REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CRI. REVISION NO. 388 OF 2020

SHARRIF MOHAMMED.....1ST APPLICANT

PATRICK KINYUA .....2ND APPLICANT

BARRACK BORU ..... 3RD APPLICANT

MOHAMED ABDIRAHIM MOHAMED.....4TH APPLICANT

MOHAMED ADAN DIDA .....5TH APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

R U L I N G

1. On 26/5/2020, the applicants were presented before the Isiolo Chief Magistrate's Court for the hearing of a Motion on Notice dated 26/5/2020 by the respondent in **Isiolo Misc. Criminal Application No. 94 of 2020 Republic vs Sharriff Mohammed & 4 others.** In that motion, the respondent sought that the applicants be remanded in police custody for 10 days to enable the DCI, Isiolo complete investigations.

2. The applicants opposed that application raising various constitutional issues touching on their liberty. By a ruling made on 27/5/2020, the lower Court allowed the application and ordered that the applicants be held until 10/6/2020.

3. Aggrieved by that decision, vide a letter dated 29/5/2020 the applicants moved this court under the provisions of ***Article 50 (2) (q) and sections 362, 364, 365, 366 and 367 of the Civil Procedure Code (CPC)*** praying for the revision of that order.

4. They contended that the ruling was a grave violation of the ***Constitution*** in ordering for their detention for 10 days without being informed of the charges that they are likely to face; that there was no holding charge against them. They further contended that the lower Court discarded the precedent set in **Micheal Rotich v Republic (2016) eklr**. They concluded that the order was in utter violation of ***Articles 29 and 49 (1) (a) (f) (g) (i) of the Constitution.***

5. The Court ordered that the parties do submit orally. **Ms. Mbogo** for the applicants submitted that the decision to hold the applicants for 14 days was arbitrary and in breach of ***Articles 29, 49 and 20 (3) of the Constitution*** since there were no compelling reasons to warrant the same.

6. On his part, **Mr. Namiti, the Senior Prosecution Counsel** submitted that the provisions of ***Article 49 of the Constitution*** only provided that a suspect be produced in Court within 24 hours. That the applicants were produced at the earliest time possible since they were arrested on a weekend. That they were informed why they were being held since the intended charges were disclosed to them.

7. As to the 10 days requested for and granted, Counsel submitted that the charges intended against the applicants were serious and occurred in 3 vast counties i.e. Moyale, Isiolo and Mandera. That samples of had to be taken to the government Chemist before the charges could be brought against the applicants.

8. This Court called for the original record of the trial Court which I have carefully considered. The record shows that the applicants were arrested on 24/5/2020 allegedly transporting 13 sacks of bhang valued at Kshs.12 million. In the affidavit in support of the Motion, **Cpl Micheal Wandera** alleged that the 1st and 2nd applicant are GSU officers at Mariara GSU Camp Meru. That they are yet to surrender the Government Stores including ammunition and firearms.

9. He further contended that the drugs were suspected to have come from Moyale. That the phones of the applicants need to be taken for analysis at the Digital ICT Lab and the suspected drugs be taken to the Government Chemist for analysis. That he needed ten days to complete investigations by visiting Moyale and the GSU Camp where he is likely to net more suspects.

10. The application was opposed by the applicants arguing that the investigations officer was already in possession of the drugs and the phones had been recovered from the applicants for analysis. The 1st and 2nd applicant being in custody could not hand over the government stores. That the investigating officer had not demonstrated how the applicants will interfere with the witnesses. They urged the trial court to proceed with plea taking and cited the case of **Micheal Rotich v Republic [2016] eklr** in support of their submissions.

11. ***Section 362 of the CPC*** provides: -

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".***

12. In **Joseph Nduvi Mbuvi v Republic [2019] Eklr,** the court held that: -

> ***"A strict reading of section 362 of the Criminal Procedure Code, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings…… In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well … the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision".***

13. Its clear from the foregoing that the jurisdiction of this Court under ***Section 362*** of the CPC is limited to calling on the lower court file and satisfying itself as to the legality of a proceeding or orders.

14. In this case the applicants contest the trial court's order detaining them for 13 days. They state that the same was a violation of ***Articles 20, 29 and 49 of the Constitution***. ***Article 20*** provides for the application of the bill of rights. ***Article 49*** provides for the rights of arrested persons, ***Article 49 (a)*** provides for an arrested person to be informed promptly of the reason for the arrest.

