



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**(Coram: A. C. Mrima, J.)**  
**CONSTITUTIONAL PETITION NO. E308 OF 2020**

**-BETWEEN-**

SIMON ADEDE NGIELA.....PETITIONER

**-VERSUS-**

THE INSPECTOR-GENERAL OF POLICE

WINNIE ATIENO OKOTH.....RESPONDENTS

**JUDGMENT**

**Introduction:**

1. *Simon Adede Nguela*, the Petitioner herein, instituted the Petition subject of this judgment sometimes in October, 2020. He sought declarations of violation of his rights and fundamental freedoms and compensation arising from alleged detention, torture, inhuman and degrading treatment he underwent in the hands of the Police sometimes in March and July, 2020.

**The Petition:**

2. The Petition is dated 14<sup>th</sup> September, 2020. It is supported by an Affidavit sworn by the Petitioner on even date. In further support to the Petition, the Petitioner filed written submissions dated 6<sup>th</sup> October, 2021.

3. The Petition was heard by way of reliance on the pleadings, affidavit evidence and written submissions.

4. In the main, the Petitioner prayed for the following orders: -

*1. A declaration that the Petitioner's fundamental rights and freed guaranteed under Articles 10, 19, 20, 22, 23, 27, 28, 29, 30, 49, 51, 239(3), 244 and 258 of the Constitution were violated by Respondents by the unlawful arrest and subsequent detention, torture, inhuman and degrading treatment meted out to him by the Respondents during his detention.*

*2. A declaration that the Petitioner is entitled to the payment compensation by way of damages and costs by the Respondents for violation of his fundamental rights and freedoms guaranteed under aforementioned provisions of the Constitution and for the above-mentioned consequences of such violation.*

*3. Costs of the Petition.*

*4. Any other or further relief that the court may be pleased to grant.*

**The Responses:**

5. Long after the matter had been heard and fixed for judgment, the 1<sup>st</sup> Respondent filed Ground of Opposition dated 2<sup>nd</sup> December, 2021

and an incomplete application seeking to set aside the proceedings and that it be granted leave to defend the Petition.

6. The application only contained a certificate of urgency and a supporting affidavit sworn by one *Mariam Chiringa*, Learned State Counsel on 2<sup>nd</sup> December, 2021. As a result, there was no competent application for consideration and the Court did not deal with the issue further.

7. From the record, it seems that there was no follow-up from the 1<sup>st</sup> Respondent's on the application.

8. The Grounds of Opposition were also dated 2<sup>nd</sup> December, 2021 and raised the following grounds: -

1. *THAT The 1<sup>st</sup> Respondent has acted with their Constitutional mandate and statutory mandate in discharging its duties.*

2. *THAT the Petitioner has not demonstrated any violations of his Constitutional Rights by the Respondents.*

3. *THAT the Petition is full of glaring conjectures and unsubstantiated allegations against the 1st Respondent. That is to say that the Petitioner has failed to demonstrate to the required degree of precision which of his fundamental rights have been infringed.*

4. *THAT the Petition is malicious as it only seeks to curtail the functions of the 1st Respondent without a justifiable cause.*

5. *THAT both the Application and the Petition filed herein is an abuse of the court process and should be dismissed with cost.*

9. Given that the Grounds of Opposition were filed long after the Petition was heard and fixed for judgment, without the leave of the Court and that the application having been incomplete, this Court finds and hold that the Grounds of Opposition are irregularly on record and the Court will not consider them in this judgment.

#### **Analysis and Determinations:**

10. I have carefully considered the Petition and submissions and the decisions referred to. I find that there is only one main issue for determination being whether the Petitioner's claim is proved and if so, whether the Petitioner is entitled to the remedies sought.

#### **The Petitioner's case:**

11. A brief recount of the Petitioner's case will set the pace for further consideration of the issue. The Petitioner pleaded that sometimes in 2019 he entered into a commercial agreement with the 2<sup>nd</sup> Respondent herein, *Winnie Atieno Okoth*, for supply and sale of fish. Part of the agreement involved getting fish on credit.

