



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 167 OF 2018

IN THE MATTER OF: ARTICLES 20 AND 22 (1) AND (2) AND ARTICLE 23 OF THE CONSTITUTION 2010-ENFORCEMENT OF BILL OF RIGHT OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: PROTECTION OF DIGNITY OF A SUSPECT AND ADMISSIBILITY OF EVIDENCE UNLAWFULLY OBTAINED

AND

IN THE MATTER OF: IN THE MATTER OF ARTICLE 41 OF THE CONSTITUTION AS READ WITH ARTICLE 47(1) (2) (3) ON FAIR ADMINISTRATIVE ACTION AND ARTICLE 73 (2) (A-E), 75 (1-3) ON INTEGRITY AND CONDUCT OF STATE OFFICERS OF THE CONSTITUTION OF KENYA

BETWEEN

VINCENT BAYA HARIRI..... PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE INSPECTOR GENERAL OF NATIONAL POLICE

SERVICE.....2ND RESPONDENT

THE CHIEF MAGISTRATE, MOMBASA.....3RD RESPONDENT

RULING

1. By an application dated 20th June, 2018, the Petitioner/Applicant seeks the following orders:

a) THAT this honourable court be pleased to direct that a Conservatory order be issued directing that the hearing of the Criminal Cases No. 1553 of 2015; Republic v. Vincent Baya Hariri & 3 others be stayed pending the hearing and determination of the Petition.

b) Costs of the application be cost in the main petition.

2. The Applicant contends that he was charged in criminal case No. 1553 of 2015 which proceedings are ongoing. The applicant contends that the 1st and 2nd Respondents intend to use evidence that was obtained illegally during the unlawful confinement of the applicant. The applicant avers that the trial magistrate has already admitted the said evidence and the as such the Applicant will be highly prejudiced if the 1st and 2nd Respondents are allowed to use the illegally obtained evidence.

3. The Respondents opposed the application by was of a Replying Affidavit sworn by Cpl JAMES NYAMOSI, the investigating officer in the criminal case, on 4th July, 2018.

4. The Respondents state that the application offends Article 254 (4) (a) (b) of the Constitution as the 2nd Respondent has the power to investigate any suspected crime and enforce the law against any person.

5. The Respondents contend that the trial magistrate has the power to exercise judicial authority in alignment with the Constitution. Further, the Respondents dispute illegal acquisition of evidence. They state that the evidence was acquired in line with the procedures/processes set out in the Narcotics and Psychotropic Substances Act.

6. It is the Respondents' case that the applicant has not proved that the evidence as admitted will infringe on his rights or render the trial unfair.

Hearing and Submissions

7. The application came up for hearing on 5th July, 2018. Mr. Magolo appearing for the Applicant submitted that the trial magistrate had admitted evidence that was acquired when the applicant was in custody. Counsel contended that the matter was coming up for further hearing on 10th July, 2018 thus he was apprehensive that the Investigating Officer who was set to testify on the day would refer to the said evidence as part of his testimony. Counsel opined that it would be prudent to stay the proceedings before the lower court pending determination by this court on admissibility of evidence acquired when the applicant was detained.

8. Mr. Jami for the state submitted that Article 50 guarantees the right to a fair hearing which has not been infringed by the trial court. Counsel argued that if the applicant is aggrieved by the decision of the trial magistrate to admit the evidence he can invoke the supervisory jurisdiction of this court or prefer an appeal.

9. Mr. Jami stated that proceedings before the lower court should not be unnecessarily interfered with in line with Section 193 (a) of the Criminal Procedure Code. Counsel urged the court to take cognizance of applicant's co-accused persons in the matter. Counsel contended that the co-accused persons were not part of these proceedings and if the trial in the lower court was stayed they would be prejudiced.

10. Mr. Makuto, Counsel for the 2nd and 3rd Respondents submitted that the petition as filed is an appeal from the decision of the trial magistrate delivered on 23rd January, 2018 as it seeks to reverse that decision.

11. In rebuttal, Mr. Magolo submitted that the option of seeking a revision as suggested by the Respondents would not be appropriate in this matter as the applicant is seeking interpretation of constitutional provisions on admissibility of illegally obtained evidence.

The Determination

12. The Petitioner seeks to have the proceedings in Criminal Case No. 1553 of 2015 stayed pending the determination of this Petition. The main ground for this prayer is that the learned trial magistrate admitted evidence that had been allegedly procured illegally or unlawfully. The Petitioner brings this Petition to interrogate the constitutionality of what he terms as evidence obtained illegally.

13. The only question for determination by this court is whether the proceedings in Criminal Case No. 1553 of 2015 should be stayed. This court notes that it has not been privy to the proceedings before the lower court. Copies of said proceedings have not been attached to this application. It is therefore difficult to interrogate the allegations brought forth by the applicant.

14. Be that as it may, I have carefully read through the application and the Petition. The Applicant claims he was arrested on 5th August, 2015 and was produced in court on 6th August, 2015. However, the Petitioner avers that he was allegedly detained unlawfully for a further seven days. During these seven days, the applicant contends that he was subjected to inhuman treatment in a bid to gather evidence. The applicant alleges that the information gathered by the police during this period in the form of "observation sheets" and "pellets" was produced and admitted into evidence despite his objection. The applicant opines that if the prosecution continues to utilize the alleged illegal evidence he will be prejudiced.

15. In my view the applicant seems to have been aggrieved by the decision of the trial magistrate to admit the evidence. The trial magistrate did nothing wrong. The magistrate simply considered the objection against admissibility of the evidence and found for the prosecution, admitting the evidence. Should the proceedings be stayed to allow the applicant, in my view, challenge the decision through this Petition? I do not think so. If indeed the admission of that kind of evidence was unlawful, that could form part of grounds of appeal.

16. The applicant has not tendered any evidence to support the proposition that he will be prejudiced if the matter proceeds. Further, the Respondents pointed out that the applicant was charged alongside other co-accused in the matters. I do concur with the Respondents that the other co-accused persons are likely to be prejudiced if the proceedings are stayed. Access to justice as guaranteed by Article 48 of the Constitution entails completion of a trial within reasonable time or the non-interference with a trial except under reasonable circumstances. This court notes that the matter before the lower court was instituted in 2015. The matter has been in court for over three years. The matter can only be delayed further under exceptional circumstances. I find no exceptional circumstances in this matter.

17. The application dated 20th June, 2018 is disallowed. Costs shall be in the cause.

Dated, Signed and Delivered in Mombasa this 9th day of October, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Ogega for State

Mr. Odhiambo holding brief for Mr. Magolo for Applicant

Mr. Kaunda Court Assistant