



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

Criminal Misc. Appli. 42 of 2008

JAPHET GITUMA JOSEPH APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The three applicants whose applications have been consolidated are charged, in the court below, with two counts of robbery with violence contrary to section 296(2) of the Penal Code and preparation to commit a felony contrary to section 308(1) of the Penal Code.

The three appeared for the first time before the trial court on 29th February 2008 and their plea taken on 3rd March 2008 (erroneously shown as 3rd February 2008). While the case was pending for hearing on 22nd July 2008 the applicants brought the present application by way of a Notice of Motion challenging their trial on the ground that they were held by the police after arrest for a period of 15 days thereby contravening the provisions of sections 72(3) and 77(1) (2) (a) (b) and (c) of the Constitution. They are seeking that their trial be declared a nullity and that they be set at liberty.

The respondent did not file a reply or grounds of opposition to this application but replied from the bar that the application was fatally defective as it offends the provisions of section 84 of the Constitution and the Gicheru Rules as it is not by way of a petition.

I have considered the arguments as well as the applicants' written submissions in which the cases of Albanus Mwasia Mutua V. R. Cr. Appeal No. 120 of 2004 and Gerald Macharia Githuku V. R. Criminal App. No. 119 of 2004 are cited. The applicants alleged that they were detained by the police beyond the constitutional limit of fourteen (14) days. The first applicant, Japhet Gituma Joseph in his written submissions states that he was arrested on 20th June 2002 and brought to court on 18th July 2002, some 28 days, according to him.

The 2nd applicant, David Bundi on the other hand submitted that he was arrested on 21st June 2002 and brought to court on 18th July 2002. Similarly, the 3rd applicant Alfano Mwangera alleges that he was detained for eighteen days having been arrested on 12th August 2002 and brought to court on 30th August 2002. From the charge sheet, the date of arrest is indicated as 20th June 2002 for all the applicants.

At this stage, I must point out that the initial trial of the applicants was concluded and the applicants convicted and sentenced to death in October 2005. They preferred an appeal to this court which was heard and determined in a judgment dated 7th February 2008. The conviction was set aside on account of failure of the trial magistrate to comply with section 200 of the Criminal Procedure Code. The court,

however, ordered a retrial. It is the retrial that is pending. The applicants raised this objection in respect of the initial trial.

As I have noted, according to the charge sheet the applicants are shown to have all been arrested on 20th June 2002. While that date may be correct in respect of the first applicant, it is erroneous in the case of the 2nd and 3rd applicants who were arrested on 21st June 2002 and 13th August 2002, respectively. The 1st and 2nd applicants were taken to court on 18th July 2002 together with a co-accused Peter Murage, who subsequently died. That is the day their plea was recorded.

The 3rd applicant was brought to court on 30th August 2002 charged in Criminal Case No. 2053 of 2002 which was consolidated with the case in which the 1st and 2nd applicants had been charged. The applicants plead to a fresh charge sheet.

If the 1st applicant was arrested on 20th June 2002 and brought to court on 18th July 2002, in strict computation of time in terms of section 57(a) of the Interpretation and General Provisions Act the 1st applicant should have been brought to court on 10th July 2002, i.e., excluding the day he was arrested as well as Saturdays and Sundays. See Dominic Mutie Mwalimu V. R. Cr. Appl. No. 217 of 2005 and State of Israel V. Michael Lewis Somone & 2 others Civil Appeal (Application) No. 148 of 2005. The 1st applicant was detained for seven (7) extra days beyond the fourteen (14) days prescribed by section 72(3) of the Constitution as he faced a capital offence.

Similarly, the 2nd applicant ought to have been brought to court on 9th July 2002 but was brought six (6) days after the fourteen days. The scenario is different for the 3rd applicant. He was arrested on 13th August 2002 and brought to court on 30th August 2002. That translates to thirteen (13) days. On that ground alone, the 3rd applicant's application must fail.

The only issue left is whether the applicants have properly moved the court to challenge their trial on the basis that their rights under section 72(3) of the Constitution have been violated. Section 84 of the Constitution vests in the High Court the power to hear and determine an application by any person alleging that his or her rights under sections 70 to 83 have been violated. Further the High Court has powers to determine any question referred to it by the subordinate court if in the proceedings before it (the subordinate court) a question arises as to the contravention of any of the rights enumerated under section 70 to 83 of the Constitution.

The rules for the practice and procedure in respect of applications under the foregoing provisions are to be made by the Chief Justice. This has been done. The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (or now commonly known as the Gicheru Rules) provide for the procedure of moving the High Court.

The rules spell out three (3) levels of jurisdiction contained in three (3) parts, namely Supervisory, Interpretative and Enforcement Jurisdictions. Of the three parts the instant application falls under Part III (Enforcement Jurisdiction).

Rule 11 provides that:-

“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.

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.”

The petition must be supported by an affidavit. The three applicants not having the service of counsel

have completely failed to comply with the above procedural requirement. Instead of a petition supported by an affidavit they have filed identical motions on notice without affidavit in support. The rules of procedure have critical role in litigation and must be complied with by lawyers and laymen equally.

I find, for these reasons that this application fails and is dismissed accordingly.

Dated and delivered at Meru this 15th day of October 2008.

W. OUKO

JUDGE