



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 9 OF 2017**

**RAMADHAN M. HASSAN.....APPLICANT**

**VERSUS**

**DPP .....RESPONDENT**

**RULING**

1. A request for review was presented to this court by letter dated 30/3/2017 and lodge in court on the 31/3/2017.

2. The background for the request is given by the applicant as the order given by the trial court in Shanzu Misc. Criminal Application No. 21 of 2017 to the effect that the Applicant be detained in custody for a period of 30 days to enable the investigations be concluded. The order directed that the matter be mentioned on 27/4/2017.

3. The Applicant therefore seeks review under the Provisions of Section 362, CRIMINAL PROCEDURE CODE on the grounds that the said orders were given in contravention of Article 49(1) f, g & h as well as section 33 of Prevention of Terrorism Act.

4. The request for review has set out in details what the applicant considers to have been the flaws on the proceeding when looked at through the lence of legal parameters set out under the statute, prevention of Terrorism Act. The highlights of the alleged breaches can be summarized as follows:-

**i. There was no evidence that the suspect had been served with a copy of the application contrary to section 33(3).**

**ii. There was no evidence that the applicant was given an opportunity to object to the application contrary to section 33(4).**

**iii. That regard was never had to the considerations under section 33(5) & (6).**

5. For those allegations of fact the applicant contends that there was outright and flagrant failure to observe the mandatory legal requirement and that the grounds contained in the affidavit in support of the application adverted to continuing investigations which is not a factor for consideration under the Act.

6. For those reasons it was contended that the applicant is entitle to forthwith release after the lower court record is called and perused. Reliance was then placed on the decision by **Kimaru J in Michael Rotich vs Republic** for the proposition that to hold a suspect in custody to allow the state commence and

complete investigations is a contravention of his rights under Article 49(1)(a) i, that to allow the practice to proceed would be to erode the gains achieved under the constitution of Kenya 2010 and that it should be advisable to even present a holding charge as investigations go on rather just keep the suspect in custody.

7. In opposing the application for review, the Office of the Director of Public Prosecution, Represented by Mr. Jamii, started by submitting that it was difficult to discern what the applicant intended to achieve by the application as the suspect was due to be arraigned in court the next day after the review application was argued. He further submitted that having been arrested on 24/3/2017, a Friday, and arraigned court on the 27/3/2017, a Monday, there had not been derogation from the dictates of Article 49(1)(f) hence the detention prior to 27/3/2017 could not be termed unlawful.

8. The third ground of opposition was that once the court ordered the detention in custody it could not be termed unlawful and that any complaint in the manner the detention was order can be handled by the trial court or at worst an application for *harbeas corpus*.

9. On compliance with the dictates of section 33, prevention of Terrorism Act, Mr. Jami conceded that there is nothing on record to show that the suspect was served with the application or given a chance to object to the same but pointed out that the accused had commented that investigations had commenced and that there is no protest by the suspect to the effect that he had not been served. To Mr. Jami even if it be found that the detention was improperly ordered he contended and submitted that the remedy is in damages and not release. The decision in ***Julius Kamau Mbugua vs Republic [2010] eKLR*** was cited for that proposition.

10. On the decision cited by Mr. Chacha, Mr. Jamii submitted that being a decision by a court of concurrent jurisdiction is merely persuasive and not binding. Additional submission was made on the decision that there is nothing in law as a holding charge as the judge had proposed in the judgment. For that proposition the decision of Cheson J as he then was in ***Samuel Cheruiyot Arap Langat vs Republic [1982] eKLR*** was cited. Also cited by Mr. Jami was the decision by ***Majanja J in Salim Kofia Chivui vs the Resident Magistrate, Batali Law Courts [2012] eKLR*** for the proposition that ‘a conduct that is not trial related should not affect the trial process as was held in the case of Julius Kamau Mbugua (*supra*).

### **Analysis and determination**

11. The court’s jurisdiction on revision under section 362 is intended to interrogate the correctness, legality or propriety of any finding, sentence or Order recorded or passed and the regularity of any proceedings of a subordinate court. The powers donated to court in revision in cases not concerned with conviction, and acquittal, is to reverse or alter the questioned order. This matter does not concern a conviction or acquittal hence at the end of it all the court will decide whether to reverse alter or confirm the same order.

12. In this matter, the trial court record I have called and perused reveal that there is that standard stamp, some courts use for expediency, which gives the wrong impression that the suspect was in court as accused person and that the charge was read and explained to him and he was expected to reply.

13. This is one practice that I wish to say every a judicial officer ought to guard against. It is not that every file placed before the court must be deemed one leading to a plea-taking. To that extent the proceedings were misleading irregular therefore and cannot be term proper. They were improper and misleading.

