



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 11 OF 2020

GEOFFREY MWANGI GITHINJI.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

STATE.....2ND RESPONDENT

INSPECTOR GENERAL OF NATIONAL POLICE.....3RD RESPONDENT

JUDGEMENT

1. The petitioner herein moved the court through petition dated 20th July 2020. The petitioner describe himself in the petition as a citizen of Kenya with a Kenyan nationality. He brings the petition against the 1st respondent who he asserts is an arm of Government created under **Article 156 (i) of the Constitution of Kenya 2010**. He further avers that the 2nd respondent is the general overseer of the implementation of the Constitution to the general public with the mandate of ensuring that no breaches arises when Government agencies enforce and/or implement the Constitution. The 3rd respondent is an office established under **Article 245 (1) of the Constitution of Kenya, 2010**.

2. It is averred in the petition that the petitioner was detained at different facilities of the 2nd respondent from the 7th July 2009 to 21st May 2020 a period ranging approximately 10 years and 10 months. That the petitioner was detained under the authority of the 3rd respondent for an allegation that he had committed an offence to wit robbery with violence contrary to **Section 296 (2) of the Penal Code**. That further the petitioner continued to be detained since preferred offence against the petitioner by the respondents did not attract the grant of bond pending appeal.

3. It is averred further that the petitioner was arrested on 27th July 2009 by an officer of the 2nd respondent, who did not explain the reasons for his arrest. That while in custody the petitioner learnt that he was arrested in connection with robbery with violence but no details were given to him and the person he was arrested with until they were arraigned in court on 13th July 2009.

4. The petitioner went on to aver that he protested his trial unsuccessfully and he was convicted on 20th July 2009. That he appealed vide Nakuru High Court Criminal Appeal No. 323 of 2009 but the same was dismissed. That he further appealed against the decision of the high court through Nakuru Court of Appeal Criminal Appeal No. 639 of 2010 but the same was also dismissed on 15th November 2013.

5. The petitioner stated that after deep reflection he sought for inspection of the first report that was made against him by the complainant and he established that there was no report by the complainant in the name of Mark Kiprotich Kibor in Nakuru police station to the effect that the said complainant was ever robbed at Ngata bridge of his motor vehicle namely KAL 758L, his Nokia phone and/or Kshs. 15,000/=.

6. The petitioner stated that he succeeded in obtaining a report made by the said Mark Kiprotich Kibor in the Eldoret Police station with the particulars that the same motor vehicle KAL 758J had been parked in Eldoret town at about 1.20pm. That the complainant after stepping out of the bank, he realized the said motor vehicle was stolen and he reported to the police station at 2.00pm. The petitioner stated further that based on the report made in Eldoret police station under OB number 54/15/6/2009 and lack of an initial report from Nakuru police station, he filed a petition for a new trial vide Nakuru High Petition No. 1 of 2014 (Geoffrey Mwangi Githinji v State) where he succeeded and the court directed that he be retried and the 2nd respondent did not appeal against the said decision. He added that the new trial resulted to his acquittal and that the respondents did not file any response or availed any evidence challenging his case. That it was against the backdrop of the said acquittal that the petitioner lodged this claim asserting the violation of his rights during the arrest, after the arrest, during the trial and after trial that culminated him being wrongfully convicted and incarcerated for a period of 10 years and 10 months.

7. The petitioner alleges violation of his constitutional rights under **Articles 49(1)(a), (f), (g); 50(2), (c), (j), (k), (p), (4) and 51 of the Constitution** of Kenya. He therefore seeks judgement as follows: -

a. A Declaration that the 3rd respondent was in possession of the following primary and crucial and or essential evidence: -

- The OB extract namely Eldoret Police Station OB No. 54 of 15th day of June 2009 bearing the initial report of the offence of theft.
- The OB Book namely Nakuru Central Police Station for the 15th and 16th days of June 2009 bearing no report of robbery with violence pitting the Petitioner.

