REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(*CORAM: OJWANG, J.)*

MISC. CRIMINAL APPLICATION NO. 809 OF 2007

IN THE MATTER OF ENFROCEMENT OF FUNDAMENTAL & CONSTITUTIONAL RIGHTS UNDER SECTION 72(3) OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF ROBERT MUENDO & ANOTHER

ROBERT MWENDO.....APPLICANT

FRANCIS MUOKI .....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicants' Notice of Motion, dated 20th November, 2007 was brought under Section 72(3) of the Constitution of Kenya, and Section 123 of the Criminal Procedure Code (Cap. 75, Laws of Kenya). They were seeking orders as follows:

> (a) that the Honourable Court be pleased to review and/or order that the Ruling of the Hon. Magistrate ***Mrs. Murage*** (acting Chief Magistrate) delivered on 14th September, 2007 in Nairobi Criminal Case No. 1458 of 2007 went against the provisions enshrined in the Kenya Constitution;
>
> (b) that a declaration [be made] that the applicants' constitutional and fundamental rights guaranteed under the Kenya Constitution (had) been violated, (by being) detained in police cells for more than 24 hours before being arraigned in Court;
>
> (c) that the applicants be acquitted unconditionally since any charges such as may be sought to be preferred against them are unconstitutional and, therefore, null and void;
>
> (d) that further proceedings in Nairobi Criminal Case No.1458 of 2007 be stayed pending the hearing and determination of this application.

The general grounds in support of the application were thus stated: -

(i) the applicants were arrested and detained in Police cells from *30th August, 2007 to 5th September, 2007* when they were finally arraigned in Court, in Criminal Case No. 1458 of 2007;

(ii) before the applicants could take plea, their advocate raised an objection premised on s.72(3) of the Constitution, contending that the applicants' constitutional and fundamental rights guaranteed under the said section had been violated, as they were not produced before a Court of law within 24 hours, and he sought their immediate release;

(iii) the presiding Magistrate, upon hearing arguments from the prosecution and the defence, dismissed the applicants' objection, in her Ruling delivered on 14th September, 2007;

(iv) the Constitution is the supreme law, and, upon determination that the applicants' constitutional rights have been violated, any prosecution against them, or either of them, is null and void;

(v) the applicants are entitled to the secure protection of the law, as provided in ss. 70(a) and 72(1) of the Constitution;

(vi) the applicants' intended prosecution in the Magistrate's Court, irrespective of the weight of evidence against them, is an illegality;

(vii) the continued prosecution of the applicants in the Magistrate's Court is an abuse of the process of the law, and is otherwise vexatious and oppressive.

The foregoing general grounds are supported by fact-depositions contained in an affidavit sworn by the applicants' advocate, ***Mr. Donald O. Owang,*** and dated 19th November, 2007.

The substance of the learned Magistrate's ruling being contested, thus reads:

> **"[The] Court has considered the objection raised by the defence seeking to block the taking of plea, because the accused had been detained in Police custody for more than 24 hours before they were brought to Court. Counsel submitted that, that was [an] infringement of [the accused persons']…right under s.72(3) [of the Constitution].**
>
> **"The application is opposed on the grounds that there was an explanation [as to] why [the] accused [persons] were not brought to Court within 24 hours…[The] prosecution submitted that the accused were arrested on 30th August, 2007, and the complainant was asked to avail documents in support of the complaint. He wrote to the bank and, on realizing [the accused could not be charged within a reasonable time], the Police filed an apprehension report under Section 37 [of the Criminal Procedure Code] on 30th August, 2007. On the same day the accused was arrested, the complainant wrote to the bank [his letter dated 30th August, 2007]. [The] prosecution has submitted that, thereafter, there was a weekend….., and the detention was explained.**
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> **"Defence Counsel has cited the case *Ann Njogu & 5 Others v. Republic)* [High Court Misc. Crim. Application No. 551 of 2007] (in which) *Mutungi, J.* held that if [the] accused is not brought to Court within 24 hours, every minute thereafter, of their continued detention, is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the accused.**
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> **"In the case of *Ann Njogu & Others*, the respondent was not represented, and no explanation was offered for the extended detention.**
>
> **"Section 72(3)(b) [of the Constitution] allows for explanation as to why a suspect was not brought to Court within reasonable time. The prosecution has submitted that the accused were brought [before the Court] as soon as was reasonably practicable….The burden of proof**

