



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. E001 OF 2020

REUBEN KIPTOO SOI.....PETITIONER

VERSUS

CHIEF MAGISTRATE, MOLO LAW COURTS.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

STATE.....4TH RESPONDENT

JUDGEMENT

1. The petitioner herein moved the court through an amended petition dated 28th July 2021 against the respondents jointly and severally claiming damages as hereunder.

a) A declaration that the rights of the petitioner were violated and or infringed by the 1st and 2nd respondent.

b) A declaration that the rights having been violated the petitioner is entitled to compensation.

c) An order for compensation in terms of exemplary and aggravated damages arising from the violation of the rights above cited and for the period entailed.

d) Costs of the petition be borne by the Respondents.

2. The gist of the matter is the criminal case filed against him, namely, Molo Chief Magistrate Court Criminal Case No. 2384 of 2010, Republic vs Reuben Kiptoo Soi in which he was convicted under **Section 215 of the Criminal Procedure Code cap 75 laws of Kenya**, on the 27th day of May 2013 and imprisoned to 20 years.

3. The petitioner claimed that he was a minor at the time he was charged namely 14 years as per the immunization card that was produced and at the time he was convicted he was 17 years as per the radiological examination done twice.

4. He went on to state in his petition that his rights were violated by both the 1st, 2nd and 4th respondents as he was charged, prosecuted and convicted as an adult in a Chief Magistrate's Court instead of the Children's Court. That he was also not afforded services of an advocate or benefit of counseling and or advise by a Children's officer. That further, the 1st respondent had abdicated its responsibility of ascertaining the age of the petitioner at the time of trial. The 2nd respondent just decided to prosecute the case brought by the 4 Respondent without ascertaining the veracity of the charges as to whether it met the status of the Petitioners age and more so the 4th Respondent not conducting an age assessment test to both the petitioner and the complainant.

5. The petitioner went on to aver that his fundamental rights under **Articles 50 (2)(h), 53(1)(f) and 2 the Constitution of Kenya, 2010, Section 4(2) and (3), Section 5, Section 72 and Section 77 of the Children Act** were breached by the Respondents. That the respondents were obligated to ensure that the rights and fundamental freedoms were met with minimal inconveniences and the period of 38 months covered the 31 months from the time of being charged to conviction.

6. He went on to state that the 2nd respondent had the obligation under the constitution including but not limited to amending the charges

from reading the petitioner was an adult to read that he was a minor, or amend it and include both the petitioner and the then complainant. He averred that 2nd respondent could also have requested the matter be taken to the Children's Court as he had in possession all evidence that guided it to know the status of the petitioner. That the 2nd respondent therefore failed in its obligation.

7. The petitioner stated that petition was brought under the **Provisions of Article 19(1) (2) (3) (a)(b)(c)** as well as **Articles 20** all through to **23** on the one part and **Article 51 of the Constitution of the Republic of Kenya. The Petitioner stated further that by dint of article 1 (1) and 2 (1) the Constitution of Kenya, 2010** permits him to seek redress as a Kenyan citizen and the 1st and 2nd respondents state organs.

8. The petition is supported by an affidavit sworn by the petitioner which reiterates the contents of the petition.

9 The respondents filed a response to the petition dated 18th April 2021 and admitted in part the contents of paragraph 6 and 7 of the petition only to the extent that the Honourable Chief Magistrates Court at Molo convicted the petitioner on 24 of May, 2013 on the main count of defilement **Contrary to Section 8 (1) and (3) of the Sexual Offences Act, 2006**, and was later sentenced to the minimum sentence of twenty (20) years imprisonment.

6. It is averred further that the contents of paragraphs 8, 9, and 10 of the petition, were denied and that the petitioner from the time he was first presented to court on 4th October 2010, to the time of his conviction and sentencing on 24th May 2013 and 27th May 2013, respectively, never at one point brought to the attention of the 1st respondent the issue that he may have been a minor. That moreover, as evidenced by the court proceedings the petitioner never presented any documentation as proof of age as alleged in the instant application, and for that reason, the trial proceeded as though he was an adult. That further, neither the testimony of the Petitioner insinuated that he was a minor nor did he contest to being charged, prosecuted and later convicted and sentenced as an adult. The respondents thus put the petitioner to strict proof thereof.

7. The respondents stated that when the petitioner was put to his defence, the petitioner testified to being a casual worker and to having a wife and children for whom he provided for. As such, there was no doubt cast whatsoever that the accused person was an adult. The Respondents in response to **paragraphs 11 (a), (b), (c), (d), (e), (f) and (g)** of the Petition deny that any of the stated provisions of the Constitution of Kenya were violated, breached or infringed. That further to paragraph 7 none of the stated provisions of the **Children's Act** were violated since the petitioner did not inform the 1st respondent that he was a minor, and at all times during the hearing of the case, the petitioner carried himself in a manner to suggest that he was an adult. The respondents aver that the onus was on the petitioner to bring to the attention of the 1st and 2nd respondents that he was a minor to enable the court to make an informed decision as to the manner in which to conduct the trial proceedings.

