



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT MACHAKOS

Criminal Case 60 of 2008

REPUBLIC

VERSUS

1. DORCAS NDUKU

2. JOSEPH MUTUKU WILLY

3. ANDREW MUTHIMBO ALIAS DRO ..... ACCUSED

RULING

1. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons herein, Dorcas Nduku and Joseph Mutuku Willy have, through their advocate, D.R.T. Konya Esq, objected to the taking of the plea for the alleged offence of murder for the following reasons; that their constitutional rights have been violated in that they were held in custody beyond the 14 days envisaged by Section 72 (3) of the Constitution and they pray that the proceedings herein be declared null and void.

2. I have taken into account the submissions made in this matter but my mind is clear that the objection cannot stand as framed and argued. I say this, with respect, because nowhere in his otherwise lucid submission has Mr Konya told me when the accused persons were arrested in the proceeding before me. I note that the information was filed on 14/7/2008 and on 21/7/2008, the accused persons were produced before this court. I am aware that the accused persons were initially arrested and charged with the same offence as in the present proceeding. I am also aware that they were then discharged upon a nolle prosequi being entered in those proceedings. I am certain that the nolle prosequi has not been challenged on any known lawful ground and yet in submissions, Mr Konya correctly argued that those proceedings cannot now be revisited. If so, what then is the basis for the complaint before me?

3. Mr Konya referred me to a number of decisions which he cited in a similar objection in H.C.Cr. 33/2008 – R vs Mwanja Kithome. All those decisions have their reference point as the Court of Appeal decision of Albanus Mutua vs R – Cr. Appeal No. 120/2004. The basis for that decision, as I understand, it was that the Appellant had been arrested, and detained beyond 14 days before he was taken to court and upon his conviction, he challenged his detention. This court in previous proceedings was guided by that decision but in the present case, I cannot follow it. There is just not enough material placed before me to justify such an inference and I see nothing in the nature of the present case for me to declare null and void.

4. Having so held, perhaps there is need for me to revisit an issue that arose in submissions. I agree with

Mr O’Mirera learned Principal State Counsel, that release of a suspect whose rights have been violated is not the only remedy and available to an aggrieved party. Such a remedy can take any of the forms envisaged by Section 72 (6) and Section 84 (1), (2) and (6) of the Constitution. Those sections provide as follows:-

**“Section 72 (1)**

**(a)** .....

**(b)** .....

**(c)** .....

**(d)** .....

**(e)** .....

**(f)** .....

**(g)** .....

**(h)** .....

**(i)** .....

**(j)** .....

**(2)** .....

**(3)** .....

**(a)** .....

**(b)** .....

**(4)** .....

**(5)** .....

**(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that other person.”**

**“Section 84 (1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.**

**(2) The high Court shall have original jurisdiction-**

**(a) to hear and determine an application made by a person in pursuance of subsection (1);**

**(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).**

- (3) .....
- (4) .....
- (5) .....
- (a) .....
- (b) .....
- (i) .....
- (ii) .....

**(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court.)”**

5. Under Section 84 (6) aforesaid, the Chief Justice promulgated Rules, being L.N. 6/2006 i.e. The Constitution of Kenya (Supervisory jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006. Rule 11 and 12 thereof provide as follows:-

**“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.**

6. Rule 23 is however clear with regard to matters before the High Court. It provides as follows:

**Where a constitutional issue arises in a matter before the High Court, the court seized of the matter may treat such issue as a preliminary point and shall hear and determine the same.”**

7. Mr O’Mirera’s argument that the objection for want of procedure is improperly before the court cannot for that reason be sustained and the objection will fail for reasons other than want of procedure.

8. For all the above reasons, although the objection has been properly raised, it lacks merit and is overruled.

9. The plea shall now be taken.

10. Orders accordingly.

Dated and delivered at Machakos this **16<sup>th</sup>** day of **December** 2008.

ISAAC LENAOLA

JUDGE