



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL CONSTITUTIONAL APPLICATION NO. 9 OF 2012

**IN THE MATTER OF: AN APPLICATION UNDER ARTICLE 19, 20,
21, 22 AND 23 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 12
AND 13 OF THE CONSTITUTION OF KENYA**

BETWEEN

IZANA MOHAMED ALIPETITIONER

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. By her Constitutional Petition filed on 26th March, 2012 the Petitioner seeks stay in Malindi Chief Magistrate's Court Criminal Case No. 679 of 2011 R v Izana Mohammed Ali and four related declarations. She swore an affidavit in support of the Petition. The State responded through an affidavit sworn by one Moses Omwago on 25th October, 2013. The parties elected to dispose of the petition by way of written submissions.
2. I have now read through the Petition, the respective affidavits and submissions of the parties. I take the following view of this matter. There is no dispute as to the nature of charges preferred against the petitioner in the Lower Court. They relate to the unauthorized making of a certificate of birth, certificate of death, school leaving certificate and uttering the same before various persons in authority. She is also charged with the theft of a birth certificate, making false declarations for purposes of procuring a passport being an unlawfully present in Kenya as an Ethiopian national, and failing to apply for refugee status upon entry into Kenya.
3. The Petitioner's submission are primarily premised on the assertion that there is no evidence to support the charges against the petitioner. They could easily be mistaken for submissions intended before the trial court. This is also the tenor and substance of her petition; that she is properly a Kenyan citizen and that all the relevant documentation is proper. As I understand it, the State's case is to the contrary; that the documents are false. The best forum for the determination of these

questions, and ultimately the guilt or innocence of the petitioner is before the trial court. She will have an opportunity to test whatever evidence the State adduces and to give her own side of the story if necessary.

4. Whether she was a Kenyan citizen during the material period is a question of fact to be decided by the court in the trial. In the circumstances, her claim that the charges violate her rights under Article 12 and 13 of the Constitution is untenable.

It has often been said by the courts that a party who approaches the court alleging a constitutional violation must disclose with some precision how the right has been violated. In the case of *Anarita Karimi Njeru v Republic* [1979]1 KLR 154 the court expressed itself on the question in the following words:

“.....if a person is seeking redress from the High Court on a matter which invokes a reference to the Constitution, it is important, (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

5. On the face of it, the petitioner’s petition although brought under Articles 16-23 of the Constitution was not related to the Bill of Rights in any way. Nor has the alleged violation been shown to be related to the trial. The petition seems to have been brought without any reference to a specific fundamental freedom and right under the Bill of Rights. It is a cardinal principle of the rule of law that persons suspected of committing offences ought to be brought to account for their actions except where it is demonstrated that such trial itself amounts to a constitutional violation of a serious nature, which renders a fair trial impossible.
6. In *Sanderson vs The Attorney General, Eastern Cape, 1988(2) S.A. 38cc.*, the South African Constitutional Court was dealing with a complaint over delayed arraignment. The principles enunciated are also relevant to the present case. The court stated:

“Even if the evidence he has placed before the court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society’s complaint against an alleged transgressor of society’s rules of conduct. That will be seldom warranted in the absence of significant prejudice to the accused ... Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of “appropriate” remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused. A bar is likely to be available only in a narrow range of circumstances, for example where it is established that the accused has probably suffered “irreparable prejudice as a result of delay.”

(See also *David Mwangi Muiruri vs Chief Magistrate's Court, Malindi & Another* [2012] eKLR and *Republic v Pc. George Okelo & Antoher* [2012] eKLR).

7. The present petitioner appears to merely complain that she should not have been charged. No prejudice is demonstrated. I am not persuaded that on the law and the circumstances of this case the orders sought are available to the petitioner. The petition herein lacks merit and is dismissed. The trial in the Lower Court should proceed expeditiously.

Delivered and signed at Malindi this 3rd day of **March, 2014** in the presence of Mr. Lughanje holding brief for Mr. Kadima for Petitioner, Mr. Kasyoka holding brief for Mr. Nyongesa for the DPP.

Court clerk – Evans

C. W. Meoli

JUDGE