12. He further pleaded that at the beginning of 2020, the Petitioner fell into arrears and delayed in settling the outstanding amount he owed to the 2<sup>nd</sup> Respondent. He nonetheless committed himself to pay her, though at a slow pace. This was due to COVID-19 pandemic.

13. Despite the foregoing, the Petitioner pleaded that he started experiencing hostility from the 2<sup>nd</sup> Respondent that involved threats of incarceration and torture until payment is made in full. True to her threats, the 2<sup>nd</sup> Respondent sought, procured and secured the services of the 1<sup>st</sup> Respondent to execute her heinous plan.

14. On or about 10<sup>th</sup> March, 2020, the Petitioner alluded that he was arrested by the officers of the 1<sup>st</sup> Respondent and detained in their motor vehicle (Toyota Land cruiser) for approximately five (5) hours whereupon he was commanded to pay the outstanding credit advanced by the 2<sup>nd</sup> Respondent. He was later released after being beaten and treated inhumanely.

15. During the arrest and internment in the 1<sup>st</sup> Respondent's vehicle, the Petitioner averred that he was held incommunicado, denied food, water and he could not even visit toilets to relieve himself. The vehicle in which he was held was parked in an open space in hot torrid sun. He was also denied an opportunity to contact his family members. One of the officers who arrested him could occasionally walk into the vehicle and squeeze his genitalia while asking him, "*haujapata pesa*". He was later released towards 8pm.

16. He further pleaded that on 31<sup>st</sup> July, 2020 two uniformed police officers in the company of the 2<sup>nd</sup> Respondent and a third civilian man drove to the Petitioner's shop situated in Joyland, Satellite Estate, Nairobi County at around 2:30pm on-board a private motor vehicle saloon car that he could only remember as KAH.

17. The Petitioner posited that he was arrested by the said officers of the 1<sup>st</sup> Respondent attached at Satellite Police Station in full direction and command of the 2<sup>nd</sup> Respondent. He was handcuffed and bundled into the car. During this time, the 2<sup>nd</sup> Respondent shouted at the Petitioner stating that this is what he gets for not paying debts.

18. On arrest, the Petitioner further posited that he was driven around until around 4:50pm when he was taken to the police station. During the forced drive, he was harassed and questioned as to why he had refused to pay the 2<sup>nd</sup> Respondent her debt. At the Police station, the Petitioner was booked in under OB 65/31/7/2020.

19. He alleged that he was then pushed and shoved into the cells by the arresting officer who also insulted him by uttering the following words "*wewe kumbafu utakikulipa pesa ya wenyewe ingia cell. Toa viatu na belt uweke hapa kondoo wewe.*" The officer also allegedly

incited the rest of the inmates to teach him a lesson for failing to pay debt.

20. The Petitioner alleged to have been beaten, assaulted, intimidated and harassed by the other inmates in the full glare and command of the 1<sup>st</sup> Respondent's officers.

21. The Petitioner also contended that he was also stripped naked by the inmates at the direction and command of the officers of the 1<sup>st</sup> Respondent at the Station. His trousers were completely torn apart and he had to pull it side by side to cover nakedness.

22. While at the Satellite Police Station, he averred that his phone was taken away. He was denied an opportunity to contact his family members or even reach out for legal assistance. When he was given back his phone he was warned of dire consequences if he dared contacted anyone.

23. He posited that at no given time whatsoever was he ever informed of the reason for his arrest. He only came to the conclusion that it was because of the debt since the 2<sup>nd</sup> Respondent was there and the utterances she and the officers made.

24. While in the detention, he posited that he was forced to clean human waste that was spread all over the Cells without gloves, adequate water or even proper tools to do so. He was also forced to spend two nights on cold floors of the Cell bare footed and without anything to cover myself. Most of the time he slept while seated because there was no space due to crowding or he just kept awake standing in fear of what may happen to him.

