



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS) Petition 1188 of 2007**

**PETER MAINA GACHERU..... PETITIONER**

**VERSUS**

**THE HONOURABLE THE ATTORNEY GENERAL.....RESPONDENT**

**J U D G M E N T**

The Petitioner herein, Peter Maina Gacheru filed the Originating Summons dated 31/10/07 under S 84(1) of the Constitution alleging breach of his fundamental rights under sections 70, 77(1) and (2) of the Constitution. The prayers sought are as follows:-

- (i) *That the Honourable Court do find and declare that the Petitioner's inalienable Constitutional right to a fair trial has been irreparably contravened.*
- (ii) *That the Honourable Court do quash the proceedings in CR C 1263/1999 and declare that the petitioner is entitled to acquittal.*
- (iii) *That the court do make such orders as it deems just to do in the circumstances.*

The application is supported by the affidavit of the Applicant dated 31/10/2007, and submissions filed in court on 31/3/09.

The Respondent opposed the petition and only filed arguments dated 24/01/07.

Briefly, the facts underlying this petition are that the Petitioner is the accused person in Criminal Case No. 1263/1999 having been arrested on 25/5/1999 and charged with the offence of theft by servant on 27/9/1999. Since the commencement of the said proceedings, there have been various adjournments and delays caused by the court and the prosecution and as a result, the Petitioner has been denied his right to a fair and expeditious trial of his case. In his affidavit, the Applicant has made a schedule setting out the adjournments made, the reasons for the adjournment, and the parties who applied for the adjournment. It is the Applicant's contention that he is unlikely to get a fair hearing because the court treated the prosecution more favourably and placed them on unequal footing especially as related to the granting of adjournments. That the Applicant's advocate was also put under a lot of pressure to proceed with the case even when there were compelling reasons for the grant of an adjournment. That he has not been afforded a reasonable opportunity to present his case; he has not been tried within a reasonable time due to the many adjournments and unexplained delays in typing of the proceedings; that due to the delay the Petitioner is no longer able to pay for services of his advocate of choice due to the increase of court fees and he is not able to communicate with his counsel as frequently as he used to do. His right to have adequate time to prepare his defence, communicate with counsel and obtain attendance of his witnesses

has been compromised and as a result his witnesses have died or are unwilling to attend court due to having come to court severally without being heard.

The Petitioner's counsel urged that the delay from 1999 to 2009 is prejudicial and relied on the case of *BARKER V WINGO* (407) U.S. 574 in which the court identified 4 factors that need to be taken into account by the court in determining whether an accused person has been deprived of the right to a speedy trial amounting to an abuse of process and these are;

1. *Length of the delay;*
2. *Reasons given by the Prosecution to explain or justify the delay;*
3. *The accused's responsibility for and past attitude to the delay or accused's assertion to an expeditious trial;*
4. *Proved or likely prejudice to the accused.*

That the case was commenced before Ms Mugo then Chief Magistrate in 1999, was then recommenced in 2001 by Mrs. Muigai after Mr. Ombongi abandoned it upon his transfer to Marsabit. Thereafter, the Magistrate insisted on hearing the 1<sup>st</sup> witness afresh yet he had been heard for 2 years. In the mean time, there were many adjournments during the hearing. Counsel also relied on the case *THE QUEEN V CHARLES CHEUNG WAI BUN* 160 of 1989, *SUPREME COURT OF HONG KONG AND PUBLIC PROSECUTOR V NAM CHEONG TRADING SDN BHD* CR APP 41-07-98-1 which enunciated the principle that justice delayed is justice denied. That the test to fairness is balancing of rights of the accused and those of the society and the court has the power to prevent abuse.

Counsel also relied on international instruments in support of his case;

- (1) *The Universal Declaration of Human Rights – Article 7 and 10*
- (2) *The African Charter on Human and People's Rights Articles 3 and 7*
- (3) *The International Covenant on Civil and Political Rights, Article 14*

As noted earlier the Respondents did not file any replying affidavit. Mr. Okello, the Litigation Counsel submitted that he had cited 79 adjournments from the schedule. The Prosecution had applied for 15 adjournments, the Petitioner had asked for 13 and the court had on its own motion adjourned the case 51 times. He submitted that it is not the prosecution who are to blame for the delay. That the handling of the case by different Magistrates led to the delays. That since the petitioner was charged in 1999, the hearing did not commence till July 2001. The case had to start afresh before Mrs. Muigai and by then, only one witness had testified. Counsel agreed that one is entitled to a speedy trial and he agreed with the principles set out in the *BARKER* case (supra). He urged that the Petitioner had not taken any steps until he was placed on his defence, that he invoked the Constitutional provisions. He urged that in any event the constitutional issues raised herein should have been raised before the subordinate court that was trying him at the earliest opportunity. Counsel relied on the decision in *DOMINIC MUTIE MWALIMU VR CR C APP 217* and *MURIITHI MUGO V REP CR APP 286/06*. That the Petitioner sat on his rights and raised the alleged breach after 8 years. Counsel urged the court to dismiss the petition for having been filed late in time.

