief Magistrate's Court there, on similar charges, of being in possession of explosives. The defence counsel raised objections on similar grounds to those which had been raised at Makadara Law Courts. This resulted in the Kibera Chief Magistrate's Court giving a ruling in which it, too, disqualified itself from hearing the case, and it directed that the relevant files be placed before the Chief Magistrate at the Nairobi Central Law Courts, for directions.

It was represented to this Court that, in the proceedings before both the Makadara and Kibera Courts, there was an error on the face of the record and, on that account, the relevant Magistrate's Court records be placed before the High Court for revision of the two rulings aforementioned, of 18th December, 2007.

The applicant's case is, firstly, that the Subordinate Courts had no powers to refuse to admit a charge-sheet on grounds other than those contained in s.89(5) of the Criminal Procedure Code (Cap.75, Laws of Kenya); secondly, that the Subordinate Courts have no powers or jurisdiction to decline to admit a charge-sheet, or to take plea, on the ground that the criminal proceedings constitute an abuse of the criminal process; thirdly, that the Subordinate Courts had no powers or jurisdiction to refuse to admit a charge-sheet, or to take plea, merely on the ground that the accused person was not brought before the Court within the period stipulated in s.72(3) of the Constitution; fourthly, that, by preventing the admission of charge-sheet, the Subordinate Courts erred and misdirected themselves, as they had not afforded the prosecution an opportunity for an explanation, as contemplated by s.72(3) of the Constitution; fifthly, that since all the three Chief Magistrates' Courts involved had equal jurisdiction, it was improper and unprocedural for the Makadara and Kibera Courts to refuse to take plea, and instead refer the cases to the Chief Magistrate at the Nairobi Central Law Courts, to "give directions"; and sixthly, that as no party had asked of the several Chief Magistrates' Courts that they disqualify themselves, their self-disqualification amounted to an improper abdication of jurisdiction.

Learned counsel **Mr. Ndubi** submitted at the beginning that the High Court could proceed on its own, and dispose of the gravamen in the reference by the Attorney-General's office, making appropriate orders on revision. The point was well conceived, in the light of s.365 of the Criminal Procedure Code (Cap.75, Laws of Kenya) which provides that:

"No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision:

Provided that the court may, when exercising those powers, hear any party either personally or by an advocate...."

In the course of addressing revision issues, it has, however, become apparent to me that an opportunity to take counsel's submissions cannot but enhance quality in the ruling given. In **Charles Gitau v. Republic**, Criminal Revision Case No. 482 of 2007 this Court gave directions on the exercise of the revision jurisdiction, as follows:

"Generally, revision matters touch on the legality, propriety and correctness of proceedings in the Magistrates' Courts. Inevitably, therefore, such matters are often very important in terms of proper interpretations of law.

"Whenever such is the case, then the High Court comes to recognize that there are not always single, uncontrovertible answers in matters of legal interpretation; and hence, valid and proper decisions, quite often, can only be arrived at after hearing both sides.

"Therefore, I hold that, with very few exceptions, matters coming up for revision by virtue of the Court's powers provided for in ss.362, 363, 364 and 365 of the Criminal Procedure Code (Cap.75) should be accompanied by the calling-up of records, and service on both sides, to the intent that they should come and canvass their positions, before the Court takes a decision.

"This practice would, in my opinion, be of great assistance to the High Court, considering that it

hears a large number of cases every day, and time is often extremely short.”

Learned counsel for the applicant, **Mr. Warui** made an oral presentation of the Attorney-General’s gravamen, as set out in the letter of request for revision aforementioned. He urged that the decisions taken by the Makadara Law Courts and Kibera Law Courts Chief Magistrates, respectively, to refuse the prosecution case a hearing, and to remit the matters to the Nairobi Central Law Courts Chief Magistrate, were wrong in law and should be annulled. Learned counsel wondered what legal or jurisdictional consideration could justify *suo motu* decisions by the Makadara and Kibera Chief Magistrates, to defer to their fellow Chief Magistrate, in the hearing of matters properly lodged in Court by the State. Counsel submitted that there was no legal basis upon which the Chief Magistrates’ Courts could refuse to take plea, in criminal matters lodged before them.

Mr. Warui contested the validity of a circular letter written by the Chief Magistrate at the Nairobi Central Law Courts, ordering refusal to register any criminal matter which involved accused persons who had been held by the Police for longer than 24 hours, in the case of offences not punishable by death, and for longer than 14 days, for offences punishable by death. The immediate effect of the implementation of the said circular, had been to *deny* the prosecution authorities a forum in the Nairobi Central Law Courts, where the trial of criminal cases could be conducted, whenever the conditions set out in the Chief Magistrate’s circular had not been met.