25. The Petitioner contended that he was arrested during the COVID-19 pandemic. Despite the circumstances, he was detained in a crowded cell where people had no masks on and there was no sanitizers or water to keep safe from the violent disease. When he asked about the same, he was told to stop being "mjuaji" and pay debts in order to get masks and sanitizers.

26. According to the Petitioner, the toilets he was forced to use were full of human waste, stinking, unhygienic and deplorable. All the time he visited them; he went in barefooted.

27. He further posited that the totality of the experience is that the Petitioner was traumatized, psychologically drained, felt less of a human being, exposed to life threatening situations under the orchestration and perfect execution of the Respondents.

28. He also pleaded that he stayed at the Station's Cells from around 4:50pm on 31<sup>st</sup> July, 2020 up to 2<sup>nd</sup> August, 2020 around 2:30pm. During his entire stay at the Satellite Police Station he survived on a cup of tea that was served on him on 1<sup>st</sup> August, 2020.

29. He was then picked from the Station at 2:30pm on 2<sup>nd</sup> August, 2020 by the 1<sup>st</sup> Respondent's officers from Kamukunji Police Station in a Toyota Land cruiser registration number GKB 707U with three police officers onboard.

30. He was further detained at Kamkunji Police Station from 3:30pm 2<sup>nd</sup> August, 2020 until around 5:20pm when he was released after being forced to sign an agreement to repay the money owed to 2<sup>nd</sup> Respondent. The said agreement was written and signed in Room 7 at Kamukunji Police Station in the presence of two plain clothed police officers one of whom was carrying a pistol.

31. It was the Petitioner's averment that during the arrest and incarceration, he interacted with so many police officers but he could only remember three of them namely, PC Sigei, PC Mwendwa and the officer only know to him by his service number being No. 221891.

32. The Petitioner pleaded that the totality of the Respondents' actions amounts to direct and indirect contravention of the Constitution and violation of the Petitioner's fundamental rights and freedoms under Articles 10, 19, 20, 22, 23, 27, 28, 29, 30, 49, 51, 232, 239(3), 244 and 258 of the Constitution of Kenya. Further, the Respondent's actions violated Sections 58 & 59 of the National Police Service Act, No. 1 IA of 2011.

33. On violation of Article 49 of the Constitution, the Petitioner pleaded that the Respondent knew that he had the rights guaranteed to an arrested person but failed to respect the same by: -

- Refusing, neglecting and failing to inform promptly, in language that the petitioner understands, the reason for the arrest and to remain silent.
- Denied the Petitioner an opportunity to communicate with an advocate, and other persons whose assistance is necessary.
- The Respondents compelled the Petitioner at gun point to accede to and sign an agreement admitting that he owed debt.
- The 1<sup>st</sup> Respondent failed, refused and/or neglected to arraign the Petitioner before court despite have adequate time to do so.
- The 1<sup>st</sup> Respondent detained the Petitioner in custody when it was clear that there was no offence committed or punishable in law.

34. On the infringement of Article 51 of the Constitution, the Petitioner alluded that the 1<sup>st</sup> Respondent took away all his rights and violated every single of them including the right to human treatment, dignity, right to food and water and habitable sanitation.

35. While alluding further to the violation of Article 28 of the Constitution, the Petitioner pleaded that the right was infringed in that: -

- The Petitioner was denied water and food.
- The Respondent forced the Petitioner to sleep on cold wet floor without anything to cover himself.
- The Respondent insulted and degraded the Petitioner through abuses, and inhumane treatment.
- The 1<sup>st</sup> Respondent forced the Petitioner to clean and wipe out human waste without enough water, or proper gear for that purpose.
- The 1<sup>st</sup> Respondent caused the Petitioner to be stripped necked as his fellow inmates watched, laughed and made a mockery of him.

36. On the right to equality and freedom from discrimination under Article 27 of the Constitution, the Petitioner pleaded that the Respondent deliberately and without any justification discriminated on the Petition from other inmates in that: -

- While the rest of the inmates enjoyed adequate food and water, the Petitioner only survived on a cup of tea for three days.
- While others were given opportunity to converse and interact with their family members, the Petitioner's phone was taken away from him and when it was returned, he was warned of dire consequences if he used it.

