



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO 437 OF 2010**

**MUNEER HAROON ISMAIL.....APPELLANT**

**VERSUS**

**REPUBLIC.....**

**.....RESPONDENTS**

**JUDGMENT**

1. This is an appeal by the appellant who being aggrieved and dissatisfied by the ruling of Nairobi Chief Magistrate Mr. G. Mutembei delivered on 13<sup>th</sup> May 2010, has appealed against the said ruling in its entirety.
2. The applicant was charged in Count one with being in possession of ammunition contrary to **Section 4(2)(a)** of the **Fire Arms Act Cap 114 Laws of Kenya**, being in possession of unauthorized explosives contrary to **Section 6(1)(a)** as read with **Section 5(2)** of the **Explosives Act Cap 115** of the Laws of Kenya in Count two and stealing contrary to **Section 275** of the **Penal Code** in Count five. He faces three alternative counts to the main charges in which he is charged with handling stolen property contrary to **Section 322(2)** of the **Penal Code**.
3. The applicant contends that the learned trial magistrate declined to frame the questions for determination by the High Court on an application he made alleging contravention of his fundamental rights and freedoms under Sections 72(3), 76(1), 76(2) and 77 of the repealed Constitution. The application was made pursuant to the provisions of section 84(3) of the repealed Constitution and Rules 25, 26 and 30 of the repealed Constitution of Kenya.
4. Mr. Bowry, Learned Counsel for the appellant framed the following issues for determination at the Chief Magistrate's court, and orally submitted on them; The issues were:-
  - a. Firstly, whether the trial of the 1<sup>st</sup> accused was unconstitutional and contrary to section 77(1) of the repealed Constitution, the 1<sup>st</sup> accused having been brought to court on 10<sup>th</sup> December 2009 after the expiry of 24 hours from the date of his arrest on 7<sup>th</sup> December 2009?
  - b. Secondly, whether the arbitrary searches by the police on the accused's residential and business premises in Embakasi, Nairobi and Narok Townships without a search warrant were in breach of his fundamental rights under section 76(1) and (2) of the repealed Constitution?
  - c. Thirdly, whether having been subjected and exposed to investigatory, prosecutorial and judicial impropriety, the accused could receive a fair trial and secured protection of the law as envisaged under section 77(1) of the repealed Constitution?

- d. Finally, whether the accused's exposure to pre-trial publicity during investigations and in the course of being charged in court would vitiate the impartiality of the court under section 77(1) of the repealed Constitution?
5. In reply, the Prosecutor filed written submissions which formed the basis of their case.
6. The trial court found the application to be frivolous, vexatious and lacking in merit and dismissed it. The appellant filed this appeal on 30<sup>th</sup> May 2010 faulting the trial court for declining to frame the constitutional questions he had raised for reference and determination by the High Court. He advanced 15 grounds condensed into 6 as follows:-
  - a. That the trial magistrate failed to frame questions raised by the applicant for reference to the High Court, and usurped powers of the High Court to adjudicate on constitutional matters beyond his jurisdiction.
  - b. That the trial magistrate failed to determine the extent to which the application by the appellant was vexatious and frivolous.
  - c. That the trial magistrate erred in relying on the written submissions and affidavit tendered by the prosecution in response to the applicant's oral arguments for an application for reference to the High Court.
  - d. That the trial magistrate failed to find that the issue of the appellant's detention beyond 24 hours was one to be adjudicated and determined only by the High Court.
  - e. That the search without a warrant conducted by the Investigating Officers in the appellant's business premises and home was arbitrary and in breach of his fundamental rights.
  - f. Lastly, that the trial court failed to find that there were disparities in the bail terms granted to the 1<sup>st</sup> appellant and the other accused persons, which was discriminatory and could only be investigated by the High Court as a Constitutional court.
7. Learned State Counsel Ms. Maina opposed the application.
8. I have analysed the record of the trial court and the grounds advanced to arrive at my own independent conclusions:-