rests on [the prosecution]. [The prosecution] has explained what occasioned the delay – the effort made by the Investigating Officer to file an apprehension report, and to advise [the] complainant to seek documents from the bank.

"The explanation given satisfies the requirement of section 72(3)(b) [of the Constitution]. I therefore dismiss the objection raised by [the] defence, and order that plea should be taken."

Learned Counsel, ***Mr. Owang*** argued the application, and canvassed the several grounds in support of the same. In the process, he brought before the Court several authorities, which he urged, supported the applicants' case: that the trial being conducted against them was a nullity, on account of guarantees of trial-rights provided for in the Constitution.

Learned counsel's prime authority was the High Court (***Mutungi, J***.) decision in ***Ann Njogu & 5 Others v. Republic***, Misc. Crim. Application No.551 of 2007. Counsel highlighted certain portions of the ***Njogu*** case, and these may here be set out –

(i) "The applicants were arrested on 31st July, 2007 at 12.00 [?] and no attempt had been made to bring them before any Court, till today, 2nd August, 2007, before the Nairobi Chief Magistrate's Court, where Counsel for the applicants blocked the attempt to charge the applicants. In the result, no pleas were taken before the Subordinate Court.

"The applicants' case is that their constitutional and fundamental rights, as per section 72(3) of the Constitution, have been violated, in that, they had not been produced before a Court of law within 24 hours…. The charge according to the charge sheet under which they were to be charged at the lower Court, clearly showed that the offences were not of [a] capital nature and, accordingly, they were to have been brought to Court within 24 hours of their arrest or detention."

(ii) "Under Section 72(3) of the Supreme Law of this country, the Constitution, the applicants should have been brought before the Court by 12.00 noon on 1st August, 2007; that was before the expiration of the 24 hours permitted by the Constitution. I dare add that the section is very clear and specific – that the applicants can only be kept in detention or the cells for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the Court, every minute thereafter of their continued detention is an unmitigated illegality, as it is a violation of the fundamental and constitutional rights of the applicants."

(iii) "Accordingly, I find and hold that the constitutional rights of the applicants have been, are being, and continue to be, violated by their continued stay in detention."

(iv) "I must also add, in line with the authorities cited before me – Albanus Mwasia Mutua vs Republic, Cr. App. No. 120 of 2004, and Republic v. James Njuguna Nyaga, High Ct. Crim. Case No. 40 of 2007 with which I totally agree and associate myself… – that upon determination that the constitutional rights of the applicants have been violated, any prosecution against them or any of them, on the basis of the events for which attempted charges were being made this morning, 2nd August, 2007, is null and void. And that is so, and will remain so, irrespective of the weight of the evidence that the Police might have in support of their case. This is on the simple reason that such a prosecution would be based on an illegality and a null-and-void case."

(v) "Finally, all should note that there is as yet NO known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional and fundamental rights were violated prior to the purported institution of the criminal proceedings complained against. Nor is there any room for extension of the constitutionally-provided-for period of 24 hours."

COURT OF APPEAL DECISIONS

Learned counsel did not place before the Court the High Court decision referred to in the ***Njogu*** case, namely, ***Republic vs James Njuguna Nyaga***, High Ct. Crim. Case No. 40 of 2007; but he sought to rely also on two Court of Appeal decisions, namely, ***Albanus Mwasia Mutua v. Republic***, Crim. App. No. 120 of 2004, and ***Gerald Macharia Githuku vs Republic***, Criminal App. No. 119 of 2004.