37. On the freedom and security of the Petitioner under Article 29 of the Constitution, the Petitioner posited that the Respondent knew too well that the Petitioner had the right to freedom and security but failed to accord the same in that: -

- The 1<sup>st</sup> Respondent while on the 2<sup>nd</sup> Respondent's retainer arrested and detained the Petitioner for more than three days when it was clear that there was no offence committed thereby depriving him of freedom arbitrarily and/or without just cause.
- Detained the Petitioner without trial despite being aware that there was no friable offence in the first place.
- The 1<sup>st</sup> Respondent incited other inmates to beat, insult, assault, harass and cause actual bodily harm.
- The 1<sup>st</sup> Respondent treated the petitioner with cruelty, inhumanely and in a degrading manner. This was exhibited through being forced to clean human waste, sleeping on cost wet floors, being denied mask and sanitizers, being exposed to the risk of contracting COVID-19.

38. The Petitioner filed submissions in support of his claim. He mainly reiterated the averments in the Petition and urged Court to allow the Petition as it had attained the requisite threshold required in law.

· **The Analysis:**

39. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by the Constitution and the law.

40. The practice and procedure in constitutional Petitions is further provided for under *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '**the Mutunga Rules**').

41. *Rule 20(1)* of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Such Petitions may be heard by way of *affidavits* or *written submissions* or *oral evidence*. *Rule 20(3)* of the Mutunga Rules provide that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. *Rule 20(4)* and *(5)* of the *Mutunga Rules* provide for the summoning and examination of witnesses.

42. The conduct of constitutional Petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in *Section 2* thereof. The provision provides as follows: -

*(1) This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.*

*(2) Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.*

43. *Sections 107(1), (2)* and *109* of the Evidence Act are on the burden of proof. They state as follows:

*107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

and

109. Proof of particular fact

*The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

44. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** as follows: -

*Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.*

45. Turning back to this matter, the Petition was heard by way of reliance on the pleadings, affidavit evidence and written submissions.

46. The Petitioner's cardinal claim was the manner in which he was arrested and treated on arrest. Whereas the Petitioner deposed that he was arrested on 31<sup>st</sup> July, 2020 and later booked in at the Satellite Police Station under OB No. 65/31/07/2020, there was no such evidence of his arrest on the 10<sup>th</sup> March, 2020.

47. On the basis of the foregoing guidance in the manner in which the averments in a Petition are to be proved, this Court finds that there is no evidence that the Petitioner was ever arrested on 10<sup>th</sup> March, 2020. As a result, that claim is dismissed.

48. This Court, however, is satisfied that indeed the Petitioner was arrested on 31<sup>st</sup> July, 2020 and held upto the 2<sup>nd</sup> August, 2020. The Petitioner was not charged. His claim was that the incarceration was contrary to the Constitution.

49. I will now consider the allegations of violations.

50. The first one was on **Article 49** of the Constitution. The Petitioner particularized the violations in paragraph 37 of the Petition.

51. Article 49 of the Constitution provides for the rights of arrested persons. It states as follows: -

1. *An arrested person has the right—*

*(a) to be informed promptly, in language that the person understands, of—*

*(i) the reason for the arrest;*

*(ii) the right to remain silent; and*

*(iii) the consequences of not remaining silent;*

*(b) to remain silent;*

*(c) to communicate with an advocate, and other persons whose assistance is necessary;*

*(d) not to be compelled to make any confession or admission that could be used in evidence against the person;*

*(e) to be held separately from persons who are serving a sentence;*

*(f) to be brought before a court as soon as reasonably possible, but not later than—*

*(i) twenty-four hours after being arrested; or*

*(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*

*(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and*

*(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.*

*(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.*

52. The Petitioner contended that he was not informed of the reason of his arrest. He, however, pleaded in paragraph 17 of the Petition and deponed in paragraph 8 of his affidavit that on arrest the 2<sup>nd</sup> Respondent shouted at him and said that *'this is what you get for not paying debts'*.