**Failure by the trial magistrate to frame questions raised by the applicant for reference to the High Court.**

9. The appellant raised constitutional questions in his application and cited violations of his Fundamental rights and freedoms under Sections 72(3), 76(1), 76(2) and 77 of the pre-2010 Constitution. He also referred to Article 23(1) of the constitution (2010) which grants the High Court Jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial or violation or infringement of a fundamental right.
10. The starting point is always to consider the jurisdiction vested in a Court by the Constitution. As enunciated by Nyarangi, JA in the often quoted case of **Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1**, to which the appellant referred me:

***“Jurisdiction is everything. Without it, a Court has no power to make one more step.”***

Article 159 of the Constitution vests judicial authority in the Courts. Article 165 of the Constitution on the other hand deals with the jurisdiction of the High Court by providing, among other things, as follows:

**165. (1)...**

(3) Subject to clause (5), the High Court shall have -

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) ....

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of:.....(emphasis mine)

11. The subordinate court similarly has jurisdiction to frame any constitutional issues and forward them to the High Court for determination. From the record, the trial magistrate referred to section 67(1) of the Constitution (repealed) which provides that:

***“Where a question as to the interpretation of the constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may and shall if a party to the proceedings so requests refer the question to the High Court.”***

Section 67 of the repealed Constitution is now Article 165 of the Constitution and both vest power in the High Court to interpret the Constitution.

12. The trial magistrate also referred to rule 25 of the repealed Constitution (repealed) (supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court practice and procedure rules, 2006 which states as follows:

***“Where a party of proceedings in a subordinate court alleges contravention of any of the provisions of section 70 to 83 of the pre-2010 constitution, and the presiding officer is of the opinion that the question raised is not frivolous or vexatious, he may refer the question to the High Court”***

13. I do note here that in dismissing the application, the trial magistrate gave reasons that it was “vexatious” and “frivolous,” even though he did not delve deeper in the reasons as to why or how he arrived at that conclusion.

14. It is clear that under the previous Constitutional order a Subordinate Court could refer a Constitutional question arising in Proceedings before it to the High Court for determination. That would be after the Subordinate Court satisfied itself that the question arising was not frivolous or vexatious. A judicial officer has to consider whether the question raised goes to the heart or substance of the matter before the Court, or it is merely peripheral to the substantive issues at hand.

15. The substantive issue herein is whether the trial of the appellant is unconstitutional and contrary to section 72(3) of the pre-2010 constitution. Under section 72 (3) (b) of the repealed Constitution, the police were required to present a person charged with a capital offence before court within 14 days of arrest. If they failed to so present the person the state was obligated to show that such a person was presented before court as soon as was reasonably practicable. This issue was dealt with by the trial court in the ruling of 13<sup>th</sup> May 2010, where the trial magistrate made the following remarks;

***“The apparent breach of the constitutional right of an accused person to be arraigned before a court can be cured by the prosecution giving a satisfactory explanation as to why they could not do so. In the present case the prosecution gave an explanation for the delay.....the court subsequently ruled that the explanation was satisfactory”***

In any case, even if the High Court were to find that the appellant's rights had been violated, under **Section 72(3) of the Constitution (repealed)** the trial in the lower court would not be vitiated. At most the appellant would be entitled to a remedy through a separate action.

**Whether the application by the appellant was vexatious and frivolous?**

16. The trial magistrate found it vexatious and frivolous for the applicant to re-visit the issue of the Prosecution's delay to present the appellant to court within the prescribed 24 hour period, especially as it had been dealt with by the trial court. The court found that the submissions were on issues of fact. In the case of **Trust Bank Ltd Vs. Amin Company Ltd & Another 2000 KLR 164**, referred to by the appellant, Ringera J. defined what amounted to a frivolous and vexatious application in the following words:

*“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action”*

In view of the above, I do agree with the learned trial Magistrate that the application was vexatious and laced with frivolity, for raising in the same court, issues which were already determined by that court. This would only serve to further delay the case. Even if they were determined in the appellants favour, they would not determine this case.