b. A Declaration that the 3rd Respondent deliberately failed to disclose the existence of the primary crucial and or essential evidence in (a) above to the Petitioner at the time of arrest, arraignment to Court for trial and even after trial during the subsequent appeals and also during trial and also failed to disclose the said information to the trial Court.

c. A Declaration that the Petitioner could not have been aware of the primary, crucial and or essential evidence in paragraph (a) above as to have requested for them but the Respondents knew of the said evidence and information.

d. A Declaration that the refusal to disclose and or make available the evidence in (a) above, to the Petitioner, amounted to denial, violation and or infringement of the Petitioners fundamental rights both old and new and in including but not limited to the following rights:

- Right to be supplied with adequate facilities to prepare for defence.
- Right to be informed in advance evidence the prosecution intends to rely on.
- Right to challenge and adduce evidence.
- Right to be released on bond violated by presenting falsified charges.
- Protection from discrimination.
- Protection from inhuman treatment
- Violation of personal dignity.

e. A declaration that the 1st respondent under whose authority the Criminal prosecutions were conducted failed its duty to adhere to the provisions of the Constitution requiring the conduct of a fair trial and the 2nd respondent was the general overseer of the implementation of the fundamental rights.

f. A declaration that the respondents were still mandated to disclose to Court and or supply the Petitioner with the evidence cited in (a) above even after the trial, that is during the appeals but the said respondents failed to do so.

g. A declaration that the respondent deliberately crafted evidence that incriminated the petitioner and or evidence that will have supported the mounting of no-existent offence.

h. A declaration that the respondents further violated the provisions of Article 50(4) of the Constitution of Kenya, 2010 by shielding the primary, crucial and or essential evidence in (a) above since it amounted to obtaining evidence against the Petitioner in a manner that violated the latter's fundamental rights and freedoms.

i. A declaration that by the denial infringement and or violation of the petitioner's rights above explored, the Petitioner suffered separable damage including but not limited to:

- Wrongful arrest and wrongful detention before trial.
- Wrongful and or unlawful conviction.
- Serving wrongful and or unlawful sentence for a period ranging 10 years.
- Mental anguish, social isolation, psychological depression etc.

j. A declaration that in consequence to the damage suffered by the petitioner arising from violation of the constitution by the respondents, the petitioner is entitled to monetary compensation from the respondents.

k. An order for compensation be made to the petitioner in terms general aggravated and exemplary damages payable by the respondents.

l. The Petitioner also prays for costs of the Petition.

8. The petition is supported by an affidavit sworn by the petitioner. They reiterated the allegations made in the petition.
9. The respondents filed no response to the petition.
10. When the matter came up for hearing the court directed the parties to file their written submissions and only the petitioner complied.

Petitioner's Written Submissions

11. The petitioner raised six issues for determination by the court; first, is the right to information and all evidential material. The petitioner submitted that no reasons were given at the time of his arrest and that the 2nd and 3rd respondents were in possession of the evidential material required for just determination of his case. The petitioner stated that he never knew of the existence of the said evidence and information and that was vindicated by the court that heard the petition for new trial. That it could not have been possible for the petitioner even if he was represented to have requested for the said evidence and information captured in the Judgment dated 3rd January 2015. He referred the court to pages 143 and 145 of the petitioner on the same. The petitioner added that the 2nd and 3rd respondents were mandated to have supplied the said evidence, information and particulars of the theft, use of violence, prosecution and court hearings which took place in Nakuru or bring it to the attention of the court so that he could choose to request for them or not.

12. The other crucial evidence that needed to be supplied was the information about reporting to Eldoret Police Station on 15th June 2009 at 2.00 pm regarding the theft and not having reported to Nakuru on the same day but few days later regarding the offence of robbery with violence. The petitioner draws the court's attention to the Judgment of **Nakuru Petition No. 1 of 2014** at paragraph **14 to 17 (page 143 to 146 of the petition)** and also the last two paragraphs of the 2nd trial court found on page 188 of the petition. The petitioner submitted further that the refusal by the 2nd and 3rd respondent to avail evidence was deliberate and that occasioned prejudice to him in that without the same he still would have been in prison with bad records.