Clearly, the Attorney-General’s office could immediately have challenged the Nairobi Central Law Courts Chief Magistrate’s circular, for it, in effect, pre-empted the exercise of the prosecutorial competence, to a significant degree. And the invocation of this Court’s revision jurisdiction at this stage, is thus, entirely unsurprising.

In the meantime, however, the Attorney-General’s office thought to initiate criminal cases in Courts where the Nairobi Central Law Court Chief Magistrate’s limiting circular had no effect.

This matter has come before the High Court at an early opportunity, because the constraints imposed by the Nairobi Central Law Courts Chief Magistrate were immediately ‘imported’ into the Makadara and Kibera Courts, with the effect that the State’s fora of lodgment of criminal cases had, in respect of the Nairobi Area, been substantially limited.

Was it right in law for the Nairobi Central Law Courts Chief Magistrate to deny the criminal law enforcement authorities a forum where suspects could be arraigned, as may be necessary?

In the respondents’ perception, the Chief Magistrate was right; and once it was recognized that she was right, then the prosecution had no right to escape her strictures, by seeking other charge-fora at the Makadara and Kibera Law Courts. Learned counsel **Mr. Ndubi** maintained that, by seeking to prosecute suspects at the Makadara and Kibera Law Courts, the prosecution was engaged in an abuse of process – an argument which would entail that the *foundation of right*, in the prosecution of cases, was the Nairobi Central Law Courts Chief Magistrate and her circular; and so all other Magistrates’ Courts should adopt and uphold such a notion of right, and thus, continue to limit the prosecution’s scope for arraigning suspects before a Court of law.

Learned counsel **Mr. Ndubi** and **Mr. Mbugua** urged that it was the said magisterial circular that represented the safeguard for the *fundamental rights* of the accused; and so the prosecution must not be allowed to open up “Courts of choice”, for defeating the principle represented in the said circular.

The case-management complication created by the orders of the three Chief Magistrates, and the quandary in which this left the conduct of prosecution in the entire Nairobi Area, emerges clearly from the following passage in the ruling by the Makadara Law Courts Chief Magistrate, in Criminal Case No. 5293 of 2007 – **Republic v. Ahmed Mohamed Osman & 4 Others**:

“I have considered the prosecution’s application and the defence response. The defence has raised several issues, among them, that the accused persons were produced before the Chief Magistrate’s

Court for plea, and were later produced before this Court under unclear circumstances. This has two implications: that the Chief Magistrate’s Court, Nairobi was not treated with dignity and respect; this Court, equally, has not been treated with dignity and respect – for failure to disclose to any of the Courts the sense behind the removal of the accused from [the other Court] [to this Court]. Secondly, this conduct has made this Court appear like it is a mockery of justice and is insensitive to rights of the accused persons. Thirdly..., this Court cannot deliver justice, because...it is sitting as the prosecution’s Court of choice.

For these reasons, I disqualify myself from hearing this case and direct that the case be placed before the [Central Law Courts] Chief Magistrate’s Court for directions.”

Mr. Warui submitted that such a ruling was in error, as the Makadara Chief Magistrate had no jurisdiction to refer the matter to the Nairobi Central Law Courts Chief Magistrate for directions – as the two Courts had concurrent jurisdiction; and besides, there was no application requesting such a transfer of the case from one Chief Magistrate to another Chief Magistrate.

Learned counsel submitted that, had there been a genuine apprehension on the part of the Makadara and Kibera Chief Magistrates, that there was an *abuse of Court process*, then their only recourse would have been to refer the matter to the High Court, to make appropriate orders by virtue of its supervisory jurisdiction over subordinate Courts (s.65(2) of the Constitution of Kenya).

Learned counsel urged that the question of abuse of process in trials, is a matter reserved to the High Court to pronounce upon, and to give necessary directions. For this proposition, counsel relied on a High Court Constitutional Bench decision, ***Crispus Karanja Njogu v. Attorney-General***, Crim. Application No. 39 of 2000, in which the following paragraph appears:

“The question which now needs to be determined is whether the Subordinate Court has been conferred with inherent jurisdiction under the Constitution to check...abuse of power or abuse of Court process. We are of [the] considered view that the Subordinate Court, as defined in s.123(1) of the Constitution, is not the Court which is conferred with the power prescribed in s.123(8) of the Constitution.”