**Whether there were arbitrary searches conducted by the police on the accused's residential and business premises in breach of his fundamental rights under section 76(1) and (2) of the pre-2010 constitution?**

17. It is not disputed that a search was conducted at the appellant's house without a warrant. Miss Maina submitted that the fact that the appellants property was searched arbitrarily without a warrant, was a matter of Law as it was well settled that a police officer could search a premise without a warrant if a cognizable offence was involved and where obtaining a warrant would defeat the purpose of obtaining it in the first place.

18. Under Article 31 of the Constitution of Kenya 2010 every person has the right to privacy which includes the right not to have; (a) their person, home or property searched. The position of the Law however is such that these rights conferred for instance under Article 31 are not absolute and may be limited and qualified in accordance with **Article 24(1)** of the Constitution.

19. The circumstances under which a search without a warrant could have been conducted were set out in **sections 20 of the Police Act (Repealed)**. It is equivalent to **section 60 of the National Police Service Act (Chapter 84 of the Laws of Kenya)** which provides, in part, as follows;

*20(1) When an officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something necessary for the purposes of such investigation is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant as aforesaid enter any premises in or on which he expects the things to be and there search or cause a search to be made for, and take possession of, such thing .....*

20. Although there may have been justification for the search, the law requires that before conducting a search without a warrant, the police officer is required to record the grounds and reason for the belief that the persons searched are suspects and that they are in possession of the thing necessary

for investigation. This is a matter of evidence to be dealt with during the trial.

21. On this ground, the appellant also contended that whereas he presented his arguments orally while raising the questions for reference to the High Court, the prosecution presented written submissions. This, it was argued, denied him the right to question the submissions in open court or even seek clarification. In rebuttal Miss Maina urged that when the prosecution requested to put in written submissions, the applicant did not object, although they had an opportunity to do so. That this implied that they did not have any objection then.

In a decision by the Court of Appeal, in **Erick Wambulwa Muchocho & Another versus Republic, Criminal Appeal No. 24 of 2003**, (at Nakuru), The Court of Appeal stated that:

*“The High Court was not bound to hear the appellants in any particular manner so long as they were heard. The record of the High Court clearly shows that the appellants were present before the judges but each chose to provide the judges with what they called “written submissions.” The High court could not compel them to address them verbally.”*

I note that in the case before me the appellant was represented in the lower court and there is no record of any objection when the prosecution applied and were allowed to file written submissions.

**On the disparities in the bail terms granted to the appellant and the other accused persons.**

22. The appellant in his submissions urged that his rights to a fair trial under Article 50(2) (a) of the Constitution were violated. He contended that the trial court imposed stringent conditions on him alone to provide sureties of Kshs. 3 million unlike his co-accuseds. This according to him altered the scale of justice by presuming him guilty. I have looked at the order of Warsame J that imposed the said stringent bond terms on the appellant in the ruling in Criminal Revision No. 51 of 2009 and observe that it sought to strike a delicate balance between upholding the rights and liberties of the appellant held on mere suspicion, and the issue of National security.

23. It is also important to mention that the nature of the offence and severity of sentence in the event of conviction is an important factor for the court to take into consideration when considering the terms of bail/bond to impose in any particular case. Warsame J ordered the appellant to provide a further security in view of the charges that were leveled against him. This is a discretion that the court had and which it correctly exercised in the circumstances.

24. Having considered the record, and each ground raised by the appellant, I find no cogent evidence that the trial court acted arbitrarily or unconstitutionally in reaching its decision. This court could only interfere with the findings of the trial magistrate if there was sufficient evidence that he violated the provisions of the Constitution, or acted capriciously without due regard to the law. Consequently, I find that this appeal is lacking in merit and dismiss it accordingly.

**SIGNED DATED and DELIVERED in open court this 10<sup>th</sup> day of July 2014.**

**L. A. ACHODE**

**JUDGE**