It is not in dispute that when the Petitioner filed this Originating Summons, the criminal proceedings were on going in the lower court. Rule 25 of the Constitution of Kenya (Supervisory Jurisdiction and *PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL*) *HIGH COURT PRACTICE* and Procedure Rules, 2006 requires that a party to proceedings who alleges contravention of his rights under S 70 – 83 of the Constitution should raise the issue informally before the presiding magistrate, who will consider the issues and determine whether or not they are vexatious. If he finds that the issues are substantive, he will frame the issues in terms of Form F of the schedule and refer

them to the High Court for hearing and determination and the criminal case is stayed. However, if the court finds that the issues raised are vexatious, it will dismiss the application and proceed with the hearing of the criminal case. This procedure is meant to reduce any would be vexatious matters being sent to the High Court when they do not raise any constitutional issues, they save on the court's time and avoid unnecessary delays in the cases before the lower courts. Of course if the magistrate declines to refer the matter to the High Court as a reference, then the aggrieved party would have a right of appeal.

This procedure is mandatory. It is not enough for the Applicant to tell this court that the subordinate court would not have allowed a reference to be made because the court was the cause of delay. The procedure was put in place for a purpose and it has to be adhered to. I will echo the decision in the case of *JAMES NJENGA KARUME V THE SPEAKER OF NATIONAL ASSEMBLY CA 192/1992* where that court said

“\_\_ where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

There is a clear procedure provided under the Rules on how an aggrieved party should approach this court. There should be no short cuts except for very good reason. None has been shown in this case and I find that the petition is premature and is irregularly before this court for determination.

In addition to the above, I do find that the originating summons to be incompetent because the rules made pursuant to S 84 (6) of the Constitution do guide the petitioner on how to approach the court. In 2007 when this originating summons was filed, the Rules were in operation. There is no provision for approaching this court for redress by way of Originating Summons. When a party alleges contravention of fundamental rights and wishes to approach the High Court directly as the Applicant did, Rule 12 requires that he comes by way of petition as set out in Form D to the schedule to the Act. If one comes under the supervisory jurisdiction of the court under, Ss 65 and 67 of the Constitution, then he has to come by way of Originating Notice of Motion. If the constitutional issue arises in the subordinate court as is in the instant case, the Applicant should have moved this court by way of a reference as set out in Form F of the schedule to the Rules. Form F is formatted as hereunder:

“Form F

IN THE HIGH COURT OF KENYA AT.....

CONSTITUTION REFERENCE NO. .... OF .....

IN THE MATTER OF SECTION 84 (3)

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION (*insert section*).....

IN THE MATTER OF CRIMINAL/CIVIL CASE NO..... OF.....

AT ..... COURT

BETWEEN

A.B. (*insert names of parties*)..... APPLICANT

AND

C.D. (*insert names of parties*)..... RESPONDENT

To: The High Court of Kenya;

Question(s) for determination of the alleged contravention of Section(s) ..... of the Constitution of Kenya.

1. On the ..... day of ..... 20..... a question(s) arose as to the convention of section(s) ..... of the Constitution.
2. *The parties contend as follows ..... (set out, in consecutive paragraphs the specific issues contended by each of the parties referring where necessary to Acts or decided cases.).....*
3. .... *(briefly set out the opinion of the subordinate court on the question raised)*
4. .... *(briefly set out the facts necessary to enable the High Court to properly decide the question(s) raised).*
5. *The question(s) for determination of the High Court is ..... (state the question(s)).*

DATED this ..... day of ..... 20 .....

Magistrate/Presiding Officer”

What is before the court in the form of an originating summons is unknown under the current Rules, Legal Notice 6/06. This application was filed by an Advocate of the High Court who is averse to the above procedure and the reason for the existence of the Rules. The Rules are meant to make the manner of approaching court uniform and a look at the format, the pleadings capture all that is required of a petitioner to lay before the court so that a Respondent can easily respond. Failure to comply with the Rules renders this application incompetent and must be struck out on that basis. To enable the applicant, if he so wishes, to move this court appropriately, this court will not consider the merits of the originating summons. Costs of this application will be borne by the applicant.

Dated and delivered at Nairobi this 7<sup>th</sup> day of October 2009.

**R.P.V. WENDOH**

**JUDGE**

Presence of:

Court:

Mr. Nderitu for Petitioner

Mr. Tamut for Respondent

Court clerk - Muturi