



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 40 of 2007**

REPUBLIC.....PROSECUTOR

**VERSUS**

JAMES NJUGUNA NYAGA..... ACCUSED

**RULING**

On 16/7/07, Learned Counsel for the accused gave the Hon. The Attorney General, Notice of Preliminary Objection on a point of law as follows:

**The constitutional rights of the accused person, as envisaged by Section 72 (3) (b) and Section 77 (1) (2) (a) (b) (c) of the Constitution had been, are being, and are likely to, be violated by these proceedings which were rendered null and void by virtue of the said violations of the Constitutional rights of a fair trial and protection of the law, of the accused person.**

On the 24/7/07, when the application came up for hearing, Counsel for the applicant/accused made the following submissions:

The accused was arrested on 12/2/07 on suspicion of belonging to an illegal Organization. He was kept in custody for 5 months and an application, in the nature of HABEAS CORPUS [Misc. Application No. 436 of 2007] had to be filed before the accused was produced and charged with the crime of murder, on 14/6/07.

That is the background and the undisputed facts behind this Preliminary Objection, by the accused.

The case by the accused is briefly that the above facts and acts by the police constituted and constitute a violation of his constitutional rights.

Sections 72 and 77 of the Constitution are part of Chapter V of the Supreme Law of this Republic and deal with the **Protection of Fundamental Rights and Freedoms of the Individual**.

Section 72 (3) (b) provide as under:

**“A person who is arrested or detained upon reasonable suspicion of his having committed or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty four hours of his arrest or from the commencement of his detention, or within 14 days of his arrest or detention, where he is arrested or detained upon reasonable suspicion of his having committed or**

**about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as reasonably practicable shall rest upon any person alleging that the provisions of this sub section have been complied with”**

Section 77 (1) (2) (a) (b) and (c) provide as under:

**77 (1) “If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**

77(2) (a) (b) ( c )

**Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty, shall be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence with which he is charged, and shall be given adequate time and facilities for the preparation of his defence.”**

From the material before me, it is common ground that the accused was brought to court 105 days after the expiry of the constitutionally permitted period of 14 days.

It is the case by the accused that the police had no reasonable suspicion; else why wait for 105 days after the expiry of the 14 days.

Further, it is the case by the accused that he was denied access to court, and that violated his right to the protection of the law as per Section 77 of the Constitution. Again, the material before me is beyond reproach on this point, and is a common ground for both sides.

On the basis of the above constitutional provisions; the facts in this case, and the authorities cited and relied upon, the learned counsel for the accused submitted that the case herein be declared null and void.

In Reply Ms. Wafula, Learned State Counsel, submitted that the application is defective as it does not state the time nor the court by which the application will be heard. This, the Learned State Counsel stressed, violates the provisions of Section 84 of the Constitution and the Constitution of Kenya

visory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual] High Court Practice and Procedure Rules, 2006.

The Learned State Counsel further submitted that the application is defective because it has no Supporting Affidavit, nor grounds as to the objects of the application. Further, continued the learned State Counsel, the Rule of Law entails Rules of Procedure, otherwise such Rules of procedure need not be there in the first instance if they were to be ignored. The State Counsel further submitted that an accused person cannot come to court just any how, no matter his grievances.

In reply to why the Police have not explained why the accused was in custody for 5 months before being brought to court, the Learned Counsel submitted that it was because of the incompetence of the application whereby the Attorney General could not, and has not even, filed a Replying Affidavit to the application to show why the accused was held in custody for so long.

Finally, the State Counsel submitted that the application – Preliminary Objection – be dismissed for incompetence.

In response, the Learned Counsel for the accused/applicant submitted that the application is on a Preliminary Objection basis, and the accused does not need to go into any facts. It is on a point of law, notice of which had been given to the prosecution. There is no requirement for any affidavit in a Preliminary Objection. He concluded by observing that Legal Notice No. 6 of 2006 – Rules is not applicable here, and the matter is properly before this court and the court has jurisdiction.

Having very carefully gone through the submissions and the authorities cited and relied upon, by Learned Counsel for both sides, I have reached the following findings and conclusions.

In any legal proceedings, the first thing to determine is whether or not the Court/Tribunal before which the proceedings are brought has jurisdiction. That is critical because anything said or done without jurisdiction is null and void, and the court, upon determination that it has no jurisdiction over the matter, must down its tools forthwith.

In the present case/application, **Section 84(1) (2) of the Constitution** confers jurisdiction to this court. It provides, in the relevant parts, as under:

**“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.....then, without prejudice to any other action with respect to the same matter which is lawfully available, that person....may apply to the High Court for redress.**

**The High Court shall have original jurisdiction to hear and determine an application made by a person in pursuance of Subsection (1)..... 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).”**

It is trite to reiterate that the application before me, falls squarely under Sections 72 and 77 of the Constitution, which are within the coverage of section 84, herein above.

In other words, this court has jurisdiction to hear and determine the application herein.