While it is clear that the ***Njogu*** case, in its full tenor and effect, favours the applicant's stand as canvassed in the instant matter, it is not evident such is the case, too, with regard to the said two Court of Appeal judgments. The passages in the ***Albanus Mutua*** case which learned counsel underlined, as being in support of the application, may be set out here –

> ***(i) "Even if the appellant had been arrested for other offences on 16th February, 2000 as the charge-sheet shows…..that would not provide an explanation as to why the appellant was not taken to Court on the charges we are dealing with until some eight months later…."***

From the foregoing passage, it is clear that the Court's perception of s.72(3)(b) of the Constitution, is that in a proper case, an *explanation* of delay in prosecution – even for some months – was not shut out of the realms of possibility; and the logical inference from this fact, in my opinion, is that the Court has in each case coming before it, of the kind typifying the instant application, the normal judicial obligation to consider the *facts and circumstances*, before determining the question.

> ***(ii) "We must admit that the matter has caused us some considerable thought and anxiety. On the one hand it is the duty of the Courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the Courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution."***

Quite clearly, the Court would not have been of the view that a cut-and-dried answer, for judicial application, existed whenever an application such as the instant one came up, and there was evidence that the Police authorities had detained a suspect for longer than twenty-four hours in the case of a non-capital offence, or for longer than fourteen days in the case of a capital offence – before bringing him or her before the Court. It is beyond doubt that the Court, in the ***Albanus Mutua*** case, was much alive to the competing claims which have been embedded in the constitutional document: this instrument is for safeguarding the trial-rights of the suspect, just as it is for guaranteeing safety to the collective society, in the conduct of civil life. The strategic role of the judiciary, in that context, is to interpret the law with discretion and sensitivity, to give meaning to the competing claims. This role, for all practical purposes, can only be performed by the *judicial organ*, since neither plebiscites nor special legislative events are to be expected, once the Constitution or the ordinary law has in the first place been enacted.

In the ***Albanus Mutua*** case, the Court was involved in such a balancing function, and it is difficult to see that the Court decreed on that occasion, a particular path which, without question, favours the case which the applicant brings before this Court.

> ***(iii) "In the case of Ndede v. Republic [1991] KLR 567 … there was no explanation offered for the delay of some thirty days before Ndede was brought to Court….[The Court of Appeal held that]…..the trial Magistrate ought not to have accepted Ndede's plea of guilty. Ndede's appeal was allowed and his conviction quashed. It did not matter that before convicting Ndede, the Deputy Public Prosecutor had stated the facts in support of their charges, that Ndede had admitted those facts, and the facts themselves had disclosed the offences charged against him. The quashing of the convictions must have been on the basis that Ndede's constitutional right given to him by Section 72(3)(b) of the Constitution had been violated and he was entitled to an acquittal."***

Although learned counsel sought to rely on the above passage, he appears not to have been alive to the question of *explanation*, as a possible excuse for the prosecution not bringing a suspect before the Court within a defined period of time. In my opinion learned counsel did not properly invoke the foregoing passage in the ***Ndede*** case, as it is not consistent with any inflexibility in s.72(3)(b) of the Constitution

such as would qualify this Court's scope for interpretation and discretion.

> ***(iv) "In the appeal now before us, there was undoubtedly a gross violation of the appellant's constitutional right guaranteed to him by section 72(3)(b) of the Constitution. He was brought before the trial Magistrate some eight months from the date of his arrest and no explanation at all was offered for that delay."***

Once again the foregoing passage would not, in my opinion, support the concept in the applicants' case, that s.72(3)(b) of the Constitution sets up an inflexible law which ordains the acquittal of a suspect where the suspect was not brought to Court within a defined period of time. The detaining authority can acquit itself by giving an explanation for the delay – and, quite clearly, this would turn on the facts and circumstances of each case – which it is the Court's obligation to assess and rule upon.