Indeed when the two files from the Makadara and Kibera Courts respectively, were referred to the Nairobi Central Law Courts Chief Magistrate, she *may have noted* the ripples sparked by her aforementioned circular; she held that the two files had been transferred to her *irregularly*, and directed that they be placed before a Judge of the High Court.

Mr. Warui urged that since the Makadara Court had not been limited by the kind of circular which had been issued at the Nairobi Central Law Courts, the right course of action for the Makadara Chief Magistrate would have been to question only the charge sheet as drawn – but not to refuse to take plea.

The Kibera Court had taken a decision similar to that of the Makadara Court, upon learned counsel **Mr. Ndubi** and **Mr. Mbugua** urging that the prosecution had intended to use that Court as a “Court of choice”, to defeat the Chief Magistrate’s circular at the Nairobi Central Law Courts. The Kibera Chief Magistrate then declined jurisdiction, typifying the lodgment of prosecution in her Court as an *abuse of Court process*. The Chief Magistrate here, took precisely the action taken by her counterpart at Makadara: referring the matter to the Nairobi Central Law Courts Chief Magistrate. This decision, learned counsel **Mr. Warui** urged, was irregular, as the Kibera Chief Magistrate had no jurisdiction to transfer the matter to a different Chief Magistrate. Learned counsel urged that the decision by the Kibera Chief Magistrate be nullified, and she be required to take plea, and for the Kibera Court to proceed with the trial of the case.

Of the Nairobi Central Law Courts Chief Magistrate’s circular, which, clearly, was the basis of the decisions of the Makadara and Kibera Courts, learned counsel **Mr. Warui** urged that it lacked a *legal basis*; for s.72 of the Constitution, which the circular purported to implement, had detailed provisions which called for *interpretation* on a case-by-case basis and which, therefore, fell much more squarely to the jurisdiction of the High Court. By s.72(3) of the Constitution, a person arrested or detained is

required to be brought before the Court as soon as reasonably practicable, and the burden of proving that any delay in that regard has been reasonable, lies with the detaining authority. Since s.72(3) of the Constitution envisages the occurrence of *delay* in arraigning a suspect in Court, an *opportunity for explanation* must become available, to be exercised before the Court. Thus the Court of Appeal, in *Eliud Njeru Nyaga v. Republic*, Crim. Appeal No. 182 of 2006, thus held:

“We are, accordingly, unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity, and, therefore, that there was no reasonable explanation for the delay. Even s.72(3) of the Constitution, which deals with the period of bringing an accused person to Court, recognizes that there can be a valid explanation for failure to bring an accused person to Court as soon as reasonably practicable.”

The foregoing point was illustrated by yet other cases. In the persuasive authority, *Ann Njogu & 5 Others v. Republic*, Misc. Crim. Application No. 551 of 2007, *Mutungu, J.* referred to the requirement of a *judicial forum*, for resolving any breach of s.72(3) of the Constitution, when he remarked:

“...in the absence of the authorities that are detaining [the applicants], despite being duly served, there is no explanation, good or otherwise, as to why the applicants were not brought before the Court within 24 hours.”

In the Court of Appeal decision, *David Waiganjo Wainaina v. Republic*, Crim. Appeal No. 113 of 2005, the following passage appears:

“...We think it would be wrong for anybody to contend that where there has been inordinate delay in bringing an accused to Court, then without any further investigation such a person ought to be set free regardless of what had led to his arrest and incarceration.”

The *judicial forum* as the venue for deciding upon rights under s.72(3) of the Constitution, is further emphasized in the Court of Appeal decision in *Morris Ngacha Njuguna & 3 Others v. Republic*, Crim. Appeal No. 232 of 2006:

“If the 2nd appellant felt his rights under the Constitution had been violated, the best course of action would have been to file an appropriate application under the provisions of the Constitution to enable the relevant Court to investigate the issue. As the matter stands now, the issue having not been raised in the two Courts below, we can only base our decision on the material before us. The material is inadequate and on that basis it cannot be said that the 2nd appellant’s rights under s.72(3)(b) of the Constitution were breached.”

On the strength of the foregoing authorities, learned counsel submitted that “the [Chief Magistrate’s] circular has denied the detaining authorities any forum where they can explain why the delay [in arraigning the accused before the Court] [occurred].”

