REPUBLIC OF KENYA

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

Miscellaneous Criminal Application 218 of 2008

PONNUTHURAI BALAKUMAR …………. APPLICANT

-VERSUS-

REPUBLIC ………………………………. RESPONDENT

RULING

The applicant moved the Court by his Notice of Motion dated 21st April 2008, and brought by virtue of ss.3, 36, 37 and 276 of the Criminal Procedure Code (Cap.75, Laws of Kenya), and ss.72(3) (b) and 77 (1), (9) of the Constitution of Kenya.

The applicant's main prayers are as follows –

(a) that, pending the hearing and determination of this application, the Court do order a stay of the proceedings in Nairobi Chief Magistrate's Court Criminal Case No.254 of 2007;

(b) that, the charge preferred against the accused in Nairobi Chief Magistrate's Court Criminal Case No. 254 of 2007 be quashed;

(c) that, the applicant be acquitted forthwith.

The general grounds founding the application are set out as follows –

(i) that the applicant was arrested without warrant on *2nd February 2007* by officers from Nairobi Central Police Station, and immediately handed over to the Banking Fraud Unit of the Police;

(ii) that the applicant was held at Kileleshwa Police Station for 10 days without an apprehension report being filed in Court;

(iii) that, while held at Kileleshwa Police Station, the applicant was not allowed access to legal aid;

(iv) that, the applicant was given no reason for being arrested, and he was not told what charges against him were being contemplated;

(v) that, the 10 days of detention were in excess of the 24-hour period specified in the Constitution;

(vi) that, the applicant while held by the Police, was subjected to torture, starvation, and denial of sleep;

(vii) that, at the time he was arraigned in Court, there was no explanation of the delay in bringing the

applicant to Court;

(viii)that, the arraignment of the applicant for an alleged offence of stealing contrary to s.275 of the Penal Code (Cap.63, Laws of Kenya), after 10 days in Police custody, rendered the proceedings in Court a nullity;

(ix) that, even when the applicant raised the issue of delay in bringing him to Court, no explanation was given, but the Subordinate Court proceeded to fix a hearing date.

A supporting affidavit is sworn by the applicant's advocate, ***Mr. Nelson Hezron Oundu,*** who deponed that the applicant had been handicapped in respect of communication with the Police officers who arrested him, for "he speaks [Hindi] and is not conversant [with] Swahili or English". He depones further that "the applicant was not informed [of] the reasons for his arrest or what charges he faced"; that the applicant was arrested on *2nd February, 2007* and was not taken to Court until *12th February, 2007*, when he was charged with the offence of stealing contrary to s.275 of the Penal Code; that "no explanation was offered by the prosecution at the time of plea for the inordinate delay in arraigning the [applicant] before [the] Court"; that "even after the applicant raised the issue with the trial Magistrate, the explanation given to the effect that somebody else had escaped Police bond….does not offer a justifiable explanation for the delay...."

The deponent has deponed that at plea-taking, "no explanation' of the delay in bringing the applicant to Court was given by the prosecution; but he says too that there ***was*** an explanation, save that it was not "a justifiable explanation".

Such an apparent contradiction in the applicant's affidavit evidence is to be seen in the context of the replying affidavit of the Investigating Officer, ***Corporal Simeon Adol***, dated 20th May, 2008. The deponent is attached to the Banking Fraud Investigations Unit of the Criminal Investigation Department, and avows familiarity with matters pertaining to Crim. Case No. 254 of 2007 pending in the Nairobi Chief Magistrate's Court.

The deponent avers that the applicant was arrested on *2nd February, 2007* at the Stanbic Bank ATM machines along Kenyatta Avenue in Nairobi, while stealing money there by means of Visa cards. He avers that the arrest of the applicant for stealing, a cognizable offence, did not require a warrant of arrest to be in force before the Police could take action.

