



**REPUBLIC OF KENYA**

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

**In The Matter of the Constitution of the Republic of Kenya**

**CRIMINAL APPLICATION NO 59 OF 1985**

**MARGARET MAGIRI NGUI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

This is an application under section 84(1) of the Constitution of Kenya which enables a person who alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him to apply to the High Court for redress. The applicant is a woman aged 54 who is charged with others with robbery with violence an offence contrary to section 296(2) of the Penal Code which carries a mandatory death penalty. An application to the High Court for bail was refused on October 30, 1984. She is represented by Mr Khaminwa and seeks an order

“that section 123 of the Criminal Procedure Code as amended, to the extent that it purports to make admission to bail unavailable to the applicant ... is void as being inconsistent with section 72(5) of the Constitution of the Republic of Kenya”.

She also seeks orders that this Court has jurisdiction to determine her application to be released on bail pending her trial and an order that she be admitted to bail on such terms as the Court shall determine. Section 72(5) of the Constitution reads as follows:-

“(5) If a person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial”.

Subsection (3)(b) referred to therein applies to

“a person who is arrested or detained ... upon reasonable suspicion of his having committed, or being about to commit, a criminal offence”.

The applicant has been charged with a criminal offence and is being tried for that offence. The evidence of six witnesses has already been taken and the trial has been adjourned until April – to suit the convenience of all the defence advocates involved we were informed by Mr Khaminwa. We are not now concerned with delay in starting the trial and the adjournment is not we think sufficient to bring the applicant within the mandatory provisions of the subsection.

The first and main question for determination however is whether or not section 123(3) of the Criminal Procedure Code is void as being inconsistent with section 72(5) of the Constitution. Notwithstanding our view as to the applicability of the latter provision to the applicant we think it is appropriate for us to consider and determine this question on which we were addressed at length by both advocates. Section 123(3) reads as follows:-

“(3) The High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence direct that a person be admitted to bail or that bail required by a subordinate court or police officer be reduced”.

Prior to an amendment made by the Statute Law (Miscellaneous Amendments) Act, 1978 (No. 13 of 1978) came into effect on November 10, 1978 there were no restrictions on the powers of the High Court to grant bail. This was in accordance with the common law and with section 60(1) of the Constitution which gives the High Court unlimited original jurisdiction in civil and criminal matters

“and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law”.

The 1978 amendment removed murder and treason from the offences in respect of which the High Court had jurisdiction to grant bail and a further amendment in the Statute Law (Miscellaneous Amendments) (No 2) Act, 1984 (No 19 of 1984) which came into effect on December 28, 1984, added robbery with violence and attempted robbery with violence to the exceptions, mandatory death sentences having been provided for these offences. Mr Gatonye appearing for the state submitted that Parliament could reduce the jurisdiction of the High Court in conformity with the Constitution and that section 123(3) is in conformity with the Constitution since no absolute right to bail is there provided. We cannot agree that section 123(3) as amended is in conformity with the Constitution. Whereas section 72(5) of the Constitution makes release on bail mandatory only in certain prescribed circumstances it is applicable to all offences. The amendments to section 123(3) have the effect of prohibiting the High Court from granting bail in cases of murder, treason, robbery with violence and attempted robbery with violence in any circumstances. Thus where for example a person is accused of robbery with violence bail may not be granted even if he is not tried within a reasonable time.

Mr Gatonye also invited our attention to section 70 of the Constitution which provides that the provisions of Chapter V of the Constitution (including section 72) shall have effect for the purpose of affording protection to the rights and freedoms set out in that section

“subject to such limitations of that protections as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest”.

The amendments to section 123 he suggested were an expression of the legislature’s concern for the public interest. The Constitution however gives the legislature no power to make such amendments unless enacted under the provisions of and embodied in the Constitution. The limitations referred to in section 70 are limitations contained in the provisions of Chapter V and there is no limitation qualifying the mandatory provisions of section 72(5). We hold that section 123(3) of the Criminal Procedure Code is inconsistent with the Constitution not only section 72(5) but also section 60(1) and is accordingly void to the extent that this is so. It must accordingly be read as if the words “save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence” were deleted. We wish to add however that following the practice in Kenya prior to November 10, 1978, and subject to the provisions of section 72(5) of the Constitution bail as a general rule should not be granted where the offence charged carries a mandatory death penalty, so great is the temptation to abscond or “jump bail” in such cases. This is the practice also in England in cases of murder although the death penalty has been abolished.

The applicant has applied to this court under section 84(1) for redress. We have no doubt therefore that we have jurisdiction to consider the question of bail on its merits. We have considered the age and health of the applicant. She suffers from ulcers and high blood pressure. For these complaints she can be treated

in prison or if necessary transferred to hospital under the usual safeguards. We see no sufficient justification for disregarding the general rule in considering applications for bail in offences carrying a mandatory death penalty and exposing the applicant to the temptation to “jump bail”. The application for bail is refused.

We feel strongly however that in all such cases lengthy adjournments should be avoided and that the trial should continue from day to day until completed. Undue consideration should not be given to the convenience of advocates when the accused is facing a possible death penalty.

**Dated and delivered at Nairobi this 21st March , 1985.**

**A.H SIMPSON**

**CJ**

**A.M COCKAR**

**JUDGE**

**W.MBAYA**

**JUDGE**