The second issue to clear out of the way is the submission by Learned Counsel for the State that the application is not properly before this court because it is not by way of an Originating Motion, nor in compliance with the High Court Practice and Procedure Rules, 2006. The Counsel specifically referred to lack of Supporting Affidavit and statement of facts.

With due respect to the Learned State Counsel, the submission misses the legal points involved here. In any proceedings, any party has the right to raise any Preliminary Objection, on point of law, at any stage of the proceedings. Such a Preliminary objection may be raised either orally or formally. Here, the accused/applicant, had earlier on given Notice of the Preliminary Objection as far back as 16/7/07.

Secondly, Affidavits – Supporting or Replying – are required where issues or matters of fact are being raised. Not so when the issue is on a matter of law. Put differently, affidavits are applicable mainly in Interlocutory applications, where what is deponed in those affidavits operates as evidence, since no oral evidence is acceptable in such interlocutory applications.

No evidence is required to prove the law, for all are presumed to know the law and fail to so know it at their own detriment.

It is not necessary in light of the foregoing finding and holding, to stress that the Rules of Procedure, as per Legal Notice No. 6 of 2006, have no application under the circumstances obtaining in the present application. For avoidance of doubt, suffice it to state that the Rules referred to by the Learned State Counsel, deal with how to move the court. As stated herein earlier, there is no procedure on how to raise a Preliminary Objection on a point of law, in the course of legal proceedings before a court. Preliminary Objections on a point of law, can be raised at any time and stage of the proceedings.

In the result, the submissions that the application is defective or incompetent on account of non-compliance with the above Rules have no legal basis and I reject the same as unfounded and lacking in substance.

Having cleared the preliminary issues of jurisdiction of this court to hear the application and the

incompetence or otherwise of the application, I now turn to the substance of the application by the accused person herein.

The applicant/accused was arrested on 12/2/07 on suspicion of belonging to an illegal organization, and kept in custody for 5 months, before being charged with the offence of murder, contrary to Section 203 as read together with Section 204 of the Penal Code Cap. 63, Laws of Kenya, on 14/6/07. In other words, the accused was kept in custody for 105 days after the expiry of the 14 days permitted by Section 72(3) of the Constitution.

No stretching of argument can justify such illegal detention of the accused: The Police cannot say that the detention was on reasonable suspicion. If they had any reasonable suspicion that the accused had committed or was about to commit a crime, they should have charged him within the 14 days following 12/2/07. They did not. Keeping the accused in custody for 105 days after the expiry of the permitted 14 days can only lead to one conclusion, that the Police had no reasonable suspicion to arrest the accused in the first place. If they had they would not have detained him in custody for 105 days after the expiry of the permitted period of 14 days.

Accordingly, I find and hold, that the constitutional and fundamental rights of the accused were, and continue to be, and will continue to be, violated by the continued prosecution of these proceedings.

As was held in **ALBANUS MWASIA MUTUA V. REPUBLIC, Cr. Appeal No. 120 of 2004. where the accused had been brought to court eight months from the date of his arrest and no explanation was offered for the delay “The rights of the accused under Section 72 (3) of the Constitution had been violated, and that also amounted to a violation of his rights under Section 77(1) of the Constitution which guarantees him a fair hearing within a reasonable time”.**

**I adopt the above from the Court of Appeal and hold that the accused’s application must succeed on that point alone.**

In **GERALD MACHARIA GITHUKU V. REPUBLIC, Cr. Appeal No. 119 of 2004, three days** beyond the stipulated period of 14 days, by Section 72(3) was sufficient violation of the Constitutional rights of the accused.

Here, the accused has been kept in custody for 105 days beyond the statutory period stated in Section 72(3), of the Constitution.

This court is duty bound to uphold and enforce the provisions of this country’s Supreme Law – the Constitution. Accordingly, I find and hold that the constitutional rights of the accused have already been infringed by this prosecution, which I hold to be illegal. Continued hearing of this case – **Criminal Case No. 40 of 2007** - will simply worsen and prolong the continuing violation of the constitutional rights of the accused.

I would be failing in my duty by not declaring Criminal Case No. 40 of 2007 null and void, as it is premised, and has its genesis on an illegality.

And the position remains so irrespective of the weight of the evidence that the prosecution may adduce in support of their case. For such evidence will be in support of a vacuum – a nullity. The proceedings in Criminal Case No. 40 of 2007 are on illegality. Police, or anybody for that matter, have no right to detain any person against the law. And that is exactly what happened, and continues to happen, in this case. This court will not be party to such continuing violation of the Constitution.

All in all, I uphold the Preliminary Objection raised by the accused person and declare Criminal Case No. 40 of 2007 to be a nullity. I further order the immediate release of the accused unless he is otherwise lawfully held.

DATED and delivered in Nairobi, this 31<sup>st</sup> Day of July, 2007.

**O.K. MUTUNGI**

**JUDGE**