REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Misc Crim Case 21 of 2007

EDWARD ELLY MUMBI……………………………….APPLICANT

=VERSUS=

REPUBLIC…………………….……………………RESPONDENT

JUDGMENT

This is a Reference from the Chief Magistrate's Court at Eldoret Criminal case No. 7488 of 2006 for the interpretation of the provisions of the Constitution and the determination of questions or issues framed by the said Court. The Court also invoked S. 8 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental rights of freedoms of the individual.

The Court framed 4 questions namely:-

(a) Whether the sustenance of Eldoret Criminal Case No. 7488/2006 amounts to double jeopardy on the part of the accused in view of the trial of the same accused in Kitale SPM Criminal Case No. 984/2004.

(b) whether the sustenance of this trial will amount to infringement of section 70 (a) of the Constitution of Kenya

(c) Whether the accused will be made to suffer further costs in terms of legal fees in pursuance of this case whereas the prosecution had terminated the former trial at Kitale Law Courts.

(d) Whether the detention of the accused person for four (4) days upon arrest before charging him in Kitale SPM cr. Case No. 984/2004 infringed upon his rights under section 72 (3) of the Constitution of Kenya.

The Respondent -the Attorney General through Principal state Counsel does not oppose the application. I think that the Attorney General made a wise and correct decision in conceding to the application.

The reasons are very clear. The prosecution in the Kitale case /SRM CR.C. No. 984 of 2004 on their own volition and instance decided to close the case. There was no other reasons given. They exercised the right and discretion as the prosecution to close their case. There was no application for adjournment for any reason and which was refused. There is no coercion, or duress or undue influence by the Court or the Defence. A date was fixed for submissions on whether there was a case to answer or not. On the date given, there was an adjournment at the prosecution's instance

When the matter resumed on 1/11/2006, the prosecution did the unexpected; they entered a Nolle

Proseque terminating the case. No reasons were given. The Court was obliged to accept them under the provisions of the Constitution S.26 and other laws. The Court was not obliged to insist on reasons. The Defence had little say in the matter.

Once this was done, the Accused was discharged and released. The Police arrested him and held in custody for 2 days. He was charged once again for the same offence and on the same facts. Instead of charging him in Kitale, he was charged in the Chief Magistrate's Court at Eldoret. This gave rise to this Constitutional Reference.

I do hereby find and hold that there was bad faith on the part of the Police and the Prosecution in re-arresting and charging the Applicant. I am of the view that it is an abuse of the process of Prosecution and the instrument of Nolle Prosequi for the Prosecution to enter terminated the case for without giving any reasons and for the Police to re-arrest the Applicant and the prosecution to re-charge him.

It is clear that the true reasons for the termination of the case in the first instance is that the prosecution could not trace their police file from Matunda Police station and to avail the remaining witnesses. There were previous adjournments on this ground. The Prosecution was not sincere to disclose the true reasons and to apply for adjournment. Instead they decided to use their powers of Nolle Prosequi, arrest and prosecution to circumvent the situation. This was truly a subtle subterfuge and an abuse of the Court process.

It amounts to a mockery of justice and contemptuous of the Court. The Courts will not allow to be used as vehicles or instruments to infringe and violate the rights of the individual as protected by the Constitution and the law.

The Court also views the incarceration of the Applicant for 2 days before he was charged as high-handed and oppressive. The Applicant had been on bond throughout the trial for almost 3 years. They ought to have given him a Police bond to appear in Court as there was no need for fresh investigations.

In all, I do hereby answer the 4 questions in the affirmative. To allow a fresh trial in the circumstances of this case would also violate the rights of the Applicant to a speedy and fair trial as envisaged by section 77 of the Constitution.

I have also considered the authorities referred to by the Applicant's Counsel. I hold that to proceed with the trial would be a violation of the applicant's fundamental rights and freedoms and therefore unconstitutional.

I therefore order the immediate termination of the hearing of Criminal Case No. 7488 of 2006 at Eldoret and quashing of the charge sheet dated 3rd November, 2006. The Surety and securities be released forthwith.

DATED AND DELIVERED AT ELDORET THIS 7TH DAY OF NOVEMBER 2007.

M.K. IBRAIM,

JUDGE. (7/11/07).