REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC CRIM APPLI 37 OF 2008

JULIUS MBESHI KHANGAI……...……APPLICANT

V E R S U S

REPUBLIC……RESPONDENT

R U L I N G

The applicant, **JULIUS MBESHI KHANGAI**, was unrepresented.

In his application dated 2nd May 2008 he has one simple request;

"That the High Court file No.9/07 be closed and the case be acquittal (sic!)."

In his supporting affidavit the applicant says that he was first arrested on 10th September 2006, in relation to a murder case, in Shiseho sub-location. He was thereafter detained in the cells at the Kakamega Police Station until 29th November 2006, when he was released.

According to the learned senior state counsel, it is his office which ordered the police to release the applicant. The basis for that decision by the state law office was that the duplicate file which was forwarded to them, by Inspector John Sikuku, contained altered statements. Inspector John Sikuku was the police officer-in-charge of crime, in Kakamega, at the material time.

Following the release of the applicant together with 2 other persons, the relatives of the deceased raised an outcry. In response to the outcry, the state law office wrote to the Provincial Criminal Investigating Officer (P.C.I.O.), Western Province, asking for the police files.

Upon perusing the original police files, the state counsel was satisfied that there was sufficient evidence to warrant the charge of murder being preferred against the applicant. He therefore directed the police to re-arrest the applicant together with the other 2 suspects who had been released earlier.

Acting on the directions of the state counsel, the police arrested the applicant on 8th May 2007. Thereafter, the applicant and one co-accused were brought to court on 26th June 2007. By that date, the 3rd suspect, **ELIAKIM MAKHANU MBESHI**, was still at large. Indeed, as at 21st October 2008, when the application herein was canvassed before me, the said 3rd suspect was still at large.

As far as the learned state counsel was concerned, the delay between 8th May 2007 and 26th June 2007 was attributable to the fact that the police were still trying to find and arrest the 3rd suspect.

The state believed that the applicant ought not to be acquitted. Instead, it is said that the applicant may seek compensation from the state, pursuant to the provisions of ***section 72 (6)*** of the Constitution,, if he feels that his rights had been infringed.

In any event, the application was said to be incompetent because the applicant did not specify the provisions of law under which it was brought.

Pursuant to the provisions of "**The Constitution of Kenya (supervisory) Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006,** any person who alleges or apprehends that his fundamental rights and freedoms have been contravened, should file a Petition as set out in Form D.

But to my mind, where the person is acting for himself, it would amount to adding insult to injury, to require him to adhere strictly to rules of practice and procedure, about which he is unlikely to have any knowledge.

Incidentally, whilst the state was asking this court to enslave itself to the rules, and therefore to hold that the application was fatally defective, the state itself did not comply strictly with rule 16. The said rule reads as follows:

*"**The Attorney General or the respondent, as the case may be, shall within fourteen days of service of the petition, respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit."***

In this instance, no replying affidavit was filed. Instead, the learned state counsel offered an oral explanation, in an endeavour to satisfy the court that the applicant's constitutional rights had not been infringed.

Just the way the state was not shut out from trying to explain the delay, is the same way this court declines to reject the application simply because it is not in terms of Form D. It is necessary to do so, so that substantive justice is not sacrificed at the alter of procedural rules.

The fact that the duplicate police file contained statements which were different from those in the original police file is a serious indictment on the police force. It is an issue which needs to be examined exhaustively, as it smacks of a conspiracy to defeat justice. I say so because I cannot think of any other reason why the file which was sent to the state law offices contained statements which were different from those in the original police file.

The person who made the changes and the reasons why he did so, needs to be un-earthed. He must have intended the state counsel to base his advice to the police on the wrong statements. And that is exactly what transpired, leading to the release of the 3 suspects.

But the family of the deceased refused to let the matter fizzle out. They raised an outcry, forcing the state counsel to ask the P.C.I.O. to provide him with the original police file. Upon reading the original police file, the state counsel formed the opinion that there was sufficient evidence to warrant charging the 3 suspects. That must mean that some crucial aspects of the statements recorded by the witnesses had been removed from the duplicate file which was earlier presented to the learned state counsel. The question is, why?

