



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Misc. Case 202 of 2008

1. PASCAL OLUOCH MBAGO

2. BENARD MENCHOLI KONCHELA

=versus=

REPUBLIC

RULING

1. The Applicants herein, Pascal Oluoch Mbago and Bernard, Mencholi Kenchellah are the accused persons in Machakos CM's Court, Criminal Case No. 2573/2007. In that case they are facing multiple counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code.

2. In their originating Notice of Motion dated 7.7.2008, they have applied for the following orders:-

“a....

b. That the Prosecution against the Applicants

in Criminal Case No. 2573/07 be declared as Illegal, unconstitutional and or a breach of the accuseds' Fundamental Rights.

c. That this Honourable Court be pleased to make a finding that holding of the accused person in custody for 19 (nineteen) days from the date of their arrest on 4.8.2007 to the date they were produced to court on 22.8.2008 which was illegal, unconstitutional and a breach of accused's Right to liberty as enshrined under the constitution of Land.

d. That due to the gross violation of the Accused's Fundamental Rights, the Criminal charges preferred and/or commenced against he accuseds be declared unconstitutional and therefore null and void and the same be quashed/and or stopped forthwith as it may deem fit.

e. That the Honourable Court do grant any other orders or directions as it may deem fit and just in the circumstances.”

3. In their Supporting Affidavits sworn on 7.7.2008, they have deponed that they were arrested on 4.8..2007 on suspicion of having committed the offences aforesaid and were detained in police custody for a period exceeding 14 days in breach of the provisions of section 72(3) of the Constitution. That the proceedings against them are therefore a nullity and they should be released from custody.

4. I have taken into account the submissions by Ms Odembo, advocate for the Applicants and I have

perused the following authorities :-

- i. Gerald Macharia Githuku vs Republic Cr. App. No. 119/2004.
- ii. Paul Mwangi Mwinga vs Republic, Cr. App. No.35/2006.
- iii. Albanus Mwansia Mutua vs Republic Cr. App. No.120/2004

5. I note that the import of all the above decisions is that where there is breach of any right under section 72(3) (b) of the Constitution, then the proceeding will be rendered null and void.

6. I have also taken into account the submissions on behalf of the Attorney –General and particularly the fact that a nolle prosequi was on 27.8.2008 presented to the trial court with a view to terminating the proceedings being challenged.

7. Before therefore, I address the objection, I should determine what to do with the nolle prosequi aforesaid. Section 82 of the Criminal Procedure Code Provides as follows:-

“(1) In any criminal case and at any stage thereof

before verdict or judgment, as the case may be, the Attorney General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizance shall be discharged; but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

(2) If the accused is not before the court when a nolle prosequi is entered, the registrar or clerk of the court shall forthwith cause notice in writing of the entry of the nolle prosequi to be given to the keeper of the prison in which the accused maybe detained.”

8. It is clear to me that once the nolle prosequi was presented, the registry ought to have effected it and had the Applicants released from custody. That being the case, the proceedings herein should have been terminated on 27.8.2008 and there was nothing left to challenge. The nolle prosequi itself is not being challenged and I think it would be futile for this court to delve into the constitutionality or otherwise of terminated proceedings.

9. In the event and invoking only the supervisory jurisdiction of this court, let the Deputy Registrar of this Court comply with section 82(2) aforesaid and have the Applicants released from custody in terms of the nolle prosequi filed on 27.8.2008.

10. Orders accordingly.

Dated and delivered at Machakos this 16th day of **December 2008.**

Isaac Lenaola

Judge

In the presence of: Ms Odembo for Applicant

Mr. O’mirera for Respondent

Isaac Lenaola

Judge