REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION NO. 176 OF 2008

IN THE MATTER OF SECTION 65 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF LUCY WANGUI KIUNUHE

LUCY WANGUI KIUNUHE …….....APPLICANT

-VERSUS-

REPUBLIC OF KENYA ……..RESPONDENT

RULING

The applicant moved the Court by Originating Notice of Motion dated 28th March, 2008. This application was brought under ss. 72(1) and 77(1) of the Constitution of Kenya, and s. 123 of the Criminal Procedure Code (Cap. 75, Laws of Kenya). The applicant was seeking a declaration that her constitutional rights "have been, are being and continue to be violated by her continued prosecution in Nairobi Cr. Case No. 1871 of 2007. She sought a declaration that her prosecution in the said criminal case was a violation of her fundamental rights, and was "illegal, null and void".

In her supporting affidavit the applicant thus asserts:

(i) on *8th November, 2007* at *12.00 noon*, while she was at home at Githurai Estate in Nairobi, she was arrested by Police officers attached to the Banking Fraud Unit, and they detained the applicant in their office, and again, subsequently, detained her at Kileleshwa Police Station in Nairobi;

(ii) the detaining officers informed the appellant that a fraudulent cheque of Kshs. 495,000 had been banked in her account at Co-operative Bank, Githurai Branch;

(iii) the applicant knows nothing about the said cheque, and has made no withdrawal against it;

(iv) the applicant believes it was a violation of her fundamental rights for the Police to hold her in custody from *8th November, 2007* to *13th November, 2007* without bringing her to Court for any charge to be laid against her;

(v) five days since she was so detained, the Police now brought a charge against the applicant, in Criminal Case No. 1871 of 2007

(vi) the applicant did not plead to the charge, as she had already filed Misc. Cr. Application No. 789 of 2007 in the High Court, challenging the proceedings;

(vii) the said Misc. Cr. Application No. 789 of 2007 was marked spent, as it had been filed before Criminal Case No. 1871 of 2007 was lodged in the Subordinate Court.

John Mwangi the investigating officer in the said Criminal Case No. 1871 of 2007, swore a replying affidavit, deponing thus:

(a) that on *8th November, 2007 at 4.00pm* the officer in charge of the Banking Fraud Unit received a call from Co-operative Bank, Githurai Branch, that they had arrested a suspect whom they wanted to interview, in connection with attempted theft of Kshs. 485,000/;

(b) that on the said date, the deponent re-arrested the applicant from the hands of Co-operative Bank security officers, at about 8.40pm on *Thursday, 8th November, 2007;*

(c) that on the following day, *Friday, 9th November, 2007*, the deponent reported the arrest of the applicant to the Chief Magistrate's Court, Nairobi; and the deponent attaches to his affidavit an Apprehension Report made under s. 36 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), filed on 9th November, 2007;

(d) that on the following *Monday*, 12th November, 2007, the deponent retrieved relevant transaction documents from the complainant-bank, and these enabled him to prepare the charges to be laid against the applicant;

(e) that on Tuesday, 13th November, 2007 the deponent brought the applicant before the Court for plea-taking;

(f) that it was not reasonably practicable for the prosecution to present the applicant before the Court within 24 hours, as investigations had not yet been concluded.

When this matter came up before the Court, the applicant was no longer in custody, but had been admitted to bond by the Court. But learned counsel ***Mr. Nyachoti*** was making the case that, because detention of the applicant by the Police had lasted for *more than 24 hours*, then necessarily, the applicant's rights under s. 72(3) (b) of the Constitution had been violated, and this gave a basis for terminating the criminal proceedings *in limine* and acquitting the applicant.

It is clear that ***Mr. Nyachoti*** had disregarded the fact of a *weekend* intervening between arrest and arraignment in Court. ***Mr. Nyachoti*** added to the weekend period of time the number of hours running from *8th November, 2007 at 12.00 noon* (when the Banking Fraud Investigation unit had first made the arrest) to *4.00pm* on that same day, when the Investigating Officer re-arrested the applicant herein. So there were more hours than the period of 24 hours referred to in s. 72 (3) (b) of the Constitution, when the applicant was held in custody before being charged in Court. In the words of counsel:

"There can be no two arrests. The *arrest* was the one [effected] by the [Banking Fraud Investigation Unit]; the Investigating Officer only took over."

Mr. Nyachoti disputed the explanation of delay in prosecuting as stated by the Investigating Officer; in learned counsel's words:

"S. 36 of the [Criminal Procedure Code] casts a duty upon the person arresting, to arraign a suspect before a judicial officer. [It is the] duty of an arresting officer to bring the suspect before a judicial

officer within the shortest time possible, to explain why the applicant wasn't brought to Court within twenty-four hours. That explanation is lacking in the replying affidavit".