It is deponed that upon the said arrest of the applicant, the sum of Kshs.250,000/= was recovered from him, and the arresting Police officers were led to the applicant's room at the 680 Hotel; and there, they conducted a search, and recovered assorted currencies and Visa cards. The appellant was thereupon informed of the reason for his arrest, and was committed to custody; he raised no complaints pending further investigations and the laying of charges against him in Court.

Initial investigations showed that the applicant and his accomplices (who were then at large), "were involved in an intricate web of theft from various banks in the country, among them, Stanbic Bank, Kenya Commercial Bank, and Commercial Bank of Africa."

The Police realized, in those circumstances, that "further, thorough and protracted investigations" were required, and that the same could not be achieved within twenty-four hours.

In the course of investigations, some of the applicant's accomplices were apprehended, and one of them, ***Abdul Kader Samsudeen,*** is his co-accused in Crim. Case No. 254 of 2007; and this accomplice did jump Police bond, and "frustrated the efforts to expedite the investigations and charging of the applicant herein".

The deponent came to believe, upon taking advice from learned respondent's counsel, ***Mr. Makura,*** that the explanation of delay in prosecuting tendered in Court by the prosecution, was "reasonable explanation".

From the averments in the supporting and the replying affidavit, I find that the prosecution did indeed, before the Subordinate Court, provide an explanation for the delay in bringing the applicant to Court, for the purpose of being charged with the offence in question.

The applicant's case was canvassed before me on 21st May, 2008 by learned counsel ***Mr. Oundu.*** He asked that a declaration be made, that the charge and proceedings in Criminal Case No.254 of 2007 were null, and that his client be set at liberty. He grounded this case on s.72(3) (b) of the Constitution, maintaining that the applicant ought to have been brought before the Court within 24 hours of being apprehended. Counsel discounted the explanation which the prosecution gave in the trial Court for the delay, and contended that even the explanation contained in the replying affidavit by the Investigating Officer, was unacceptable: "for the fact that investigations are ongoing does not provide justification for breaching s.72 (3) of the Constitution." Counsel urged that the prosecution's duty at the time of arrest, was stated in s.33 of the Criminal Procedure Code (Cap.75, Laws of Kenya) which provides:

" ***A Police officer making an arrest without a warrant shall, without unnecessary delay and subject to the provisions of this Code as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case or before an officer in charge of a police station".***

The reason for bringing such a suspect before an officer of Police in charge of a station, is that such officer is empowered to assess the degree of seriousness of the offence suspected to have been committed, and to consider granting release on bond, where the offence is not a serious one. The relevant section (s.36) of the Criminal Procedure Code provides:

"***When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence or attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable…"***

The foregoing section, in my assessment, gives a *discretion* to the officer in charge of a Police station: he is to determine whether or not an alleged offence is serious; and only in cases that he considers not serious, is he required to consider release on bond, pending appearance before a Subordinate Court. Such appearance before the Court is a requirement, and, in the case of a suspect whom the officer in charge of a Police station considers it inappropriate to release, such a suspect shall be brought before the Court as soon as is practicable – an expression which *ordinarily* means within twenty-four hours, for non-capital cases; and fourteen days, for capital cases. It is permissible, on the basis of both *s.36 of the Criminal Procedure Code,* and of *s.72(3) (b) of the Constitution,* to bring the suspect to Court *after* the said time-periods have lapsed, save that there is to be an explanation for the delay.