Mr. Warui urged that the charge as laid before the Kibera Chief Magistrate’s Court be admitted; and in that Court, the accused persons may raise the issue of delay in charging them; the prosecution will have a chance to give an explanation; and thereafter the Courts of law shall decide the question, and give proper directions.

For the respondents in this revision matter, learned counsel *Mr. Mbugua* entered upon his submissions by urging that the applicant’s case tended to be merely pejorative, in respect of the three Chief Magistrates’ Courts, which had no representation before the High Court. This, however, was not an apposite contention, since this is a *revision matter*, in respect of which only the High Court has jurisdiction, by virtue of s.65(2) of the Constitution, and of ss.362 – 364 of the Criminal Procedure Code (Cap.75, Laws of Kenya); and it has no duty to hear parties.

Mr. Mbugua took the position, in relation to the Chief Magistrate’s circular aforementioned, that it

was all-regular, and “based both on the Constitution and on precedent... [The] [Chief Magistrate] was relying on the Constitution and [on judicial] decisions”. Counsel urged that the Chief Magistrate “has the authority in her administrative capacity to issue circulars to guide the conduct of business within her Court. The circular in question was made in good faith.” But counsel then qualified the substance of his earlier submission:

“We submit – and admit – that, perhaps in [the Chief Magistrate’s] zealotry, the circular appears to deny the prosecution the window [of opportunity] to offer an explanation as regards delay in bringing suspects to Court.”

Notwithstanding that admission, learned counsel still urged that there was valid *precedent* to justify the Chief Magistrate’s circular; and in point here is the High Court ruling in *Republic v. James Njuguna Nyaga*, Criminal Case No. 40 of 2007, which was concerned with s.72(3) of the Constitution, and in which Mr. Justice Mutungi held:

“I would be failing in my duty by not declaring Criminal Case No. 40 of 2007 null and void, as it is premised [on], and has its genesis [in] an illegality.

“And the position remains so irrespective of the weight of the evidence that the prosecution may adduce in support of their case. For such evidence will be in support of a vacuum – a nullity.”

On that basis, learned counsel contended that the prosecution of a criminal case, without complying with *deadlines* referred to in s.72(3) of the Constitution, constitutes *nullity* in the proceedings.

Learned counsel submitted that, an election should be made between the line of authorities which recognize the possibility of *explaining away* the prosecution’s belated commencement of a criminal case, on the one hand, and the line of authorities which hold that there is to be a *strict compliance* with arraignment-deadlines referred to in s.72(3) of the Constitution; and he thought the first of the two is untenable. In counsel’s words:

“All the decisions that admit of a window of [opportunity for an] explanation are not clear on the question, at what point in time should the explanation be offered? After the plea is taken? Or should the charge sheet come accompanied by an explanation? Must the violation be raised by the accused? On the face of the charge sheet there is the date of arrest, and the date of arraignment. If fundamental rights are to be [safeguarded], then explanation for delay must come [at the beginning] ... There should be judicial guidelines on the point.”

Mr. Mbugua urged this Court, even if it decided to exercise its revision powers in the instant case, not to require the respondents to return before the Magistrates’ Courts to take plea: because the prosecution had already “squandered its moment to explain.” On this point counsel maintained: “They have never shown eagerness to explain the delay; this has never been a priority for them.”

Seeking to reinforce Mr. Mbugua’s line of submission, learned counsel Mr. Ndubi urged that the Subordinate Courts “should be able to recognize an obvious violation of the law and refuse to have a charge-sheet registered.”

After summarizing the main points in this matter, and carefully considering the submissions of counsel, I have come to certain conclusions. Firstly, a plain reading of s.72(3) of the Constitution shows it to *establish a rule*, regarding the lawful period of detention before a suspect is arraigned in Court – but with an *exception*: prolonged detention beyond the stipulated periods, can in certain circumstances be explained away. This reading of the Constitution – as a second point – is the one adopted by the *overwhelming number of authoritative judicial decisions* which have adverted to the matter: see *Eliud Njeru Nyaga v. Republic*, Crim. Appeal No. 182 of 2006; *David Waiganjo Wainaina v. Republic*, Crim. Appeal No. 113 of 2005; *Morris Ngacha Njuguna & 3 Others v. Republic*, Crim. Appeal No. 232 of 2006.

