



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. E006 OF 2021**

**CALEB ODHIAMBO ODERA.....1<sup>ST</sup> PETITIONER**

**WILLIAM SUJI ODERA.....2<sup>ND</sup> PETITIONER**

**LEONARD WAMUKHURIA ADIEDO.....3<sup>RD</sup> PETITIONER**

**PATRICK OCHIENG OKETCH.....4<sup>TH</sup> PETITIONER**

**FESTUS RANYONDO OKETCH.....5<sup>TH</sup> PETITIONER**

**VERSUS**

**INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT POLICING**

**OVERSIGHT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**AND**

**NATIONAL POLICE SERVICE COMMISSION...1<sup>ST</sup> INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. By a Petition dated 23<sup>rd</sup> August 2021 filed on the 30<sup>th</sup> September 2021, the Petitioners claim that they were unlawfully arrested and detained by the Respondents in breach of the Petitioners' fundamental rights and freedoms guaranteed by the Constitution.

2. The petitioners sought the following reliefs:

*a) A declaration that the conduct of the respondents are contrary to and inconsistent with the provisions of Articles 10 of the Constitution of Kenya 2010.*

*b) A declaration that the respondents violated constitutional rights of the petitioners and in particular Articles 20 (1) and (2), 24 (1), 25 (c), 27 (4), 29, 31, 39,47,49, 50 (1) and 51 of the Constitution of Kenya 2010.*

*c) An Order that the arrest and incarceration of the 1st to 5th petitioners each for a period commencing on the 20th April 2014 to 16th October 2018 by the respondents for alleged offences of murder and failure to produce them in court in good time was unconstitutional.*

*d) An Order for adequate compensation for damages for unlawful arrest and incarceration in (c) above for deprivation of the Constitutional right to freedom of movement and their liberty by the respondents.*

*e) Any other relief that this Honourable Court shall deem fit by dint of Article 23 (3) of the Constitution of Kenya 2010 and are just*

to grant in the circumstances.

3. It is the petitioners' case that on the evening of 20<sup>th</sup> April 2014, the petitioners were unlawfully arrested around Yala town while engaging in their normal business whereupon they were bungled into a police vehicle.
4. The petitioners further state that were then threatened against making any phone calls and taken to the police station where they were not told the reason for their arrest and were subsequently charged with murder and on the 10<sup>th</sup> November 2015, they were charged in Siaya High Court Criminal Case No. 16 of 2015 with the offence of murder. It is the petitioners' case that they spent a total of 1,279 days in custody thus violating their human rights.
5. The petitioners further pleaded that the respondents ought to have exercised their powers strictly in compliance with the provisions of Articles 10, 49 and 51 of the Constitution before acting as they did. The petitioners further aver that the actions and omissions of the respondents are a violation of the petitioner's constitutional rights specifically Articles 20 (1) and (2), 24 (1), 25 (c), 27 (4), 29, 31, 39,47,49, 50 (1) and 51 of the Constitution of Kenya 2010.
6. The petitioners thus seek general, exemplary and punitive damages as provided by Article 23 (3) (e) of the Constitution. The petitioners' pleadings are reiterated in the supporting affidavit sworn by the 1st petitioner on the 23<sup>rd</sup> August 2021.
7. Opposing the Petition, the respondents through the Attorney General filed Grounds of Opposition dated the 8th October 2021 and filed on the 22nd October 2021 contending that:

*i. The petition herein is based on claims that amounts to the tort of malicious prosecution and false imprisonment. The same being tort is statute being pursuant to section 3 of the Public Institution Act.*

*ii. The court lacks jurisdiction because the claims are based on tortious Acts and the lower court is quite capable of handling the matter.*

*iii. The suit has been filed to circumvent the statute of limitation and is an abuse of court process.*

8. The parties agreed to canvass the petition by way of written submissions.

#### **The Petitioners' Submissions**

9. The petitioners submitted that it was the prosecution who caused their arrest, detention and prosecution but that the prosecution failed to adduce sufficient evidence leading to the petitioners' release and as such it was evident that the entire process was conducted without any cause and with malice.
10. It was further submitted that the petitioners were arrested and detained illegally while the prosecution was aware that there was no case warranting their arrest, detention or prosecution ab initio. They submitted that their prosecution was done in bad faith with the intent to deny the petitioners their rights of freedom or to settle other matters which the petitioners were not privy to.
11. The petitioners submitted that as a result of their arrest, detention and prosecution, they lost their earnings as law abiding citizens and had their reputations damaged and they could have lost their lives had the public been incited against them.
12. It was further submitted that the petitioners were entitled to the reliefs sought as they had proved that they were illegally confined by the respondents for a long time whereas the respondents knew the same to be a farce.