The foregoing principles have been restated by the superior Courts, including this Court, on numerous occasions, and they should now be regarded as not being the subject of much debate; see for instance: ***Albanus Mwasia Mutua v. Republic,*** Cr. App. No.120 of 2004; ***Gerald Macharia Githuku v. Republic,*** Cr. App. No.119 of 2004; ***Eliud Njeru Nyaga v. Republic***, Crim. App. No. 182 of 2006; ***David Karobia Kiiru v. Republic,*** Nbi H. Ct Misc. Crim. App. No.863 of 2007; ***Republic v. Joseph Ndirangu Nungari & Another,*** Nbi High Ct Cr. Case No.42 of 2006; ***Republic v. Peter Githongo Maina & 2 Others,*** Nbi High Court Cr. Case No. 79 of 2005; ***Dickson Ndichu Kago v. Republic,*** Nbi High Ct. Misc. Crim Application No. 639 of 2007; ***Alfred Kimathi Meme v. Republic,*** Nbi High Ct. Misc. Crim. Application No.857 of 2007; ***Fan Xi & 3 Others v. Attorney-General,*** Nbi High Ct. Misc. Crim. Application No.860 of 2007; ***Shem Karanja Waigwa v. Republic,*** Nbi High Ct. Misc. Crim. Application No.186 of 2008; ***Republic v. Talib Abubakar & 5 others,*** Nbi High Ct. Crim Rev. No.1 of 2008.

It is known, as a fact, that the Police, in the instant matter, held the applicant for about *ten days* beyond

the stipulated period of 24 hours, before bringing him before the Court, even though this was a non-capital case. What is required, therefore, is, firstly, an indication of the *seriousness of the suspected incident of crime*; and secondly a *cogent and good-faith explanation of the delay* which took place. If those two conditions are satisfied, then the Court is expected to consider the question whether or not a *satisfactory explanation* has indeed, been offered for the delayed bringing of the applicant before the Court. This, precisely, is the point which the submissions on both sides ought to address, and, in the end, it is *for the Court* to form its conviction and to pronounce according to its assessment and its conscience.

Learned counsel urged that the officer in charge of the Police station ought to have granted the applicant a Police bond, by virtue of the powers conferred by s.36 of the Criminal Procedure Code; and the fact that the Police believed they were dealing with concerted crime, and indeed, one of those suspected to be part of the theft- syndicate had jumped bail, in the submissions of learned counsel, bore no materiality. Counsel doubted that the delay in bringing the appellant to Court could be explained on the basis that there were Police investigations in progress – because it had not been shown that any such investigations did last through a duration of ten days. Counsel urged that the ten-day detention of the applicant was not justified, for the Police should have first sought the Court's leave to retain him at the Police station for such an extended period.

Counsel submitted that it emerged from the evidence, that the applicant had been detained *for longer than 24 hours*; and therefore, there was a breach of s.72(3) (b) of the Constitution, and, consequently, all proceedings now in progress against the appellant, are a *nullity*.

It was learned counsel's contention that such an argument was supported by some of the authorities cited earlier on, particularly by the Court of Appeal decision in ***Albanus Mwasia Mutua v. Republic***, Cr. App. No.120 of 2004.

Although the ***Albanus Mwasia Mutua*** case has been cited in the same vein by counsel in many other applications of the kind now before me, I am not convinced that, that authority has been properly relied upon. On the several occasions when I have had to refer to the ***Albanus Mwasia Mutua*** case, I have come to the conclusion about it and other Court of Appeal decisions on the point, that, as I expressed in a recent decision, ***Republic v. John Paul Ombere***, Nbi High Ct Crim. Case No.22 of 2005, such authorities –

"…. have underlined the need for the trial Court to review the pertinent facts and circumstances, before determining the question whether or not the accused may be released, owing to breaches of s.72(3) (b) of the Constitution. This Court has taken guidance from [the line of cases represented by ***Albanus Mwasia Mutua]*** as they have been, and are, in my opinion, more consistent with judicious interpretations of s.72(3) (b) of the Constitution. Such an approach, moreover, I think, would carry the merits, of preserving the High Court's interpretative jurisdiction which is expressly created by s. 60(1) of the Constitution; it also, in my opinion, safeguards the High Court's *discretion* in the assessment of evidence, so as to arrive at just decisions, as dictated by the circumstances of each particular case coming up for resolution".

