



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

Misc Crim Appli 551 of 2007

(In the matter of an intended appeal)

BETWEEN

ANN NJOGU & 5 OTHERS APPLICANTS

VERSUS

REPUBLIC RESPONDENT

RULING

On 1/8/2007, the Applicants herein moved to this court by way of an Originating Notice of Motion under Sections 72(1), 77 (1) of the Constitution of Kenya, and Section 123 of the Criminal Procedure Code and the inherent power and Jurisdiction of this court.

Upon perusal of the application herein above, this court ordered that the same be served upon the Attorney General, and the Commissioner of Police, and an **interpartes** hearing was fixed for this morning, 2/8/07. The court also ordered that the applicants be in attendance during the **interpartes** hearing.

Today, 2/8/07, at the commencement of the hearing, this court was informed by Learned Counsel for the applicants - Mr. F. Nowrojee (on behalf of all the 20 advocates appearing for the applicants) that: the Attorney General's office [the D.P.P.] and the Commissioner of Police, were duly served with this court's orders dated 1/8/07, on the same day. There is a return of service to that effect, even though those officers made no appearance, either in person or through their counsels.

In brief, I am satisfied that the State Law Office and the Commissioner of Police were duly served.

Under those circumstances, the hearing commenced, their absence notwithstanding, and this is because of, among other factors, the constitutional implications brought out in the pleadings before me and the submissions by the Learned Counsel for the applicants.

The brief facts in this application are as under.

The applicants were arrested on 31/7/07, at 12.00 and no attempt had been made to bring them before any court, till today, 2/8/07, before the Nairobi Chief Magistrate's Court, where the counsels for the applicants blocked the attempt to charge the applicants. In the result, no pleas were taken before the Subordinate Court.

The applicant's case is that their constitutional and fundamental rights, as per section 72(3) of the constitution, have been violated in that, they had not been produced before a court of law within 24 hours as required by the constitutional provisions. The charge according to the charge sheet under which they were to be charged at the lower court, clearly showed that the offences were not of capital nature and accordingly they were to have been brought court within 24 hours of their arrest or detention.

Having considered the pleadings and the submissions by Learned Counsel for the applicants, and the authorities cited and relied upon, I have reached the following findings and conclusions.

Under Section 72(3) of the Supreme Law of this country, the Constitution, the applicants should have been brought before the court by 12 noon, on 1/8/07. That was before the expiration of the 24 hours permitted by the constitution. 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 applicants.

Needless to say, in the absence of the authorities that are detaining them, despite being duly served, there is no explanation, good or otherwise, as to why the applicants were not brought before the court within 24 hours.

Accordingly, I find and hold that the constitutional rights of the applicants have been, are being, and continue to be, violated by their continued stay in detention.

I must also add, in line within the authorities cited before me - *ALBANUS MWASIA MUTUA VS. THE REPUBLIC*, Cr. Appeal No. 120 of 2004, and High Court Criminal Case No. 40 of 2007 *REPUBLIC V. JAMES NJUGUNA NYAGA* with which I totally agree and associate myself with, -that upon determination that the constitutional rights of the applicants have been violated, any prosecution against them or any of them, on the basis of the events for which attempted charges were being made this morning, 2/8/07 is null and void. And that is so, and will remain so, irrespective of the weight of the evidence that the police might have in support of their case. This is on the simple reason that such a prosecution would be based on an illegality and a null and void case.

Finally, all should note that there is as yet NO known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional and fundamental rights were violated prior to the purported institution of the criminal proceedings complained against. Nor is there any room for extension of the constitutionally provided for period of 24 hours, it could as well come after a year. Either way such prosecution is in violation of the rights of the arrested or detained person or persons, and it is illegal and null and void.

In the end, and for the above reasons, I declared the current and continuing detention of the 6 applicants herein to be illegal and a violation of their constitutional rights.

Accordingly, I order their immediate release, unless they are otherwise lawfully held.

DATED and delivered in Nairobi this 2nd Day of August, 2007

O.K. MUTUNGI

JUDGE