#### **The Respondents' Submissions**

13. The respondents submitted that the claim by the petitioners was one for malicious prosecution cloaked under the guise of a constitutional petition in a bid to circumvent the statute of limitation. It was further submitted that being a tortious act, the law provided for avenues for its resolution. Reliance was placed on the cases of **Dickson Chebuye Ambeyi v National Police Service & Another ; Peter Sifuna Waesonga & Another (Interested Parties) [2020] eKLR** and that of **Patrick Nyamuke Etori v National Police Service Commission & 2 Others [2019] eKLR** where the court in both instances interrogated petitions brought claiming infringement of rights and found that that was malicious prosecution and ought to have been prosecuted as such.
14. It was submitted that the petitioners had not elaborated how the cited provisions of the Constitution they allege were violated had been infringed. Reliance was placed on the case of **Anarita Karimi Njeru v Republic [1979] eKLR** where the court emphasised the fact that where an individual alleges violation of the constitution, that individual should set out with precision the provisions said to be infringed.
15. The respondents further submitted that the petitioners had failed to prove ingredients of malicious prosecution that were set out in the case of **George Masinde Murunga v Attorney General [1979] eKLR** specifically that the prosecution was instituted without reasonable and probable cause and that it was actuated by malice.
16. It was further submitted that the mere fact that the petitioners were acquitted does not connote that the respondents acted illegally or against the Constitution. Reliance was placed on the case of **Dickson Chebuye Ambeyi (supra)** case where the court stated that an acquittal was not a sufficient basis to ground a suit for malicious prosecution and as such the instant petition ought to be dismissed. The respondents further submitted that suits claiming malicious prosecution are instituted by way of plaint in the magistrate's court depending on the

pecuniary jurisdiction.

17. It was further submitted that this petition amounted to an abuse of court process as the law has set down the procedure to seek redress in this case being by way of plaint, for compensation or the torts of false imprisonment, unlawful arrest and malicious prosecution. Reliance was placed on the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where the Court of Appeal stated that where there was 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. The respondents further relied on the Supreme Court decision in the case of **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR** which reiterated the Court of Appeal's previous decision on the issue.

18. The respondents submitted that the claim herein was one for malicious prosecution and should have been brought within one year as per section 3 of the Public Authorities Limitation Act and had been couched to circumvent the statute of limitation.

19. It was further submitted that the alleged infringement occurred from 20<sup>th</sup> April 2014 to 16<sup>th</sup> October 2018 and the petitioner had up to 16<sup>th</sup> October 2019 to institute a suit whereas they filed the petition on the 23<sup>rd</sup> August 2021, 3 years after limitation had lapsed. Reliance was placed on the case of **James Kanyita Nderitu v Attorney General & Another [2019] eKLR** where the Court of Appeal held that a constitutional petition was not meant to circumvent the law on limitation of actions and that each petition filed alleging violation of the Bill of Rights ought to be considered on a case by case basis.

20. The respondents submitted that the substratum of the instant petition was a tortious act which was time barred and thus incompetent and that the petition was mischievously filed to defeat the statutory impediment. It was further submitted that the petitioners' claim was tortious in nature and as such the lower court was fully seized with the jurisdiction to handle it.

21. It was further submitted that the petitioners had not proved that they were deserving of the damages claimed. Reliance was placed on the case of **Dickson Chebuye Ambeyi (supra)** where the court held that in any claim for general damages, the party claiming must formally prove their claim.

### **Analysis & Determination**

22. I have considered the pleadings herein as well as the submissions by both parties to this petition. I find the following issues for determination:

- a) *Whether the court has jurisdiction to entertain this petition and whether the instant petition is an abuse of court process*
- b) *Whether the instant suit is time barred by Section 3(1) of the Public Authorities Limitation Act, 1974 Laws of Kenya*
- c) *Whether the elements necessary to sustain a claim for malicious prosecution have been met.*

### **Whether the instant petition is an abuse of court process**

23. It is the respondents' submission that the instant petition is an abuse of the court process as it was a claim for malicious prosecution masked under the guise of a constitutional petition in a bid to circumvent the statute of limitation whereas the law had set down the procedure to seek redress in this case being by way of plaint, for compensation for the alleged torts of false imprisonment, unlawful arrest and malicious prosecution. In other words, the respondents contend that this court lacks jurisdiction to entertain the instant petition.

24. Article 22 of the Constitution provides that:

***'22(1) Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***

***(2) In addition to a person acting in their own interest, court proceedings under clause may be instituted by –***

- a) *A person acting on behalf of another person who cannot act in their own name;*
- b) *A person acting as a member of, or in the interest of a group or class of persons;*
- c) *A person acting in the public interest; or*
- d) *An Association acting in the interest of one or more of its members.'*

25. In my view, this Court has the requisite jurisdiction at the first instance to entertain this petition. This jurisdiction is founded in Article 165(3) of the Constitution as was explained in the case of **A.O.O & 6 Others v Attorney General & Another [2017] eKLR** that:

***“Article 165 (3) (d) (i) & (ii) of the Constitution vests power to the High Court to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of, the constitution. An unconstitutional statute is not law; and more important judicial***

*function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of statutes. The judiciary has a special role in our system with respect to constitutional interpretation. Courts are bound by the Constitution and must interpret it when a dispute so requires.”*

26. Therefore, on whether this petition is an abuse of the process of the court, I find the answer to be in the negative. The previous murder case not having been determined on merits, the petitioners were at liberty to bring a fresh claim to ventilate their issues. In the case of **Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others (2009) eKLR**, the Court of Appeal stated that:

*“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”*

27. In the instant case, I cannot see any elements of abuse of process of court as stated in the case of **Muchanga Investments Limited v Safaris Unlimited (Africa) (supra)**. The petitioners herein are exercising their rights under Article 22 of the Constitution and therefore I find that the instant petition is not an abuse of court process.