14. The second point, I have noted is that the prosecutor, one Ms. Merinda is not shown to have been accorded an opportunity to urge her application. Instead the court seems to have taken it upon itself to read the application and deal with it in a summary way as if it were an *exparte* application. It is doubtful, by lack of records, that the trial court ever applied its mind to the provisions of section 33 which to me are a derivative of Article 49 (1) g and h as it exudes the norms dictated by the constitution. That, I find was a fundamental flaw that negate the proceedings and deny them the description as proper or regular.

15. I must add that a judicial officer before whom an application is presented seeking to limit the enjoyment of a suspect's fundamental freedom akin to the right to liberty is duty bound and enjoined by law and the Constitution to be extra vigilant and to interrogate whether the facts presented to it meet the dictates and spirit of the law invoked before it are in consonance with the attributes and general philosophy of the Constitution which guards against arbitrary and unjustifiable limitation of enjoyment of rights and fundamental freedoms.

16. Granted that expeditious disposal of court cases and criminal trial is a core pillar and dictate of the constitution it cannot overshadow the need to do right even with the difficult circumstances by overload of judicial work the officers undergo on a daily basis. I do not feign lack of appreciation of the work load on the magistracy but that workload should be the very reason that extra caution is taken so that the need to dispose matter does not overshadow the need to dispose them off in a legal, correct and proper way.

17. Mr. Jamii for the prosecution has correctly admitted, and my reading of the file has confirmed that no inquiry was made as to the compliance with various requirements of section 33, Prevention of Terrorism Act. That failure to make the inquiry to this court led to flossing over germane and critical pre-requisites before an order for detention could be made. The result is that the order for detention was made contrary to the law and to that extent it cannot be allowed to stand. It must be declared to have been made without compliance and therefore untenable. I do find so and have me otherwise but to reverse it.

18. However, as I make this determination on revision, I take note that time granted to the prosecution of 30 days lapsed some 7 days ago, with the consequence that unless, the prosecution did present the accused in court with a charge, the period has been spent and cannot be reversed by these proceedings for review.

19. Equally, merely that the law under section 33 of the prevention of Terrorism Act was not complied with would not be a justification to clear the suspect of any criminal offences if the police investigation reveal any offence as having been committed. As was held by the Court of Appeal in Julius Kamau Mbugua vs Republic (supra) and correctly submitted by Mr. Jami, the remedy is in damages in a properly instituted Civil Proceedings.

20. The difficulty expressed above ought to inform any person seeking revision that this should be taken up expeditiously and before so much water passes under the bridge. As much as the request here was made on the 3<sup>rd</sup> day after the challenged orders, more effort should have been made to have the revision disposed off prior to the period of remand lapsing.

21. I would reiterate, even if it be by way of direction to the police and the office of the Director of Public Prosecution that the dictates of section 33(2) prevention of Terrorism Act are mandatory and must be observed whenever they seek to hold a suspect longer than the law require. The application must disclose:-

**The nature of the offence the suspect has been arrested for**

**The general nature of the evidence gathered.**

**The extent of investigation covered and what awaits to be gathered.**

**The need to continue holding the suspect before being charged rather than being released on terms.**

These facts must be disclosed on the face of the application and proved by an affidavit on oath.

22. To the extent that the law permits the foregoing reason and parameters for justification to hold a suspect beyond the constitutionally set limits, I hold that it is not necessary to bring an accused person to court on anything other than a *bonafide* charge the office of the Director of Public Prosecution believes to disclose a criminal offence.

23. To the court, it is imperative that one investigates, interrogate and Satisfies himself that:-

**The accused has been served with the application if he desires.**

**The accused gets a chance to object to the application.**

**Appreciate that every person including an suspect is entitled to his liberty and freedom of movement only subject to safeguard being put in place to ensure his attendance when required to attend court.**

**Only impede the suspects liberty and freedom for compelling reasons to be recorded.**

24. To comply with the foregoing, it is key that attention be put to detailed recording because without recording a court that call for the file for perusal would not lay its hand on the justification the court made the order it did.

25. Having said all the foregoing and noting that the court is called upon to exercise its jurisdiction in revision, I make the following orders:-

**i. The proceedings conducted at Shanzu before , D Mochache, SPM, on the 27.3.2017 were not conducted in accordance with the law under section 33 of the Prevention of Terrorism Act which was invoked to bring them. To that extent they were not properly conducted and therefore subject to revision.**

**ii. Let the suspect, if not yet, arraigned in court with a charge or released, be forthwith arraigned in court not later than 4pm today or be released forthwith.**

**Dated and delivered at Mombasa this 05th day of May 2017.**

**HON. P.J.O. OTIENO**

**JUDGE**