



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUSIA

Criminal Application 34 of 2012

IN THE MATTER OF ARTICLE 22(1), 23(1) & 165 (3)(B), (D)(II) & 4 OF THE CONSTITUTION OF KENYA

AUSTINE

ODHIAMBO OUMA

COLLINS

OMONDI

FRANCIS ONYANGO OCHIENG.....

PETITIONERS

AND

DIRECTOR OF PUBLIC PROSECUTION

MAJOR

CHARLES MUNARI

STEPHENE NYONGESA OMONDI

SHADRACK OUMA OMONDI.....

RESPONDENTS

RULING

The Petitioners, Austine Odhiambo Ouma, Collins Omondi and Francis Onyango Ochieng are charged with two(2) criminal offences. In the first case, i.e. Criminal Case No.523 of 2012, Austine Odhiambo Ouma has been charged with the offence of **causing grievous harm contrary to Section 234** of the Penal Code. The particulars of the offence are that on 12th March 2012, at Bukalama village in Busia County, the said Austine Odhiambo Ouma, jointly with others already before court, unlawfully did grievous harm to Stephen Nyongesa Omondi. He was alternatively charged with the offence of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars are more or less the same. Earlier, Francis Onyango Ochieng and Collins Omondi were charged with the same offence of **causing grievous harm** to the said Stephen Nyongesa Omondi. The particulars of the offence were that on the same 12th March 2012, at Bukalama village, the two (2), jointly with another not before court,

unlawfully did grievous harm to Stephen Nyongesa Omondi. They were alternatively charged with the offence of **assault causing actual bodily** harm contrary to **Section 251** of the **Penal Code**. The particulars of the offence are more or less the same. The petitioners pleaded not guilty to the charges. They are out on bond pending the hearing of the criminal case.

The petitioners lodged this petition alleging that their right to fair trial had been infringed by the respondents. In particular, they alleged that they had been arrested and charged with the present offences with a view of pressuring them to settle a civil suit. They alleged that after their arrest, on 22nd March 2012, they were arbitrary detained at the police station for a period of four (4) days before they were taken to court on 26th March 2012. They argue that the delay in taking them to court contravened their constitutional rights as provided for under **Article 49 (1)(f) & (h)** of the **Constitution**. It was therefore their prayer that the criminal charges facing them in the subordinate court be forthwith terminated. During the hearing of the petition, the petitioners reiterated the contents of their petition and the supporting affidavit. They reiterated that the criminal charges were brought against them to prevent them from prosecuting a civil suit that they had filed against the police and the complainants. They were of the view that their unlawful detention by the police prior to being brought to court was for the sole purpose of pressurizing them to settle the civil case.

Mr. Obiri for the State, opposed the application. He submitted that the actual reason why the petitioners lodged the present petition, was because they were dissatisfied with the consolidation of the two (2) criminal cases. He further submitted that the fact that the petitioners were brought to court after being detained for a period longer than the statutory period is not sufficient reason for this court to terminate the criminal charges facing them. He stated that it was now settled that if the petitioners established that they were indeed detained for a longer than the statutory period by the police before they were brought to court, they would be entitled to be paid damages and not to have criminal charges facing them terminated. He urged the court to dismiss the petition with costs.

I have carefully considered the rival submission made by the petitioners and by Mr. Obiri on behalf of the State. This is a constitutional reference. The petitioners allege that their constitutional right under **Article 49(1)(f) & (h)** of the **Constitution** were infringed when the police failed to produce them to court within 24 hours. They further complained that they were detained by the police for a period of four (4) days before they were brought to court. It was their case that the criminal charges brought against them was for the ulterior purpose of pressuring them into settling a civil case. The respondents opposed the application. **Article 49(1)(f) & (h)** of the **Constitution** sets out the rights of arrested persons. The said Articles require that a person who has been arrested, be brought to court “as soon as reasonably possible” but not later than 24 hours after his arrest. If his arrest is outside court working hours, then the next day that the court session will be held. **Article 49(1)(h)** of the Constitution provides that an arrested person shall be released on bond or bail pending charge or trial unless “there are compelling reasons not to be released”. The thrust of the petition lodged by the petitioners herein is to the effect that because their Constitutional rights were infringed, then the criminal charges facing them should be terminated. The respondents did not file a replying affidavit to the petition. The averments made by the petitioners in their petition clearly points to the fact that there exists a long running dispute between the petitioners and the complainant in the criminal case. The complainant in the criminal case lodged a complaint with the police that he had been assaulted by the petitioners. The prosecution will be required to adduce evidence to establish the charge to the effect that the petitioners indeed assaulted the complainant in the criminal case as to cause him grievous harm. The prosecution will be required to prove this charge to the standard of proof beyond any reasonable doubt. It was apparent to this court that the facts put forward by the petitioners in their petition are actually their defence to the criminal charges facing them. The petitioners will have to wait for an appropriate time during the criminal trial to present their respective defences.

Can this court terminate the criminal charges facing the petitioners if the complaint made by the petitioners is proved? Having carefully read the said **articles** of the **Constitution** that is the subject of this petition, it is clear to this court that even if the petitioners established that they were detained for a period of more than 24 hours before they were brought to court, it cannot result in this court issuing an order automatically terminating the criminal charges facing them. The remedy available for the petitioners is to file an appropriate suit for damages where the police fail to give a reasonable explanation for their failure

to bring the petitioners to court. Further, the petitioners have a civil remedy of filing suit for malicious prosecution in the event that they shall be acquitted of the charges. It is this court's considered view that an accused person alleging that his right to be brought to court within 24 hours has been infringed, cannot use that fact alone to have the criminal charges facing him terminated. The criminal process and procedure is designed to afford an accused person all the opportunity to challenge the charge brought against him in a fair trial. It is not unconstitutional for an accused person to be charged with a criminal offence, whether in the opinion of such an accused person, the charge is justified or not.

For the above reasons, the petition lodged by the petitioners herein lacks merit and is dismissed. The petitioners shall present themselves before the subordinate court and proceed with the trial to its conclusion.

DATED AT BUSIA THIS 11TH DAY OF JULY, 2012.

L. KIMARU
J U D G E