REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Crim. Misc. Appli. 8 of 2008

WEKESA SIKANGA :::::::::::::::::::::::::::::::: APPLICANT

V E R S U S

REPUBLIC :::::::::::::::::::::::::::::::::::::: RESPONDENT

R U L I N G

The applicant has moved this court by way of a Petition, pursuant to the provisions of **section 72 (3)** of the Constitution of Kenya, as read together with section 84 (1) of the said Constitution.

He urges the court to declare that his constitutional right to liberty had been infringed by the police, who had detained him in custody for almost 2 months without bringing any charges against him.

He also contends that, in the light of that delay, this court ought to declare that he would not obtain a fair trial.

If the court should declare that the applicant's constitutional rights had been infringed, as sought for above, the applicant asks that this court should set him at liberty forthwith.

The facts, as set out by the applicant were that he was arrested on 18th August 2007. His arrest was effected after a human body had been discovered lying by a stream that crosses at the far end of the applicant's property.

The applicant's wife was arrested 2 days later; and after a further period of 5 days, his son was also arrested.

Following the arrests, the applicant was held in police custody for almost 2 months, without any charges being preferred against him.

On 15th October 2007, the advocate representing the applicant filed an application in the High Court, for Habeas Corpus. The said application was filed on behalf of the applicant herein, together with 16 other people. The application was PATRICK MAKOTSI INDULU & 16 OTHERS VS REPUBLIC, KAKAMEGA HIGH COURT CRIMINAL MISC. APPLICATION NO. *42* ***OF*** *2007.*

On 22nd October 2007, Hon. G. B. M. Kariuki, J. delivered his ruling in that application. By the said ruling, the learned judge held that the detention of the applicant was illegal. He therefore ordered that the applicant, together with 13 others, be released forthwith.

Although the applicant does not expressly say so, it would appear that he was indeed set free.

However, on 12th November 2007, the applicant was, once again arrested. It is the understanding of the applicant that the reason for his arrest was the offence in respect to which he had been arrested on 18th August 2007.

On that second occasion the applicant was held at the Kakamega Police Station for a period of 19 days, without any

charges being preferred against him. He was then produced before the court on 4th December 2007, and the learned Acting Senior Principal Magistrate, Kakamega, ordered that the applicant be remanded at the Kakamega G. K. Prison.

It was submitted by Mr. D. S. G. Mango, learned advocate for the applicant that the applicant's constitutional rights had been infringed, because he was not brought before a court within 14 days.

Learned counsel cited the Court of Appeal's decision in **G**ERALD MACHARIA GITHUKU V REPUBLIC, CRIMINAL APPEAL NO. 119 OF 2004, as authority to back his submissions.

It was the applicant's understanding that the state had a duty to explain the delay, if any, in bringing an accused person to court. It was the applicant's further understanding that if the state did not offer an explanation, the accused would be entitled to an acquittal.

In this case, the learned Senior State Counsel, Mr. Daniel Karuri, had not filed a Replying Affidavit in response to the affidavit of the applicant.

In the absence of the Replying Affidavit, the applicant submitted that the state had failed to offer any explanation. He therefore asked the court to consider the application as having been unopposed.

The submissions of the applicant, in that regard, were founded upon the provisions of Rule 16 of The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. The rule reads as follows;

"*The Attorney-General or the respondent, as the case may be, shall within fourteen days of service of the petition, respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit."*

As the state had not filed any replying affidavit, the learned state counsel conceded that there had been a failure to comply with rule 16.

In the result, the facts set out by the applicant are wholly unchallenged. Secondly, it means that the state has completely failed to give any explanation for holding the applicant in custody for longer than is permissible under section 72 (3) of the Constitution.

Thirdly, the police arrested the applicant a second time, after the High Court had already held that by keeping the applicant in custody for more than 14 days was illegal. Notwithstanding that reminder, the police went ahead to keep the applicant in custody for 19 days.

To my mind, the police were not only acting in breach of the applicant's constitutional rights, their actions were callous to the extreme.

In GERALD MACHARIA GITUKU VS REPUBLI*C* (above-cited), The Court of Appeal cited with approval, the following words in the case of ALBANUS MWASIA MUTUA VS REPUBLIC – CRIMINAL APPEAL NO. 120/2004*;*

"*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 judgement appears to be that an unexplained violation of a constitutional right will normally result in an acquittal.……."*

In line with that decision, which is binding upon this court, I do hereby find that, in the circumstances of this case, the applicant is entitled to an acquittal. It is therefore ordered that the criminal case preferred against him, being KAKAMEGA HIGH COURT CRIMINAL CASE NO. 37 OF 2007 be determined forthwith.

It is further ordered that the applicant be set at liberty forthwith, unless he is otherwise lawfully held.

*D**a**ted, Signed and Delivered at Kakamega, this 23rd day of October, 2008.*

FRED A. OCHIENG

J U D G