REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Misc Crim Appli 639 of 2007

[In the Matter of Nairobi Chief Magistrate's Court Case No. 1903 of 2005]

DICKSON NDICHU KAGO..……..……...……..…..…. APPLICANT

-VERSUS-

REPUBLIC……...RESPONDENT

RULING

The applicant came before this Court by Chamber Summons dated 11th September, 2007. This application was filed under ss.134, 137 and 362 of the Criminal Procedure Code, and s.72(3)(b) of the Constitution of Kenya.

The applicant's prayers were that this Court should, on revision, quash the charge laid against him in Nairobi Chief Magistrate's Court Criminal Case No. 1903 of 2005, ***Republic v. Dickson Ndichu Kago*** and forthwith acquit him. He also prayed for any other orders such as this Court may deem fit to grant.

The general grounds forming the basis of the application are that: the applicant had been arrested on 26th August, 2005 by the Police, and was held at the Central Police Station, Nairobi for four days up to 30th August, 2005 before being charged with the offence of stealing by agent. The applicant asserts that his fundamental rights under s.72(3)(b) were violated through the said confinement in the Police cells.

The evidentiary basis of this claim is in the applicant's supporting affidavit dated 11th September, 2007. He avers that he is an Advocate of the High Court of Kenya, and that he was, on 26th August, 2005 summoned by DCIO Central Division, on allegations of stealing by agent from a complainant, one ***Jane Wanjiru Njuguna***. He was held for four days before being charged with the offence of stealing by agent contrary to s.283 of the Penal Code (Cap.63). He averred that the act of holding him in the cells for four days contravened his fundamental rights under s.72(3) of the Constitution. To the charge as laid, the applicant had pleaded not guilty; but he avers that the charge amounted to a nullity, for being "founded on an illegality." He averred that the subsisting charges continue to violate his rights under the

Constitution.

He averred that pending the criminal trial against him, he has been freed on a cash bail of Kshs.20,000/=.

This application, obviously, stands or falls on a correct interpretation by this Court of the language of s.72(3)(b) of the Constitution. It thus provides:

"**(3) A person who is arrested or detained…**

(b) 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 fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or [being] 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 is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."

There are ***four*** governing principles in the provision set out above, and it is on the basis of these that this Court must resolve the claim in the application:

(i) the person who detains the subject, must bring the subject to Court "as soon as reasonably practicable";

(ii) basically, "reasonably practicable" means 24 hours for non-capital offences; and 14 days for capital offences;

(iii) that basic principle is qualified: depending on the circumstances of a particular case, those minimum periods defined in the provision may be extended, for good cause;

(iv) good cause, such as may perfectly justify such extension of the period of detention, is to be established by the person who detained the subject.

What is *not stated* in the Constitution is, must it always be the detaining authority who *begins* voluntarily to justify the extended detention? Does that authority *wait to be called upon* to explain the extension of detention? Is it unnecessary for the subject to demand to be released and to invoke the limited period of detention provided in s.72(3)(b) of the Constitution? Is the trial Court required to remain always mindful of the terms of s.72(3)(b) of the Constitution, and to enter upon the trial task only *after asking* if the limitation in the detention period has been complied with?

When this matter came up before me *ex parte*, on 26th September, 2007 I made orders for service, to enable both sides to make their representations; and on 14th September, 2007 the applicant in person, and learned State Counsel ***Mrs. Kagiri*** made their respective submissions.

Mrs. Kagiri raised the preliminary point that since the gravamen rested on s.72(3)(b) of the Constitution, the *applicant* ought to have raised the matter in accordance with the fundamental rights-enforcement rules (*The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual), High Court Practice and Procedure Rules, 2006*), whereunder the matter would first have been raised before the trial Court (Part II, rule 8); and if the learned Magistrate did not consider the matter frivolous, then she would *refer* it to the High Court. There was no indication in the application papers that the matter had been *raised in the trial Court.* Learned counsel urged that there was good reason to raise the matter first in the trial Court; and so, counsel urged, the instant application is defective.

The applicant contended, by contrast, that s.67(1) of the Constitution gives a *choice* to the applicant,

the accused person ? on whether or not to raise objections; that by virtue of s.84(1) of the Constitution, the accused has leeway to institute proceedings in the High Court if he feels that his rights under ss.70 – 83 of the Constitution are being violated. The applicant also urged that his application was properly before the Court, because the High Court has a *supervisory jurisdiction* over all Subordinate Courts in the country.