> ***(v) "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 in support of the charge…The deprivation by the Police of his right to liberty for a whole eight months before bringing him to Court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."***

The tenor and effect of the foregoing passage is, in my opinion, quite consistent with that which is apparent in the other passages the applicants have sought to rely on. Section 72(3)(b) of the Constitution has an open window for the Police, where they have not brought a suspect before the Court within a defined period of time: the Police need to *explain* such delayed arraignment of the suspect in Court, to the satisfaction of the Court; and, no doubt, the Court will be exercising its mind, in this regard, in a judicious mode, by considering all the *facts* and *circumstances*.

The applicant has also relied on particular passages from the Court of Appeal decision in ***Gerald Macharia Githuku vs Republic***, Crim. Appeal No. 119 of 2004. Just one of these passages may be set out here –

> ***"We have come to the conclusion, after a careful weighing of [the claims of the public interest, vis-à-vis the appellant's trial-rights], in the light of the facts of the present case, that although the delay of three days in bringing the appellant to Court 17 days after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the Constitution should be disregarded . Although the offence for which he was to be 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.***
>
> ***"In reaching this conclusion we have also been mindful of the fact that the appellant has now been in custody for in excess of 12 years and that his two co-accused have died while in custody."***

The foregoing passage, quite clearly, is not consistent with the point carried in learned counsel's submission, that s.72(3)(b) of the Constitution *requires* the acquittal of an applicant who was detained for longer than the defined periods of time, before being charged in Court. For one thing, the Court was fully cognisant of the principle that delay in laying charges against a suspect may, in certain cases, be for good cause. Secondly, the appellant in the ***Githuku*** case was released on the basis of the facts, partly, that he had already been held in jail for some twelve years; and that in the meantime his co-accused had already died while serving jail sentence.

Referring to the two decisions, ***Albanus Mwasia Mutua*** and ***Gerald Macharia Githuku***, learned counsel ***Mr. Owang*** urged: "the present application falls within the limbs of those authorities."

Learned respondent's counsel, ***Mr. Makura*** made no submissions in response, but asked that this Court should consider the record from the Magistrate's Court, and rule on the question whether the delay in bringing the applicants before that Court had a proper explanation.

WHAT IS THE NATURE OF THE SUBORDINATE COURT'S JURISDICTION WHEN OBJECTIONS TO TRIAL ARE RAISED BY VIRTUE OF SECTION 72(3) OF THE CONSTITUTION?

As already noted, objections to trial were raised in the Magistrate's Court; and the learned Magistrate went ahead and made a ruling, on 14th September, 2007. In her ruling, the Court did not limit itself to *fact-finding* and *directions on fact*, but dealt with the *merits* of the objection, and overruled the contentions of counsel that the complaint should be decided in the manner proposed, as a matter of law. The learned Magistrate ruled that:

> ***"The explanation given satisfies the requirement of section 72(3)(b) [of the Constitution]."***

And on that basis, she dismissed the objection, directing that any dissatisfaction with her ruling, be resolved by way of *appeal.*

However, what is now before the Court is not an appeal, but an *application* brought under s.72(3) of the Constitution.

Whether or not the learned Magistrate had the competence to determine the substantive constitutional question – as she purported to do – and whether only an *appeal* could lie, following her ruling, is itself a question of law, falling for determination on the basis of authority.

It is well known that the High Court has the jurisdiction to determine all justiciable disputes, including those entailing the *interpretation of the Constitution* itself. Section 60(1) of the Constitution stipulates that:

> ***"There shall be a High Court, which shall be a superior Court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."***

While a question of the interpretation of the Constitution, such as that which has arisen in the instant application, clearly falls within the jurisdiction of the High Court, it is not apparent that such a matter of the substance of the Constitution would fall properly within the jurisdiction of the learned Senior Principal Magistrate.

