



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

Misc.Crim. Appli 53 of 2007

GEEOFREY N. WESONGA APPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

The applicant has informed this court that he had been charged with the offence of giving false information to a person employed in the Public Service contrary to section 129 (a) of the Penal Code.

The court before in which that charge has been preferred against him is the Chief Magistrate's Court, at Kakamega; and the case is Criminal Case No.1955 of 2004.

When the matter first came before me on 2/4/2008, the applicant had not yet served the respondent with his application. The respondent therefore sought, and was granted an adjournment.

Meanwhile, as the criminal case against the applicant was scheduled to be heard on 14/4/2008, the applicant asked this court to order that those proceedings be stayed until the application before this court was heard and determined. His reason for requesting that those proceedings be stayed was that his fundamental rights had been infringed.

In answer, the learned Senior Principal State Counsel, Mrs. Kithaka said that she did not object to the stay of the criminal proceedings.

This court thereafter ordered that the criminal case would be stayed until the application before the High Court was heard and determined.

The application before this court was brought pursuant to sections 72 (1) and 77 (1) of the Constitution of Kenya, as read together with section 41(1) of the Police Act.

When prosecuting his application, the applicant submitted that his constitutional rights had been infringed by the police, and by extension, the prosecution before the trial court, when they brought him before the court 4 days after his arrest. As far as the applicant was concerned, he ought to have been taken to court within 24 hours of his arrest.

The applicant emphasized that even though the police failed to beat the 24 hours' deadline, they never gave any reason to the trial court on 29/7/2004, when the applicant was taken before the court for plea. It

is his contention that the prosecution was under an obligation to tender their explanation, if any, to the court, on that day.

The applicant also submitted that there was malice, mischief and sheer un-professionalism on the part of the police, in detaining him longer than the law requires.

He says that he had personally gone to the police station on 26/7/2004, with a view to making a report. Given that fact, the applicant believes that the police had the option of giving him a police bond.

By not giving him a police bond, and then failing to take him to court within the prescribed period of 24 hours, the police are said to have violated the provisions of section 41 of the Police Act, which requires them to enforce all laws and regulations. One of the laws which the applicant submits was violated by the police is section 72 (3) (b) of the Constitution.

In view of the said alleged violation of his rights, the applicant submitted that this court ought to declare null and void, the charges he was facing in criminal case No.1955 of 2004. He also asked that this court should set him free forthwith.

When called upon to answer to the application, the learned State Counsel, Mr. Karuri submitted that when the criminal trial resumes, the prosecution would call the arresting officer to give an explanation for the delay in presenting the applicant before court. Therefore, the state perceives the application herein to be premature.

In a nutshell, although the State had been served with an application which required it to satisfy the court that the applicant had been taken to court as soon as was reasonably practicable, the State has to-date not offered any explanation to this or any other court.

Whereas, there may not be an obligation on the prosecution to tender its explanation on the date when a plea is taken in a case in which the accused person had been brought to court after the expiry of the period prescribed in section 72 (3) of the Constitution, prudence demands that as soon as the issue of delay is raised by either the accused or the court, the State must provide its explanation for the delay.

Indeed, I do venture to say that a prosecutor who was exercising due diligence in his duties should arm himself with the requisite explanation even before the question is raised by anybody else. In other words, the prosecutor should demand answers from the Investigating Officer even before the accused was brought to court, as he should anticipate the obligation to discharge the burden of satisfying the court that the accused had been taken to court as soon as was reasonably practicable.

In the case of *GERALD MACHARIA GITHUKU Vs. REPUBLIC – CRIMINAL APPEAL NO.119 OF 2004*, the Court of Appeal quashed the conviction of the appellant, set aside the death sentence that had been handed down to him, and set him at liberty. They did so because;

“Although the offence for which he was 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.”

As the State has, in this case too, made no attempt to satisfy the court that the applicant was brought before the magistrate’s court as soon as was reasonably practicable, I find and hold that his constitutional rights had been infringed.

On the authority of *GERALD M. GITHUKU Vs REPUBLIC* (above-cited), in which their Lordships cited their decision in *ALBANUS MWASIA V. REPUBLIC – CRIMINAL APPEAL NO.120/2004*, I would reiterate their following words;

“At the end of the day it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which

emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced to support the charge.”

If that be the case, it would make no sense to allow the trial to proceed against the applicant.

I therefore declare null and void the charge preferred against the applicant in Kakamega SPM Criminal Case No.1955/04. Accordingly, the case shall be terminated forthwith and the applicant set at liberty unless he is otherwise lawfully held.

Dated, Signed and Delivered at Kakamega, this 4th day of June, 2008

FRED A. OCHIENG

J U D G E