But ***Mrs. Kagiri*** urged that, in respect of all claims under s.67 or s.84 of the Constitution, the procedure for moving the High Court is set out in Part I, rule 2 of the fundamental rights-enforcement rules; and the applicant is to come by *Originating Notice of Motion.*

Mrs. Kagiri submitted that, since the trial had begun before the learned Magistrate, all the *relevant facts are before the trial Court*, and it is the trial Magistrate who should determine whether interpretation by the High Court is necessary.

Rule 8 of the said fundamental rights enforcement rules thus provides:

"***Where a party to proceedings in a subordinate court alleges that there is a question as to the interpretation of the Constitution and the court is of the opinion that it involves a substantial question of law, the party shall informally request the presiding officer of that court to refer the question to the High Court and the Court shall do so in Form C in the schedule to these rules."***

Ought this matter to have been raised before the trial Court? Is it proper for the applicant to come before this Court in the manner in which he has come? Ought this application to have come before this Court by way of Originating Notice of Motion, as contemplated in rule 2 of the Fundamental Rights Enforcement Rules (aforementioned)?

Where a party only alleges, as the applicant does here, that he has been detained for too long before being charged in Court, it is not apparent to me that a *special motion* to interpret the applicable constitutional right, as specified in s.72(3)(b) of the Constitution is at all necessary. "Interpretation" has to be concerned with the *ascertainment of meanings attached to particular expressions;* and I do not believe that to be the purpose of the instant application.

Therefore I am not in agreement with learned State Counsel that the applicant had to go through any complicated motions, in the terms of the Fundamental Rights Enforcement Rules.

Moreover, the burden of the applicant's case herein, rests on ss.134, 137 and 362 of the Criminal Procedure Code (Cap.75), save that his complaint about being detained for unduly long periods has a *constitutional basis* in s.72(3)(b) of the Constitution of Kenya. Such a claim, I believe, can – and indeed should – be placed before *the trial Magistrate* who has the fullest authority to determine the question, as an *inherent part of the trial process*; and an accused who remains dissatisfied thereafter, may file an application before the High Court.

As a corollary, and as a practical consideration, the grievance now brought before this Court ought to have been laid before the trial Court. It is clear from the depositions and from the submissions, that *hardly any reference at all* was made to the right of the accused not to be detained for longer than was provided for; and so the *purely-factual question* whether there was *cause* for longer detention, was not at all considered. The trial Court is the *tribunal of fact* in this matter, which ought to have the *first opportunity* to deal with that question. My considered opinion in this instance has recently been expressed in a similar matter, ***Ben Amos Njau v. Republic,*** Crim. Appl. No. 633 of 2007, in which I thus stated:

"***True, the accused has rights which must be given effect in the trial process. I think the accused is aware of those rights. Of course, the [trial] Magistrate would also be aware of them. The prosecution too, would be aware of them.***

"***But a reminder of those rights would clearly activate the presence of mind that generates the***

explanation required. It is clear that nobody has ever spoken before the trial Magistrate, about these rights – and the prosecution has given no explanation for the delay in initiating the trial process.

*"**Does this justify the applicant departing from that forum of complaint, before the trial Magistrate, and moving over to the High Court to stop the Magistrate and to stop the trial process?"***

My answer to that question is ***no.*** The appropriate judicial practice, in my judgement, is to give the trial Magistrate a chance to consider the question, exercising his or her *discretion* judicially. In good legal practice, this Court should not be placed in a position in which it either usurps the proper first-instance fora of lower Courts, or imperiously or off-handedly dishes out belittling orders to learned Magistrates who, if given a chance, will exercise their power and discretion with all due accommodation and sensitivity.

These are the principles which guide me in refusing the application now before me, and I will make specific orders as follows:

1. The main prayer in the applicant's Chamber Summons of 11th September, 2007 is refused.

2. The applicant shall appear before the trial Court on the next scheduled mention or hearing date, and shall lodge the complaint, to be dealt with by the trial Court appropriately at the very beginning.

3. On the next scheduled date of appearance before the trial Court, appropriate directions shall be given, and the trial process shall be guided on that basis, unless an application to the High Court then arises therefrom and attendant orders in that regard are made.

4. The stay imposed on the proceedings of the trial Court, by orders of 14th September, 2007 is hereby lifted.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 24th day of October, 2007.

J.B. OJWANG

JUDGE