



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Miscellaneous Criminal Case 26 of 2008

ALI MOHAMED WANJALA.....APPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

The applicant is seeking orders that police officer Spare Michweya be compelled to return to the applicant KShs.250,000/=. The applicant contended that he was arrested on 2/4/2002 at about 10.00 a.m. along Kisumu-Busia Highway. He was waiting for public transport. He further submitted that investigations were done and the said officer admitted taking the money before the Busia O.C.P.D. Applicant further argued in his written submission that if the papers the applicant was arrested with was intended to prepare fake money then why was he not charged with the offence related to preparation of fake money.

Mr. Karuri, learned State Counsel opposed the application. He relied on three affidavits of Christopher Mdunde Kisari, Spare Michweya and Paul G. Kariuki. Counsel submitted that the O.B. extract from Busia Police Station indicate that when applicant was arrested, he was found in possession of papers for printing money. He was not booked with any cash at all and he did not lodge a complaint when he was booked in the cells. A police inquiry file was opened to investigate the allegations by the applicant but the complaints were found to be baseless.

I have perused the lower court record in Criminal Case No.514 of 2002. The applicant was arraigned before the court at Busia on 8th April, 2002. The charge was read to him and he pleaded not guilty. The matter was mentioned on 22nd April 2002, 6th May 2002, 15th May 2002, 29th May 2002, 10th June 2002, 21st July 2002 and 5th July 2002. The first witness testified on 9th July 2002. In all the above occasions the applicant was produced in court and never raised the issue of his KShs.250,000/= having been stolen.

The police officer whom the applicant is alleging to have taken the money testified before the lower court on 26th November 2002. He was PW4 and his name is recorded as AIBEA MUCHEYA. He testified that on 1st April 2002 he arrested the applicant who was accused to have committed a robbery with violence on 8th March 2003. The complainant was Joseph Ndeke Atioto. He arrested the applicant and searched his house but made no recovery. During cross-examination, the officer denied having asked for money from the applicant. Indeed the exact words by the officer are “I did not ask you for any money.”

The first time the sum of KShs.250,000/= was raised is when the applicant was giving his un-sworn testimony. He stated that police took KShs.250,000/= and 6 knives. This was on 5th February 2003, ten

months after he had been arraigned in court. From the record on cross-examination of Mr. Michweya by the applicant, it is evident that the applicant never asked the witness whether he had taken KSHs.250,000/= from him. Otherwise the trial court could have recorded that issue.

In his submissions, the applicant contended that the Busia O.C.P.D. wrote to him in 2003 and that although Mr. Michweya had admitted having taken the money, the contents of the letter was different. I have seen a letter dated 13th August 2007 by the one S. Maithya on behalf of the Busia O.C.P.D. The contents of the said letter are that the applicant had written a complaint letter to the Provincial officer, Western on 1st August 2002 and in the said letter the applicant complained of threats from the officer who was investigating his case, Corporal Spare Michweya. Indeed the letter from the police attached a copy of the applicant's letter reminding him that he never mentioned the issue of lost money in his letter.

The letter by the police from Busia dated 13th August 2003 was in reply to the applicant's letter dated 26th June 2003 wherein the applicant had raised the issue of his money having been taken. Judgement before the lower court was delivered on 19th February 2003. Meaning that other than the statement in his defence about the money the only second time the applicant issue raised the issue was on 26th June 2003 vide his letter aforesaid and this was after conviction.

When the applicant was arrested, the arresting officer, Mr. Spare Michweya was with two other officers namely P.C. Muchemi and P.C. Gurach. The O.B. extract for Busia Police Station for 1st April 2002 indicate that the applicant was brought to the station by three police officers and he was to be charged with the offence of Robbery with violence and being in possession of papers for preparing money. Although the applicant was not charged with the offence of being in possession of papers for preparing money this does not lead to the conclusion that the police took real money from the applicant. They even had an option of not recording the intended charge for being in possession of paper for making money.

Section 177 of the Criminal Procedure Code states that –

Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order:-

(a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct, or

(b) that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.

The applicant appeared before the trial court several times and at no single occasion did he raise the issue of his money. He raised it in his defence that was being taken almost ten (10) months after he was arrested. It is difficult for this court to rule that indeed the applicant's money was taken given the above background. If indeed the applicant had a genuine complaint, on his money, he ought to have raised it on the very day his plea was taken.

In the end I do find that the application herein is unfounded and the same is hereby dismissed.

Delivered, Dated and Signed at Kakamega this 7th day of October, 2009

SAID J. CHITEMBWE

J U D G E