8. The respondents further denied that the petitioner's right to a fair trial was infringed and state that the 1st respondent did provide a forum under which the petitioner was free to express himself and if the Petitioner was a minor at the time of arrest, during trial and at conviction, (which is denied *in toto*) and had the 1st Respondent been made aware that he was a minor, the 1st Respondent would have been in any event obligated to remedy the conduct of the trial and transfer the matter to the children's Court.

9. That further to paragraph 14 above, the Respondents aver that if the petitioner was a minor at the time of his trial, conviction and sentencing, then he is estopped from filing this instant suit as per **Section 143 (1) of the Children's Act** which provides that an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person had not been correctly stated to the court.

10. The respondents aver that the petitioner had not proved how his rights were violated by the Chief Magistrate's Court at the time of the hearing of his criminal case and the subsequent conviction and sentencing. That the petitioner was charged and convicted accordingly and that the prayers in the petition were therefore denied as the granting of the same only serves to enrich the petitioner.

11. The petitioner filed a reply dated 26th April 2021 to the respondents' response to the petition where he reiterated all the averments in the petition and discounted the assertions in the respondents' response save where the said response admitted the contents of the petition.

12. When the matter came up for hearing the court directed the parties to file their written submissions which they have complied.

Petitioner's Submissions

13. The petitioner in his submissions raised the following issue for determination by the court namely; whether there was proof that the petitioner was a minor at the time of trial before the 1st respondent. The petitioner submitted that he was still a minor on the 4th October 2010, when he was presented to court to take plea before the 1st respondent and all through the hearing to 27th May 2013 when the 1st respondent delivered the Judgment and sentenced him to 20 years' imprisonment. That he only reached the age of majority, that is 18 years as at 13th July 2014. The petitioner submitted that he was unlawfully arrested, unlawfully tried, unlawfully convicted and unlawfully sentenced.

14. The second issue was whether the 3rd and 4th respondent showed cause for the petitioner to be tried in a court other than the Children's court. The petitioner submitted that it was his contention that the 3rd and 4th respondent never showed any cause justifying his arraignment before the 1st respondent where he was tried and mixed up with adults. His detention before and after the trial was unlawful.

15. On the fourth issue, the petitioner submitted that the superior court was not sitting in the capacity to remedy the violation of rights in terms of **Articles 22 and 23** but as an appellate court to determine whether to dismiss or allow the appeal. That however, the court moved quickly and swiftly to do what the trial court could have done and it followed therefore that the then 3rd and 4th respondents dragged their feet.

16. On the fifth issue, the petitioner submitted that the 2nd and 4th respondents bore the ultimate responsibility to investigate, arrest, arraign before court and present all evidence concerning the case against the petitioner to the 1st respondent.

17. On the sixth issue, the petitioner submitted that there was breach of **Article 19 (3) (a)-(c), 50(2) (h), 53(1) (f) and (2) of the Constitution 2010. That further section 4(2) and (3), section 5, section 72, section 77, section 184, 185 and 191 of the Children Act** were violated.

18. While placing reliance on the cases of **Kamau Mbugua v Republic [2010] eKLR, Lechornai Lorkurani v Attorney General Nakuru High Court Petition 7 of 2010 and P.O.O (a minor) v D.P.P & SRM Mbita Law Courts Homabay Constitutional Petition 1 of 2017**; the petitioner further urged the court that he be awarded Kshs. 8,000,000/= for the 38 months of gross violation off his rights.

19. In further support of his case the petitioner filed supplementary submissions dated 9th September 2021 in response to the respondents' submissions.

Respondents Submissions

20. The respondents in their submissions identified three issues for determination. The first one was whether the 1st, 3rd and 4th respondents breached the petitioner's constitutional rights. The respondents submitted that the petitioner was arraigned before the trial Court at Molo on 4th of October, 2010 where he was accordingly charged. That the charges were read to the petitioner in Kiswahili language where he denied and a plea of not guilty was entered. A cash bail of Kshs. 15,000 was granted to him and witness statements supplied.

21. The respondent submitted further that when the petitioner was placed on his defense, the court duly complied with **Section 211(1) of the Criminal Procedure Code, CAP 75 Laws of Kenya**. That the court explained to the petitioner of his right to be represented by Counsel, to proceed alone, to give sworn evidence or unsworn evidence and to call witnesses. That the court also informed the petitioner of the right to remain silent. That the petitioner however elected to give sworn evidence without calling any witnesses.