13. The petitioner referred the court to **Article 35(1)(a) and (b)** of the **Constitution of Kenya 2010** in regard to the right to information. That also under **Article 50** he has a right to challenge evidence this being an integral part of fair hearing. That further, under **Article 51** he retained all his rights and fundamental freedoms in the bill of rights even after he was detained. That further, he was discriminated all through the trial and subsequent appeals contrary to the provisions of **Article 27** of the Constitution of Kenya. The petitioner stated that he was charged with an offence that did not exist and later sentenced and given a penalty that was severer than what was expected in law. He draws the courts attention to the provisions of **Articles 28, 29 and 51** of the Constitution.

14. It is the petitioner's argument in his submission that the current Constitution is applicable in the circumstance of his petition given that his trial commenced in the regime of the repealed Constitution. That the proceedings persisted until the operation of the current constitution including the new trial that ended on 20th May 2020. He placed reliance on the case of **Wilson Thirimba Mwangi v The Director of Public Prosecution [2012] eKLR** where the court held that under **Article 50(6)(a)** the right to petition for a new trial accrues after a person's appeal has been dismissed by the highest court or after the time for appealing has lapsed and no appeal has been filed. That as the petitioners appeal was determined on 20th May 2011, the petitioner is entitled to take advantage of the provisions of the Constitution.

15. It is further the petitioner's submission that the Chief Justice by the **Legal Notice number 117 dated 28th June 2013** enacted the guiding rules guiding the practice and procedure for lodging redress to constitutional infringements. While placing reliance in the case of **Lechornai Lorkuran v Attorney General, Nakuru High Court Petition No. 7 of 2010**, the petitioner submitted that no explanation was given by the respondents for his detention beyond reasonable time and thus the court should grant a substantial award. The petitioner in support of his petition in support of his petition draws the court's attention to the cases of **Katiba Institute V President Delivery Unit & 3 others [2017] eKLR** and **Edward Akong'o Oyugi v Attorney General [2019] eKLR**.

16. In conclusion, the petitioner submitted that he underwent a grueling period of 10 years 10 months defending a case against him that was non-existing and the respondents had hidden the evidence. He urged the court that he be awarded damages commensurate with the reliefs sought in the case of **Lechornai Lorkuran (supra)** and the costs of the petition plus interests.

ANALYSIS AND DETERMINATION

17. Upon analyzing the facts of the case, evidence and the submissions tendered by the petitioner, the following issues arise for determination namely; **Whether the Petitioner's Fundamental Rights and Freedom were violated and Whether the Petitioner is entitled to damages.**

18. In addressing that first issue, **whether the Petitioner's Fundamental Rights and Freedom were violated, Article 2 (5)** of the Constitution provides that the general rules of international law shall form part of the law of Kenya. **Article 1** of the **Universal Declaration of Human Rights, 1949** provides: -

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Article 5 of the **Universal Declaration of Human Rights, 1949** provides: -

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

19. The **African Charter on Human and Peoples' Rights** under **Article 2** provides that *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind...."* It also provides

for equality before the law, equal protection of the law under **Article 3**; guarantees respect for life and the integrity of the person under **Article 4** and the right to the respect of the dignity inherent in a human being and prohibits all forms of degradation, torture, cruel, inhuman or degrading punishment and treatment under **Article 5**.

20. The Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and forming the bedrock upon which the Constitution is based. **Article 19 (3) (a)** of the **Constitution of Kenya 2010** states that Fundamental rights and freedoms of the individual are inherent and not granted by the State. They are to be respected, upheld and promoted so as to promote Constitutionalism.

21. **Article 28** of the said Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. Further, **Article 259** enjoins the courts, in interpreting the Constitution, to promote the purposes, values and principles of the Constitution, advance the Rule of Law, and Human Rights and Fundamental freedoms in the Bill of Rights, permit development of the law and contribute to good governance. It is important to note that the former constitution also promoted the same.