Such is the position, in line with judicial authority, in my opinion, inferring from a related case of the High Court, ***Crispus Karanja Njogu v. Attorney General***, Crim. Application No. 39 of 2000:

> ***"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."***

This Court has, in an earlier decision, ***Dickson Ndichu Kago v. Republic,*** High Ct. Misc. Crim. Application No. 639 of 2007, taken the position that the Magistrate's Court as a trial Court, is not wholly deprived of jurisdiction whenever a claim is being made under s.72(3)(b) of the Constitution, save that its

jurisdiction is only a threshold one, leading to the determination of the substantive questions by the High Court. The relevant passage in that decision may be set out here:

> **"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."**

The principle in the foregoing passage is that a complaint such as the one in the instant application, should be ventilated *at the commencement* of the criminal case – *especially* where the accused is represented by counsel. This will accord the prosecution an *early opportunity* to provide any explanatory facts in relation to the delay in prosecuting. Early objection will also ensure that the judicial machinery is not taxed *in vain*, in taking proceedings that may later be adjudged to be not well-based in law. Since the hearing and determining of a criminal case is, *prima facie*, a constitutional, public-interest process, secured under s.26 of the Constitution, ***if*** it continuously engages the Court's time and operations over a long period of time, before any complaint based on s.72(3)(b) of the Constitution is raised, then constitutional principle may dictate that that process should run its full course, and the accused may then have to look only to the merits of the hearing, to vindicate him as the party who has been wronged.

The Subordinate Court's role, in that regard, is that of *laying out the basic facts*, and giving the accused a chance to state if he or she intends to seek a constitutional determination of substantive questions in the High Court. Where the suspect expresses an *intention to move the High Court*, the Subordinate Court would contribute to efficiency in the judicial process by fixing a *mention date*, for the purpose of confirming that the High Court has been so moved; and if the complainant fails to move the High Court, then the Subordinate Court would give directions on *continued trial* of the criminal case. If the complainant moves the High Court, then trial would remain in abeyance, until the High Court gives directions.

DOES POLICE DETENTION OF APPELLANTS FROM 30TH AUGUST, 2007 TO 5TH SEPTEMBER, 2007 JUSTIFY ORDERS OF ACQUITTAL?

The learned Senior Principal Magistrate made certain findings of fact, touching on the grievance now brought before the High Court. The applicants had been detained in Police custody for more than 24 hours, before being brought to Court; the prosecution proffered explanation for the delay; communication with the bank had to be undertaken, to secure relevant prosecution records; there was an intervening week-end, which slowed down the preparations to prosecute; the Police authorities, being concerned about the delay, filed an apprehension report in Court, regarding on-going preparations to prosecute.

Of apprehension reports, the Criminal Procedure Code (Cap.75, Laws of Kenya), s.37 provides:

> ***"Officers in charge of Police stations shall report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations, whether those persons have been admitted to bail or not."***

This is, I think, an accounting procedure in the conduct of the Police, to ensure the detention of persons is known to the Court.

ON THE MERITS

Although, as already noted, a portion of the learned Senior Principal Magistrate's ruling lacked a basis in law, the *factual part* thereof is, I think, quite consistent with the role of a trial Court in relation to objections raised under s.72(3)(b) of the Constitution. This part may be preserved, and I hold it to be a proper judicial statement regarding the explanations proffered by the prosecution, in respect of the detentions complained about.

From my review of the case law relied upon by the applicants; from my conclusion that they do not support the contention that the applicants *must* be released from the trial process; and from my review of the facts and circumstances attending the detentions complained about, I must come to the conclusion that there is no basis in law for allowing the applicant's prayers.

Consequently, I hereby refuse the application by Notice of Motion dated 20th November, 2007. I order that Nairobi Criminal Case No. 1458 of 2007 shall be listed for mention before the Chief Magistrate at the Nairobi Law Courts on Monday, 13th October, 2008, for the purpose of giving trial directions as appropriate.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 8th day of October, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Owang

For the Respondent: Mr. Makura