This line of submission was sought to be supported by the High Court's ***(Mutungi, J.)*** decision in ***Ann Njogu & five others v. Republic*** Nbi High Ct. Misc. Crim. Application No. 551 of 2007; and counsel relied on the following paragraph in that decision:

> ***"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 applicant".***

Counsel thereafter urged that no reasonable explanation had been given for the delay beyond twenty-four hours in bringing the applicant to Court after arrest had taken place.

Learned respondent's counsel ***Ms. Gateru*** contested the applicant's case. She submitted that s. 72(3) (b) of the Constitution did envisage a situation in which there would be reasonable cause for not arraigning a suspect in Court within twenty-four hours of arrest; and she urged that the replying affidavit had explained why it was not practicable to bring the applicant to Court within that time-frame. Counsel noted that there was a weekend intervening, between time of arrest, and time of arraignment in Court; that even in those circumstances, the Investigating Officer had made an apprehension report before the Chief Magistrate, when it became clear that arraignment in Court was not possible within twenty-four hours; and that the applicant was brought before the Court without delay, as soon as investigations had been dutifully accomplished.

This kind of application has become quite common in the High Court, in recent times. Applications in this category, sometimes, state that the applicant was detained for months, or even years, before being brought to Court for the first time; but sometimes such applications are centred around a deadline of twenty-four hours that may have been slightly exceeded, before a suspect is brought before the Court. Where the delay in bringing the suspect before the Court is inordinately long, and especially if it is not shown that that period was necessitated by the complicated nature of investigations, or the geographical or logistical situation prevailing, the case law shows an inclination towards a finding that illegal detention has taken place; and illustrations in this regard include: ***Albanus Mwasia Mutua v. Republic***, Crim. Appeal No. 120 of 2004; ***Eliud Njeru Nyaga v. Republic***, Crim. Appeal No. 182 of 2006; ***Republic v. Joseph Zakayo Maithia & four others,*** Nairobi High Court Crim. Case No. 105 of 2005.

It has become clear, however, that there are cases in which suspects have moved the Court by way of applications to nullify scheduled trial proceedings, with the primary intent of securing an assertion of safeguards signalled in the Constitution, rather than with the sincere conviction that expeditious initiation of trial was not impeded by normal, inevitable circumstances. This is where, at the end of the day, the *discretion* of the Court must come in, if the judicial mandate resting upon the Court is to be appropriately exercised. I have in the past, in ***Ponnuthurai Balakumar v. Republic***, Nairobi High Court Misc. Application No. 218 of 2008 thus explained the principle attending the Court's exercise of discretion, in such circumstances:

> **"The High Court is to be regarded as a responsible institution, which seeks to give fulfillment 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 [the] 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 the instant matter the Police officers avow that they indeed have evidence to adduce in Court, to prove

that the applicant's bank account has been put to unlawful use, and an offence under s. 357(a) of the Penal Code has been committed. The prosecution have also explained that, notwithstanding the intervention of a weekend, and even with the short time that was available for concluding investigations, a sense of duty was shown, firstly by making an apprehension report in the Chief Magistrate's Court; and secondly, by moving expeditiously to lay charges against the applicant herein. Is such an explanation being given in good faith, or as cover-up for some ulterior motive? No ulterior motive has been alleged; the applicant only says that her trial rights under s. 72(3) (b) of the Constitution have been violated.

But it is not *obvious* such a violation of rights did take place. Indeed, I found no evidence at all that the prosecution had infringed upon the applicant's guaranteed trial rights while they were engaged in any wrongful conduct. Section 72(3) (b) of the Constitution, it is clear, does not state that a suspect may not be arraigned in Court after having been detained for a period of time longer than that which is expressly mentioned. There is the proviso that *explanations* may be given for a longer period of detention, provided it can be shown that there was *reasonable* cause for the delay.

I find that the prosecution did provide reasonable explanation for the delay in bringing the appellant before the Court, which took place in this instance.

Consequently, I hereby dismiss the applicant's Originating Notice of Motion dated 28th March, 2008. I direct that the trial Magistrate shall proceed to hear and determine the case in question, this being Criminal Case No.1871 of 2007.

Orders accordingly.

DATED and DELIVERED at Nairobi this 6th day of November, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court clerk: Huka

For the applicant: Mr. Nyachoti

For the Respondent: Ms. Gateru