22. In the instant matter, it is the petitioner's case that he was arrested on 27th July 2009 by an officer of the 2nd respondent who did not explain the reasons for his arrest. That while in custody the petitioner learnt that he was arrested in connection with robbery with violence but no details were given to him and the person he was arrested with until they were arraigned in court on 13th July 2009. That further, the 2nd and 3rd respondents were in possession of the evidential material required for just determination of his case. That the same involved a report made at Eldoret Police Station on 15th June 2009 at 2.00 pm regarding the theft and no report was made in Nakuru on the same day but few days later regarding the offence of robbery with violence.

23. The petitioner stated that he was charged with an offence that did not exist and later sentenced and given a penalty that was severer than what was expected in law. That the petitioner was detained at different facilities of the 2nd respondent from the 7th July 2009 to 21st May 2020 a period ranging approximately 10 years and 10 months. The petitioner stated further that based on the report made in Eldoret police station under OB number 54/15/6/2009 and lack of an initial report from Nakuru police station, he filed a petition for a new trial vide Nakuru High Petition No. 1 of 2014 (Geoffrey Mwangi Githinji v State) where he succeeded and the court directed that that he be retried and the 2nd respondent did not appeal against the said decision. He added that the new trial resulted to his acquittal and that the respondents did not file any response or availed any evidence challenging his case.

24. It appears therefore that the petitioner was falsely arrested and imprisoned as he was later acquitted.

25. The court in **Daniel Waweru Njoroge & 17 Others v Attorney General Civil Appeal No. 89 of 2010 [2015] eKLR** the court held:

“False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort.”

26. **Mativo J** in the same case went on to quote **Harper & James** in their book, **The Law of Torts, [3rd Edition]** at page 226 where they authoritatively state that false imprisonment must include the following elements, namely: -

i. There must be detention, i.e. unlawful restraint of a person's liberty or freedom of movement.

ii. That the detention needs not be forceful. Threats of force by conduct or words coupled with the apparent ability to carry out such threats are sufficient.

iii. Detention must be total, i.e. it must be within boundaries. The restraint must be total rather than a mere obstruction of the right to go where the plaintiff pleases. Imprisonment is something more than a mere loss of freedom to go where one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own.

iv. Detention must be for an appreciable time, however short. In Prosser on Torts, it authoritatively stated that the tort is complete with even a brief restraint of the plaintiff's freedom.

v. The detention must be unlawful and must have been against the plaintiffs will.

vi. Malice is not an ingredient in the tort of false arrest.

27. In **Anthony Njenga Mbuti & 5 others v Attorney General & 3 others [2015] eKLR, Mumbi J** held as follows:

“That the conduct by law enforcement officers profiling suspects on mere suspicion, arresting and detaining them with no evidence of crime committed is arbitrary and discriminatory guaranteed in our constitution.”

28. In the case of **Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai [2013] eKLR** the Court held that:

“What emerges from the decisions I have cited above is the centrality of the liberty of the person and the protection from illegal and false imprisonment as one of the fundamental rights and freedoms enshrined in our Bill of Rights.”

29. As pointed out earlier, the respondents never filed any response to this petition or file any submissions. The only evidence before this court was tendered by the petitioner and the same remains unchallenged.

30. In view of the evidence on record, the submissions by the petitioner and in reliance to the cited provisions of the law together with the case law I find that the Petitioner was falsely arrested, prosecuted and imprisoned by the respondents in violation of his constitutional rights. There was absolutely no reason why the respondent failed to properly investigate the matter and present to the court cogent evidence. The respondents had all the material evidence before charging the respondent and all they needed to do was to present the same to the trial court.

31. The offence facing the petitioner was serious in nature, namely, capital offence. The same therefore needed serious introspect before charging the suspect. Having monopoly of the facts and evidence it was incumbent upon the respondent to bare it all before the trial court. Had it done so the courts in which the matter was adjudicated under would have arrived perhaps at a different position.

32. On the issue of **whether the Petitioner is entitled to damages**, the Court of Appeal in the case of **Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR** had this to say regarding the award of damages: -

“...It seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. (emphasis supplied) The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration...”