The police were able to re-arrest 2 of the 3 suspects, including the applicant. He was arrested on 8th May 2007.

Thereafter, he was charged on 26th June 2007. And, the delay in bringing him before the court was attributed to the fact that the police were still trying to arrest the third suspect.

Given the fact that ultimately the state preferred charges against the 2 suspects, because the police had not managed to arrest the third suspect, means that the police could have taken the applicant to court earlier.

In any event, the applicant should not be made to suffer because a police officer had chosen to provide the state counsel with a duplicate file which did not have the right statements.

Furthermore, even after the applicant was re-arrested, he was held in custody for far too long before being taken to court. The explanation provided by the state does not satisfy the court that the applicant was taken to court as soon as was reasonably practicable. It was a gross violation of the applicant's constitutional rights as provided in ***section 72 (3)*** of the Constitution.

In so finding, it must be understood that the violation is due to the delay in bringing the applicant to court, as opposed to the fact that he was re-arrested and charged after he had been earlier discharged.

Before concluding this ruling, I feel obliged to re-visit the issue of procedure. In **THOMAS P. G. CHOLMONDELEY Vs. REPUBLIC, CRIMINAL APPEAL NO.116 OF 2007**, the Court of Appeal had occasion to state as follows:-

"***We have stated time and again that each judge of the High Court is a constitutional judge and where an application is made before any of them touching on any section of the Constitution, they can deal with it without necessarily insisting on a formal application."***

Once the issue of an alleged violation of the constitutional rights of an individual has arisen, and the state has been accorded an opportunity to explain its position, the court ought to adjudicate on the matter, without undue regard to rules of procedure.

In this case, I have come to the conclusion that the applicant's constitutional rights under section **72 (3) (b)** of the Constitution have been violated. Should I now tell him to seek compensation, as the learned state counsel has said? Or should I terminate the criminal case against him and acquit him, as the applicant has said?

Pursuant to **section 72 (6)** of the Constitution;

"***A person who is unlawfully arrested or detained by another person shall be entitled to compensation from that other person."***

It is that statutory provision that the state has invoked, when it asked this court to draw the applicant's attention to his right to seek compensation. And given the reaction of the family of the deceased person, when the 3 suspects were released earlier, it is understandable why the state may prefer to pay compensation rather than to face up to a hostile family, who have lost a loved one.

In **ALBANUS MWASIA MUTUA Vs. REPUBLIC, CRIMINAL APPEAL NO.120 OF 2004** (Unreported), the Court of Appeal emphatically stated as follows:-

"***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 judgement 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 to support the charge."***

But in the very same judgement, the Court of Appeal appreciated the fact that there exist two parallel sets of duties; one is to the accused person whilst the other is to the society. This is what they said;

"***We must admit that the matter has caused us some considerable thought and anxiety. On the one hand 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."***

The issue has caused me considerable anxiety too because if the applicant is acquitted at this stage, it would appear that the society had not been accorded appropriate protection, even though the applicant's rights would have been safeguarded. It appears that the acquittal of someone, against whom there was evidence to sustain a criminal charge, would be justified just because he too had been wronged.

Surely, it would be better that if an accused person had had his rights violated, yet he too had violated the rights of another person, he too ought to be appropriately punished, whilst the person who violated his rights should compensate him.

But, at the same time, I am fully aware that an accused person is deemed to be innocent until and unless the prosecution proves to the court that he is guilty. It is because of that legal presumption alone that in this case, in which no evidence has yet been led to proved the guilt of the applicant, that it cannot be said that he too ought to be appropriately punished for the wrong he may have committed. There is a possibility that at the end of a trial, if it did proceed, the applicant could be found innocent. If that were to happen, the applicant would have been wronged even further, by his continued detention in custody.

Perhaps it is for that reason that the Court of appeal concluded (in the case of **ALBANUS MWASIA MUTUA**) that the jurisprudence emerging from case law was that a person whose fundamental constitutional rights have been infringed should be acquitted. In the event, I order that the criminal proceedings against the applicant, in High Court Criminal Case No.**9/2007** be terminated forthwith, and that the applicant be set at liberty immediately thereafter, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Kakamega, this 4th day of December 2008

FRED A. OCHIENG

J U D G E