Learned respondent's counsel, ***Mr. Makura*** based his response squarely on the content of the replying affidavit (already set out above). From the said affidavit it is apparent that several persons had been involved in the theft which forms the basis of the charge; several banks were the targets; "monumental sums of money" were involved in the suspected theft. Investigations showed the applicant to be a foreigner operating in cahoots with yet another foreigner who had escaped.

After the question of delay in bringing the applicant to Court had been raised before the Subordinate Court, the learned Magistrate made a ruling, on 8th April, 2008, in the following terms:

"***The prosecution….stated that the [reason for] the delay [was] [the need for further] investigation, which extended to several banks, [and] that the co-accused jumped Police bail…I find that the explanation given by the prosecution has merit. There is a co-accused who jumped Police bond and there were efforts [shown] on Court records after plea, to apprehend the said suspect."***

Mr. Makura urged that the explanations contained in the replying affidavit should be seen as proper in all respects, just as the learned Magistrate had seen them to be, at the very beginning.

Learned counsel urged that since the investigations were protracted, and the applicant had made it difficult to conduct those investigations, there were, indeed, good grounds, satisfying the terms of s.72(3)(b) of the Constitution, for delay in arraigning him before the trial Court. Learned counsel also urged the Court to take cognizance that s.72(3)(b) of the Constitution which the applicant was relying on, did not ordain that acquittal is to take place whenever it is found that the prosecution had not complied with the deadlines therein specified.

The question before this Court is whether the prosecution has given a *satisfactory explanation* for the delay in bringing the applicant before the Court. I note that an explanation for the delay was made, as it should have been, at an *early stage* in the proceedings before the trial Court. In relation to that explanation, the learned Magistrate conducted an assessment and, in her opinion, good cause had been shown for the delay.

It is desirable, as a practice, that complaints of the kind involved in the application should be expressed *at the very beginning*, so that the trial machinery is not engaged in vain; and it is equally desirable that the *trial Court* should establish the relevant facts, and where possible, express an *opinion*, even though the complainant will still retain his rights to move the High Court, by virtue of s.72(3)(b) of the Constitution.

This Court has benefited from the *fact findings of the trial Court,* and is thus in a position to make its own evaluation of the merits of the application.

It is not contested that the charge relates to a plurality of suspects; of foreign origin; apparently acting in collusion; the mischief involves electronic theft of money from the vaults of banks; the scope of prejudice to bank customers is colossal; suspected members of the syndicate have absconded. How does this Court, as guardian of the legal rights of all persons in this land, resolve the conflicts emanating from the facts thus illuminated? Does the Court indifferently pay regard to the time-lines specified in s.72(3)(b) of the Constitution, and dispense protection to the suspects? Or should the Court accord the judicial machinery a chance to deal with the *pertinent facts*, hear the *evidence*, and resolve the dispute, in a manner that protects the *public interest*?

The High Court is to be regarded as a responsible institution, which seeks to give fulfilment to the true *purpose* of the judicial arm of State; to protect the public interest; and to vindicate the rights and legitimate expectations of the millions of citizens who do not appear as parties in Court.

The discharge of this task is a *constitutional obligation* of this Court; and, consequently, an applicant is not to cite a certain clause in the Constitution to take away the Court's responsible discharge of duty.

In my assessment, the Police authorities had a good explanation for not being able to bring the applicant before the Court within 24 hours, and so they are to be held not to have been in breach of the applicant's rights under s.72(3)(b) of the Constitution. The Police officers were not dealing with an ordinary situation of blue-collar or white-collar crime; they were dealing with a new and much more rapid and intractable sphere of white-collar *crime – electronic crime*; and I hold that they needed enough time, especially given the special facts of the incident, to conduct investigations and to arraign the suspect before the Court. I hold, therefore, that the Police authorities did, indeed, bring the applicant before the Court as soon as was reasonable practicable.

The applicant's Notice of Motion dated 21st April, 2008 is hereby dismissed.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 22nd day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Oundu

For the Respondent: Mr. Makura