22. The respondent went on to submit that the petitioner did not meet the threshold of **Article 50(2) (h) of the Constitution** as at the time he was put on his defence, the evidence that had been adduced in court clearly demonstrated that he was not a minor who needed the services of an advocate. They draw the courts attention on the cases of **Francis Omuroni v Uganda C.C No. 2 of 2000, Pett v Greyhound Racing Association [1968] 2 ALL ER 545, CKW V Attorney General & Another General & Another [2014] eKLR, Julius Kamau Mbugua v Republic [2010] eKLR and Harish Mawjee & Another v Republic [2020] eKLR.**

23. On the last issue, whether the petitioner is entitled to any costs and damages the respondent submitted that it was settled law that an award of damages entails exercises of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion as was stated in the case of **Mbogo & Another v Shah 1968 EA 93**. In conclusion, they urged the court to dismiss the petition with costs in its favour.

Analysis and Determination

24. Upon analyzing the facts of the case, evidence and the submissions tendered by the petitioner, the following issues in my opinion arise for determination namely; **whether the petitioner's constitutional rights as a child were infringed and whether the petitioner is entitled to damages.**

25. **Article 23(1) of Constitution** provides that the High Court has the jurisdiction in accordance with **Article 165**, to hear and determine applications for redress of denial, violation and infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In particular, **Article 165(3) (d) of the Constitution** states that the High Court has jurisdiction to hear any question respecting the interpretation of the constitution including the determination of the question whether anything said to be done under the authority of the constitution or any law is inconsistent with, or in contravention of the constitution.

26. In addressing the 1st issue whether the petitioner's constitutional rights as a child were infringed, **Article 2 (5) of the Constitution 2010** provides that the general rules of international law shall form part of the law of Kenya. **Article 37(c) of the UN Convention** on the rights of the child provides that:

"...in particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so..."

27. **Section 8(7) of the Sexual Offence Act No. 3 of 2006** provides as follows: -

"Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act."

28. **Article 53(1) (f) of the Constitution of Kenya** provides that

"Every child has the right not to be detained, except as a last resort, and when detained, to be held –

i. for the shortest appropriate period of time

ii. *Separate from adults and in conditions that take account of the child's sex and age.*

29. The court in **GO versus Republic [2017] eKLR** held as follows;

“As a matter of fact, the conduct of the Respondents contravened Article 53(2) of the Constitution of Kenya; the best interest of the child was not taken into consideration. In my view, the aforementioned rights of the Petitioner were infringed; the said contravention may bruise the Petitioner for the rest of his life.”

30. **Section 190(1)** of the **Children Act** provides: -

“No child shall be ordered to imprisonment or to be placed in a detention camp.”

31. In the instant case, it is noted that the petitioner appealed the lower court decision vide **Criminal Appeal No. 25 of 2016** and the high court allowed his appeal and he was acquitted. The high court in its judgment concluded that the petitioner was indeed a minor both at the time of committing the offence and the time of sentencing upon relying on the radiography tests done on the petitioner to determine his age. The court concluded that;

“The upshot is that the facts, context and circumstances of this case strongly suggest that the punishment suffered by the appellant in this case for an offence committed when he was, at most, fourteen years old is already disproportionate to the offence. The only fair outcome is to revise the sentence to the time already served in prison. That is the order of the court. The appellant shall therefore be released from prison forthwith unless he is otherwise being lawfully held.”

32. My view therefore is that the petitioner was not acquitted of the offence. All that the appellate court did was to sentence him properly something which the trial court had failed to do. There is no evidence that he was not found guilty.

33. Reading his defence, I am intrigued by the fact that although he was found to be a minor, the petitioner testified that ***“at 7am I took my children to school. I then went to our farm with my wife.”***

34. If he was a minor by then, then this court is unable to understand how he had a wife and children who were already school going!

35. Respectfully I do not think his testimony adds up. The trial court I presume going by his quoted testimony believed that he was an adult for all intent and purposes. There was therefore no infringement of any of his fundamental constitutional rights. In any case he was granted bail which he readily afforded and it cannot be said that he was all through incarcerated with adults.

36. Looking at the proceedings overallly, there is nothing to show that he suffered any prejudice. He conducted his trial faithfully by cross-examining witnesses when required as well as offering his defence after proper explanation by the court. In my view he appreciated his trial and the environment he was in.

37. On this limb therefore the court does not find the same meritorious.

38. On the issue of damages, the court respectfully does not find it tenable. Having gone through a proper trial, and released on appeal not because he was not guilty, i do not find the prayer for damages feasible. Nothing was shown to buttress such suffering worthy of compensation.

39. The award for damages is essentially a discretionary issue by the court and it must be appropriate and just as was stated **Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR**, thus;

“...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...”

40. I think the court has stated so much to indicate that this petition is not meritorious as there were no rights infringed by the respondents in the prosecution of the petitioner. The same is dismissed with costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO CALL THIS 17TH DAY OF FEBRUARY 2022.

H K CHEMITEI

JUDGE.