53. Further, the Petitioner pleaded in paragraphs 18, 20 and 21 of the Petition and also deponed to in paragraphs 9, 11 and 12 of his affidavit that the police interrogated him on why he was not paying the 2<sup>nd</sup> Respondent's debts.

54. This Court, hence, finds and hold that the Petitioner was made well aware of the reasons for his arrest. As such, the claim fails.

55. The Petitioner also alluded that he was denied the opportunity to communicate with his Advocate or other persons for assistance. The averment was not supported by any form of evidence. The Petitioner failed to give particulars of the persons he intended to communicate with or the time at which he made the requests. The averments remain hollow and are unproved.

56. There was also an allegation that on 2<sup>nd</sup> August, 2020 just before the Petitioner was released from custody he was compelled at gun-point to sign an agreement admitting that he owed the debt. The agreement was not produced in evidence neither was there any explanation for the lapse. Infact, the Petitioner did not even avail the initial agreement as well. The allegation is also unproved and is dismissed.

57. On the failure to arraign the Petitioner before Court in time, the Petitioner pleaded that he was arrested on 31<sup>st</sup> July, 202 and released on 2<sup>nd</sup> August, 2020. The 31<sup>st</sup> July, 2020 was a Friday whereas the 2<sup>nd</sup> August, 2020 was the Sunday following his arrest. Article 49(1)(f) of the Constitution was, therefore, not infringed.

58. On whether the Petitioner was detained whereas he had not committed any offence, this Court finds that the issue hinges on evidence. It is possible that an offence may be committed even when parties are engaged in private and commercial transactions. It is also a fact that the police have to carry out investigations in order to establish whether an offence was committed. The Petitioner's contention is, hence, pre-emptive and hereby fails.

59. Flowing from the foregoing, the upshot is that the allegations on the infringement of the Petitioner's rights under Article 49 of the Constitution fails and the claims are dismissed.

60. On the breach of Article 51 of the Constitution, this Court finds that the Petitioner did not, as well, avail any evidence to ascertain that he was treated inhumanly, denied food and water and that the police cells were inhabitable.

61. For the Petitioner to succeed in such claims, there was need for evidence whether by medical experts or fellow inmates or otherwise to confirm that the Petitioner was assaulted and on the state of the police cells. The Petitioner did not adduce any form of evidence that he was injured while in custody. He only so alleged. The alleged deplorable state of the cells also remains unsubstantiated.

62. The Petitioner's claims based on the infringement of Article 51 of the Constitution are thereby not proved. They are hereby disallowed.

63. Resulting from the findings on Articles 49 and 51 above, the claim that the Petitioner's dignity as guaranteed under Article 28 of the Constitution was not respected and protected also fails.

64. The claims that the Petitioner was discriminated in that unlike him, the other inmates were given food and allowed to freely interact with their family members, again remains without any evidence. Therefore, the allegation that Article 27 of the Constitution was infringed also fails.

65. The above fate of failure to prove also follows the Petitioner's contention that his right under Article 29 of the Constitution was infringed.

66. Whereas the Petitioner's rights and fundamental freedoms may have been variously infringed in the course of the incarceration and that the Petition was well pleaded, on one hand, the Petitioner failed to adduce evidence in proof of such violations, on the other hand.

**Disposition:**

67. The above discussion is sufficient to bring this matter to an end. The Petition is hereby dismissed on account of failure to prove the alleged violations.

68. Had the Respondents so properly taken part in this matter, I would have awarded them costs. Given that the Petition was undefended, there shall be no orders as to costs.

69. Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 27<sup>th</sup> day of January, 2022.**

**A. C. MRIMA**

**JUDGE**

**Judgment virtually delivered in the presence of:**

**Mr. Salim**, Learned Counsel for the Petitioner.

**No appearance** for the Respondents.

**Elizabeth Wanjohi** – Court Assistant.