33. Further, in the case **Akusala A. Boniface v OCS Langata Police Station & 4 others Petition Number 351 of 2017[2018] eKLR**, on the question of damages, the court held as follows:

“In the instant case I find that the appropriate determination is to award reasonable damages in addition to the declaration of violation of constitutional rights. As I have already noted in this judgment, the petitioner prayed for an award of Kshs. 10 million for damages, I am however of the view that an award of Kshs. 2 million will be appropriate in the circumstances of this case. I am guided by the decision in the case of Lucas Omoto Wamari v Attorney General & another [2017] eKLR wherein the Court of Appeal upheld an award of Kshs. 2 million for violation of constitutional rights under circumstances that were similar to the instant case.”

34. On the question of damages for false imprisonment, Mativo J in the **Daniel Waweru Njoroge case (supra)** held as follows:

“On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:

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- i. *Damages should not be inordinately too high or too low.*
- ii. *Should be commensurate to the injury suffered.*
- iii. *Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.*
- iv. *Awards in past decisions are mere guides and each case depends on its own facts.*

This court has applied the above principles to the facts herein and it makes a finding that the action of the defendant was high handed and an award of Kshs. 100,000/= will be an adequate compensation for each of the plaintiff herein as general damages for unlawful arrest and false imprisonment.”

35. In view of the foregoing principles laid out in the judicial precedents above, I find that where a petitioner is entitled to compensation for a violation of his constitutional rights by the state, such compensation ought to be both general and exemplary or punitive in nature. This is so because such an award is meant to vindicate the violation of the Petitioner's rights and deter future infringements. It at the same time somehow ameliorate the sufferings he underwent during the ordeal.

36. In light of the violations occasioned by the respondents on the petitioner's rights as explained earlier above, I hold that the petitioner is entitled to general exemplary damages as was in the case of **GITOBU IMANYARA & 2 OTHERS V ATTORNEY GENERAL [2013] eKLR** in addition to a declaration on the violation of his constitutional rights. For unknown reasons and despite being served the respondents chose not to file any responses.

CONCLUSION

37. This court therefore holds and declares that;

(a) It is hereby declared that the 3rd respondent was in exclusive possession of the primary and crucial and or essential evidence in the criminal trial against the petitioner at the time of arrest, arraignment in Court for trial and even after trial during the subsequent appeals and also during re-trial and failed to disclose the said information to the trial Court and or the petitioner.

(b) It is hereby declared that the refusal to disclose and or make available the evidence in (a) above, to the Petitioner amounted to denial, violation and or infringement of the Petitioners fundamental rights

(c) It is hereby declared that the 1st respondent under whose authority the Criminal prosecutions were conducted failed its duty to adhere to the provisions of the Constitution requiring the conduct of a fair trial and the 2nd respondent was the general overseer of the implementation of the fundamental rights.

(d) It is declared that the respondents deliberately crafted evidence that incriminated the petitioner and or evidence that will have supported the mounting of non-existing offence.

(e) It is declared that the respondents further violated the provisions of Article 50(4) of the Constitution of Kenya, 2010 by shielding the primary, crucial and or essential evidence in (a) above since it amounted to obtaining evidence against the Petitioner in a manner that violated the latter's fundamental rights and freedoms.

(f) It is declared that the denial, infringement and or violation of the petitioner's rights above explained caused the Petitioner to suffer irreparable damage and loss including wrongful arrest, conviction and unlawful detention.

(g) It is hereby declared that in consequence to the damage suffered by the petitioner arising from violation of the constitution by the respondents, the petitioner is entitled to compensation from the respondents in terms of general aggravated and exemplary damages payable by the respondents jointly and severally.

(h) Pursuant to (g) above the sum of Kenya shillings three million (Kshs. 3,000,000) is hereby awarded to the petitioner which shall attract interest from the date of filing of this petition till payment in full.

(i) The petitioner shall have the costs of this petition.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 27TH DAY OF JANUARY 2022.

H K CHEMITEI

JUDGE