#### **Whether the instant petition is time barred by Section 3(1) of the Public Authorities Limitation Act**

28. Section 3(1) of the Public Authorities Limitation Act provides that:

*“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”*

29. Odunga J in **Jacob Juma & another v Commissioner of Police & Another Civil Suit 661 of 2007 [ 2013] eKLR** held that time for the purposes of limitation must begin to run as from the date when the Plaintiff is acquitted or, if there is an appeal, when his conviction is quashed or set aside. Thus the damage to the plaintiff results at a stage when the criminal proceedings come to an end in his favour.

30. In the instant petition, the petitioners who were jointly charged with the offence of murder before this court and were acquitted under Section 210 of the Criminal Procedure Code on the 16<sup>th</sup> October 2018 after the prosecution failed to call key witnesses to establish their case. The petitioners then filed the instant petition on the 23<sup>rd</sup> August 2021, 3 years later.

31. Accordingly, it is my opinion that the instant petition arising out of a tort of malicious prosecution was time barred. It must be declined as being incompetent and I so find.

#### **Whether the elements necessary to sustain a claim for unlawful arrest, detention and malicious prosecution have been met**

32. In **Sylvanus Okiya Ongoro v Director of Criminal Investigations & 4 others [2020] eKLR**, the court stated:

*“103. What I gather the petitioner to be complaining about is that his prosecution was malicious as it was not unjustified.*

*104. The principles governing a claim founded on malicious prosecution were laid down by Cotran, J in Murunga vs. Attorney General (1979) KLR, 138 as follows: -*

*(a) The Plaintiff must show that the prosecution was instituted by the Defendant, or by someone for whose acts he is responsible;*

*(b) The Plaintiff must show that the prosecution terminated in his favour;*

*(c) The Plaintiff must demonstrate that the prosecution was instituted without reasonable and probable cause;*

*(d) He must also show that the prosecution was actuated by malice.”*

33. These elements were summarized by the East Africa Court of Appeal in **Mbowa v East Mengo District Administration [1972] EA 352** as follows;

*“The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.”*

34. Accordingly, a party who claims that he was unlawfully arrested falsely imprisoned and or maliciously prosecuted, bears the responsibility of proving that the arrest had no basis in law at all. It will not be enough for him to merely state that the arrest was unlawful. Similarly, an acquittal alone cannot amount to proof of malice. There must be something more than just acquittal. In the case of **Nzoia Sugar Company Limited v Fungutuli [1988] eKLR**, the Court of Appeal observed that:

*“It is trite learning that acquittal, per se, on a criminal case charge is not sufficient basis to ground a suit for malicious*

***prosecution. Spite or ill will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the appellant. But there must be evidence of spite in one of its servants that can be attributed to the company.”***

35. From the above holdings, it is clear that for this petition to succeed, the petitioners have to prove that there was malice on the part of the respondents and the interested parties/complainants. The petitioners herein have not in any way adduced evidence in support of their claim.

36. Further, the petitioners based their petition for malicious prosecution on infringement of Articles 20 (1) and (2), 24 (1), 25 (c), 27 (4), 29, 31, 39,47,49, 50 (1) and 51 of the Constitution of Kenya 2010.

37. It is trite law that the burden of proving violation or threat of violation is upon the Petitioners as was established in **Anarita Karimi Njeru (supra)** and reiterated by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**. Further to this, it is also settled that the Petitioners must patently express the manner in which the Respondents have violated their rights as established in **Matiba v Attorney General [1990] KLR 666**.

38. In the instant case, the petitioners have only pleaded that their constitutional rights were infringed by the respondents. The petitioners have not adduced any evidence to show that there was malice on the part of the respondents and interested parties.

39. The court record in High Court Criminal Case No. 16 of 2015 shows that the petitioners were initially presented before court on the 10<sup>th</sup> November 2015. Their trial went through the normal rigours of the criminal procedure process and after the prosecution failed to call witnesses as they had earlier stated, they were forced to close their case after calling three witnesses and subsequently, the petitioners were acquitted on the 16<sup>th</sup> November 2018.

40. As earlier stated, mere acquittal is not sufficient evidence of malicious prosecution. The petitioners having failed to establish the four principles that evidence malicious prosecution. I find no merit in their claim.

41. In the circumstances I find this petition not merited. I dismiss it with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JANUARY, 2022**

**R.E. ABURILI**

**JUDGE**