As a third point, it emerges quite clearly that the question whether or not the prosecutorial process has complied with the terms of s.72(3) of the Constitution, is a *judicial* question, to be determined on legal principles, *after hearing the parties*. Whereas it is an established principle that the interpretation of the Constitution is a function of the High Court, and not of the Subordinate Courts (see *Crispus Karanja Njogu v. Attorney-General*, Crim. Application No.39 of 2000), *facts* such as may affect the constitutional decision arrived at, may in many cases be best determined by the trial Court, which is often the Subordinate Court. After considering this point in a recent case, *Dickson Ndichu Kago v. Republic*, H.Ct. Misc. Criminal Application No. 639 of 2007, this Court had thus remarked:

“It is clear from the depositions and from the submissions, that hardly any reference at all was made to the right of the accused not to be detained for longer than was provided for, and so the purely-factual question whether there was cause for longer detention, was not at all considered. The trial Court is the tribunal of fact in this matter, which ought to have the first opportunity to deal with that question.”

It is, therefore, clear, in my perception, that the Chief Magistrate’s circular which excluded charge-sheets from registration if the detention of suspects had been for longer than certain time-spans, was a purely bureaucratic arrogation of the *judicial functions* of the Subordinate Court and the High Court. The Chief Magistrate *lacked jurisdiction* to withdraw justiciable questions from the play of due process, to the arbitrary control of an unauthorized circular; and I would not agree with both counsel for the respondents, that the Chief Magistrate was, by the said circular, involved in ordinary case-management. The mischief entailed in the circular was still more far-reaching, because it purported to *qualify* the unlimited jurisdiction of the High Court (s.60, Constitution of Kenya), in the interpretation of constitutional claims, and in the resolution of justiciable disputes.

Once it is held – as I have just done – that the said circular was an illegal instrument, then it follows that the actions of the Chief Magistrates at the Makadara and Kibera Law Courts, in deferring to the same, and in declining jurisdiction in the trial of criminal cases lodged by the Attorney-General, were similarly void in law.

Moreover, by virtue of s.26 of the Constitution, the Attorney-General has the mandate to prosecute criminal cases as he considers appropriate. It was a purported pre-emption of this constitutional, prosecutorial competence, for the Chief Magistrates at both the Makadara and Kibera Law Courts to decline the jurisdiction to take plea, and to try cases duly placed before them.

On a practical level, the Subordinate Courts of the Nairobi Area, by all refusing to entertain criminal cases lodged before them, had subverted the discharge of the prosecutorial function, which is a matter of *public interest*, and which is a matter belonging to the *constitutional mandate* of the Executive, as an arm of government.

I am not in agreement with the submissions of counsel for the respondents, that there was a legal basis for the remission of cases from the Chief Magistrates at Makadara and Kibera, to the Chief Magistrate in charge of the Nairobi Central Law Courts; for if the two lacked jurisdiction and could not hear the cases, then it would be the same position as regards the Chief Magistrate at the Nairobi Central Law Courts.

Since the prosecutorial power emanates from the Constitution, it was not right for the Chief Magistrates at the Makadara and Kibera Courts to typify its exercise as an *abuse* of Court process; it was their duty to take plea and try the cases, and any question relating to abuse of process would have to be taken up before the High Court, which would resolve the same by virtue of its supervisory powers under s.65(2) of the Constitution.

This, therefore is a fit case for this Court’s exercise of its revision jurisdiction, by virtue of ss.362-367 of the Criminal Procedure Code (Cap.75, Laws of Kenya). I will, therefore, hold as follows:

1. *The three Subordinate Courts in reference herein, had no powers to refuse to admit a charge-sheet*

on grounds other than those contained in s.89(5) of the Criminal Procedure Code (Cap.75).

2. The said Subordinate Courts had no powers or jurisdiction to decline to admit a charge-sheet or to take plea, on the ground that the criminal proceedings were an abuse of Court process.

3. The said Subordinate Courts had no powers or jurisdiction to refuse to admit a charge or to take plea, on the ground that the accused persons were not brought before the Court as required by s.72(3) of the Constitution.

4. It was a misdirection on a point of law, to use a bureaucratic circular-letter as a basis for nullifying the true meaning of s.72(3) of the Constitution.

I will, on the basis of the foregoing holdings, order that the criminal cases in question may be filed in any Subordinate Court in the Nairobi Area, and the Chief Magistrates in charge of any of those Courts shall be under duty to ensure the taking of plea, as well as the conduct of trial, according to law.

DATED and DELIVERED at Nairobi this 18th day of June, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant [State]: Mr. Mungai Warui

For the Respondents: Mr. Ndubi; Mr. Mbugua Mureithi