> ***"a) Deprived of freedom arbitrarily or without just cause;***
>
> ***b) Detained without trial, expect during the state of emergency, in which cause case the detention is subjected to Article 58;***
>
> ***c) Subjected to any form of violence from either public or private sources".***

15. The applicants relied on the case of **Michael Rotich v Republic [2016] eKLR** wherein **Kimaru J** held: -

> ***"In the present application, the Respondent moved to the magistrate's court seeking orders to have the Applicant detained for a period of twenty-eight (28) days while it investigates allegations of doping laid against the Applicant. This application was made 24 hours after the Applicant had been arrested and placed in custody by the police. As stated earlier in this Ruling, the Applicant has not been charged with the commission of any offence. In fact, it is not clear from the affidavit sworn by the investigating officer what charges will be brought against the Applicant. The Applicant has not been informed of the charges that he is likely to face since his arrest. In essence, the State wants to place the Applicant in custody to enable it commence and complete its investigations … It will not do for the prosecution to present a person who has been arrested in court and seek his continued detention without a charge or a holding charge being lodged in court. It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the Constitution was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have prima facie evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: the Constitution says so."***

16. In a latter case of **Betty Jemutai Kimeiywa v Republic [2018] Eklr,** the Court appreciated the decision in **Micheal Rotich v. Republic (Supra**), and delivered itself thus:-

> ***"With respect, while I agree with the need to respect the right to liberty of suspects, I am unable to agree that the police can only produce a suspect before the court when the investigations into the offence are complete and or when they present a holding charge awaiting a full charge when investigations are complete. A holding charge, which need not be accurate in its particulars as the investigations would be ongoing may indeed offend the very foundational principle of certainty of a charge which requires that a charge gives reasonable information on the offence charged under section 134 of the Criminal Procedure Code … So that upon being brought before the court, an arrested person may be charged; or he may be informed of the reasons for detention being continued say to facilitate completion of investigations or his presentation for assessment of fitness to plead before plea is taken; or he may be released if the court for example found no reasonable grounds for his continued detention; or he may be***

released on bond pending formal charge and or trial. The Constitution does not say that the police may only arrest a person when there is prima facie evidence of an offence. It must, of course, require a probable cause for an arrest but not prima facie case in its technical acceptation of evidence upon which a court may convict, if no evidence is given on behalf of an accused person …"

17. In the said Betty **Jemutai** case **(supra)** the court was of the view that when the Prosecution presents a suspect for purposes of seeking an order to hold him/her in custody to facilitate conclusion of the investigations, it must demonstrate that, there is justifiable reason for continued detention of the arrested person and that there are compelling reasons for refusal of bail under ***Article 49 (1)(g) and (h)***.

18. I find the decision in the **Betty Jemutai Case** to be persuasive. To require that a suspect must only be held if there is a charge against him might be demanding too much. I believe that all that the Constitution requires is that one should not lose his liberty without a reasonable cause. The case of **Michael Rotich** was decided on its own peculiar circumstances. All the Court needs to satisfy itself is that there are good and sound grounds upon which the prosecution requires to hold a suspect but for a reasonable period.

19. In the present case, the trial Court considered the arguments presented by the prosecution as well as the applicants and ruled in favour of the prosecution.

20. The applicant's complaint was that the trial Court's order amounted to a breach of the applicant's rights under ***Article 20, 29 and 49 of the Constitution.***

21. I have considered the said articles and the rights enumerated thereunder. The trial Court seems to have likewise considered them. It exercised its discretion on the material before it. This Court cannot substitute its discretion for that of the trial Court. It was for the applicants to show how the trial Court acted irregularly in making the impugned order. The application for revision is not supposed to be an appeal in disguise. The parameters within which this Court's powers are to be exercised under ***Section 362*** are well spelt out.

22. The material before the trial Court showed that; the applicants were arrested allegedly transporting drugs; the 1st and 2nd applicants are security officers working within Meru County; the offence was committed within a vast area covering 3 Counties; that the prosecution intended to charge the applicants with trafficking narcotic drugs; that in undertaking investigations, the phones of the applicants and the suspected drugs are to be sent to Nairobi for analysis. Surely, these cannot be said to be non-issues.

23. To my mind, the trial Court did not exercise its discretion wrongly. The order cannot be said to have been irregular or unlawful. In any event, the period within which the applicants were ordered to be held is over. They should be presented to Court forthwith to take plea.

24. The upshot is that the application lacks merit and is hereby dismissed.

It is so ordered.

DATED and **DELIVERED** at Meru this 9th day of June, 2020.

A. MABEYA

JUDGE