



**Toroitich v Bikokwa (Chief Inspector OCS Mogotio Police Station & 6 others;
National Police Service Commission & another (Interested Parties) (Constitutional
Petition E004 of 2021) [2022] KEHC 10308 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CONSTITUTIONAL PETITION E004 OF 2021**

WK KORIR, J

JUNE 28, 2022

BETWEEN

JOSEPH KIPTARUS TOROITICH PETITIONER

AND

**MAURICE BIKOKWA (CHIEF INSPECTOR OCS MOGOTIO POLICE
STATION 1ST RESPONDENT**

**JOHNSON WAMBULWA SENIOR SERGEANT SGT MOGOTIO POLICE
STATION 2ND RESPONDENT**

SARAH BOKOSH PCW MOGOTIO POLICE STATION 3RD RESPONDENT

KIPKURUI KIMETTO PC MOGOTIO POLICE STATION 4TH RESPONDENT

DENIS IMBOGO PC MOGOTIO POLICE STATION 5TH RESPONDENT

GREGORY MONARI PC MOGOTIO POLICE STATION 6TH RESPONDENT

PETER MAINA PC MOGOTIO POLICE STATION 7TH RESPONDENT

AND

NATIONAL POLICE SERVICE COMMISSION INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

JUDGMENT

1. The Petitioner, Joseph Kiptarus Toroitich, through the petition dated July 16, 2021 seek the following reliefs:



- a. A declaration that the conduct of the respondents is contrary to and inconsistent with the provisions of Article 10 of *the Constitution*;
 - b. A declaration that the respondents violated the constitutional rights of the Petitioner and in particular Articles 20(1) & (2), 24(1), 25(c), 27(4), 29, 31, 39, 47, 49, 50(1) and 51 of *the Constitution*;
 - c. A declaration that no person should be held in remand or custody for an offence punishable by fine only or by imprisonment for not more than six months, no cash bail shall be imposed on such offender either by police officers or any court of law and any such incarceration is unconstitutional;
 - d. A declaration that no person should be held in remand or custody for any offence for more than 24 hours before being brought before a magistrate during week days and any such incarceration beyond 24 hours in a working day is unconstitutional;
 - e. An order that cash bail of Kshs. 5,000/- imposed by the Eldama Ravine Magistrate's Court against the Petitioner herein being the accused in Criminal Case Number 557 of 2021, be released to the Petitioner forthwith and in its place execute a personal bond for the same amount;
 - f. An order that the arrest and incarceration of the Petitioner for a period of 4 days by the respondents for alleged offences of unlawful procurement of Safaricom line 0728xxxxxx, stealing of energy equipment, handling of energy equipment and having suspected stolen property and failure to produce him in court within 24 hours upon arrest and instead produced him in court after a record 4 days in incarceration was unconstitutional and therefore the said charges be dropped out and Petitioner set free forthwith;
 - g. An order that the arrest and incarceration of the Petitioner for a period of 4 days by the respondents for the aforesaid alleged offences was unconstitutional;
 - h. An order for adequate compensation for damages of unlawful arrest and incarceration in (c), (d) and (e) above for deprivation of the constitutional right to freedom of movement and his liberty by the respondents;
 - i. Any other or further relief that this Honourable Court shall deem fit by dint of Article 23(3) of *the Constitution* and is just to grant in the circumstances;
 - j. Costs of this petition.
2. The respective 1st to 7th respondents, Chief Inspector Maurice Bikokwa, Senior Sergeant Johnson Wambulwa, Police Constable Sarah Bokosh, Police Constable Kipkurui Kimeto, Police Constable Denis Imbogo, Police Constable Gregory Omari and Police Constable Peter Maina are all police officers stationed at Mogotio Police Station. They are therefore persons holding offices within the National Police Service.
 3. The 1st Interested Party, the National Police Service Commission is established under Article 246 of *the Constitution* and its functions include observance of due process, exercise of disciplinary control over and removal of persons holding or acting in offices within the National Police Service.
 4. The 2nd Interested Party is the Director of Public Prosecutions (DPP). The office of the DPP is established under Article 157 of *the Constitution* and among its powers are the power to institute and



undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

5. The Petitioner alleges that his fundamental rights and freedoms under Articles 20(1) & (2), 24(1), 25(c), 27(4), 29, 31, 39, 47, 49, 50(1) and 51 of *the Constitution* were grossly violated and infringed by the respondents on March 25, 2021. His case is that on the material day he was lawfully going about his business at Marigat township in Baringo County when at around 11.00am he was lured to Marigat Sub-County Hospital by an unknown caller on the pretext that one of his relatives had been involved in a bad accident. His case was that on arrival at the hospital he was confronted by two men who arrested him, without informing him of the reasons for the arrest, and frog-marched him to Marigat Sub-County DCIO's office where he encountered several DCI officers. It was then that he was informed that he was being arrested for staying and living with S, a minor girl who was also a student.
6. The Petitioner avers that he denied staying with S but informed the police officers that he knew the lady who was staying with S and volunteered to lead them to her. The officers, however, insisted that he was living with S and asked him to take them to his residential house. He complied. On arrival, the officers forcefully entered his house and conducted search without a search warrant. After failing to find S, they told him to lead them to the house of the woman who was living with the girl.
7. The Petitioner states that he led the officers to the house of the woman who was living with S but they did not find her. The neighbours of the woman told them that the lady worked at Cham Cham butchery within Marigat township. He led the officers to the butchery where they found S working. The girl together with the proprietor of the butchery were arrested and they were all taken to Mogotio Police Station where they arrived at about 5.00pm.
8. The Petitioner states that he was booked for different offences altogether, to wit unlawful procurement of a Safaricom line, theft of a Kenya Power meter and possession of stolen property. The Petitioner avers that although the next day (March 26, 2021) was a Friday, he was not taken to court hence resulting in the violation of his right to be taken to court within twenty-four hours of his arrest. It is the Petitioner's case that at about 6.00pm on March 26, 2021 he was informed that he could be released on cash bail of Kshs. 20,000/=. The Petitioner states that the proprietor of the butchery was released upon raising cash bail of Kshs. 5,000/=.
9. The Petitioner deposes that on 28th March, 2021 he was taken to the Officer Commanding Station (OCS) and asked to sign some documents but he declined. It was then that the 2nd Respondent told him that "you think you can challenge and defeat 7 police officers in court" and escorted him back to the cells. The next day he was taken to the Principal Magistrate's Court at Eldama Ravine where he was charged and upon entering a plea of not guilty was released on cash bail of Kshs. 5,000/=.
10. The Petitioner deposes that the proprietor of the butchery was never taken to Court but released on March 31, 2021 through what he terms "dubious means". The Petitioner avers that police officers from Mogotio Police Station have developed a culture of arbitrarily arresting citizens on Fridays and Saturdays and demanding heavy cash bail thereby forcing the arrestees to languish in the police cells. Further, that those who deposit cash bail are later coerced to convert the cash bail into bribes so as to buy their freedom.
11. It is the Petitioner's case that after the respondents found that he was not living with the minor, and instead of releasing him, they arrested him on trumped up charges in their usual modus operandi with a view to soliciting bribes from him. The Petitioner urges this Court to restrain the respondents from continuing with the alleged illegalities by allowing this petition.



12. The respondents opposed the petition through a replying affidavit sworn by Luka Tumbo, the Mogotio Sub-County Investigations Officer. The respondents' case is that on February 17, 2021, the father of S reported that his daughter who was a form three student had gone missing. Their investigations revealed that the said girl was in constant communication with two phone numbers. One of the numbers belonged to Robinson Ohana.
13. The respondents' case is that on March 25, 2021, they tracked Robinson Ohana's phone and it led them to the Petitioner in Marigat. Upon arresting him, he led them to his house where after conducting a search they recovered assorted sim cards, a Kenya Power meter, a female undergarment, a love letter and five mobile phone handsets.
14. The respondents' case is that they tracked the missing girl's phone to Cham Cham butchery in Marigat. The Petitioner, the girl and the owner of the butchery were all escorted to Mogotio Police Station where they were booked. It is the respondents' averment that on March 26, 2021, a lady by the name S.J.S. was arrested to be charged with the offence of infringing the right of S to parental care by harboring her.
15. The respondents depose that on March 26, 2021 the Petitioner and S were escorted to Mogotio District Hospital for medical examination but due to the time lapse, physical examination was not conducted on S although she was tested for H.I.V. and pregnancy. The girl was thereafter released to her parents. Subsequently, the Petitioner was charged with the offences of obtaining registration by false pretence contrary to Section 320 of the Penal Code, stealing energy equipment contrary to Section 169(1)(c) of the [Energy Act](#), 2019 and handling suspected stolen property contrary to Section 323 of the [Penal Code](#).
16. According to the respondents, the Petitioner was to appear for plea on March 26, 2021 but he could not be presented to Eldama Ravine Principal Magistrate's Court because the magistrate was on circuit at Olokokwe. They aver that 27th and March 28, 2021 was a weekend and the Petitioner was therefore charged on 29th March, 2021.
17. The respondents state that the Petitioner was held in custody because he failed to raise cash bail or provide a surety. It is consequently the respondents' position that the Petitioner was lawfully arrested and held in custody before being charged in court for offences within the law. The respondents assert that there was no malice in the arrest and prosecution of the Petitioner as they were acting lawfully in exercise of their duties and obligations by investigating the report of the missing girl. The respondents contend that it was during investigation that they discovered that he had committed other crimes. They annexed assorted documentary exhibits in support of their averments and urged this Court to dismiss the petition with costs.
18. The Petitioner's submissions are dated December 3, 2021 and those of the respondents are dated January 18, 2022. The submissions of the parties will be taken into consideration in the determination of this matter.
19. A perusal of the pleadings and submissions of the parties disclose that the key question for the determination of this Court is whether the arrest, detention and prosecution of the Petitioner by the respondents and the 2nd Interested Party violated his constitutional rights, and if so, the appropriate relief in the circumstances.
20. There appears to be agreement between the Petitioner and the respondents that the reason that led the respondents to the Petitioner's doorstep was a formal report made to the respondents by the father of S to the effect that S who was a school going minor had gone missing. The respondents' averment that it was the frequency of the communication between a line registered in the name of one Robinson Ohana and S that led them to the Petitioner is also not disputed.



21. In view of the undisputed facts, the only reasonable conclusion is that the respondents were acting on a legitimate complaint. In the circumstances, the holding in *Republic v Commissioner of Police & another ex parte Michael Monari & another* [2012] eKLR is applicable to this case. There, it was held that:
- “The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.
22. Similarly, in *Hassan Ali Jobo v Inspector General of Police & 3 others* [2017] eKLR, the Court was firm that:
- “107. In my view, threat of arrest itself or threat of violation of fundamental rights and freedoms per se is not a reason enough to stop the DPP from carrying out his functions. What the law seeks to prevent is arbitrary arrest without probable cause. An objective justification must be shown to validate arrest of any individual. The Kenya Constitution recognizes that if a criminal offence is committed, investigation arrest and prosecution might ensue. In this context, *the Constitution* anticipates arrest of individuals and that is why Articles 49 and 50 (2) make provision for the rights of arrested persons. Therefore, a threat of arrest of a person per se is not unconstitutional so long as due process of law is followed and the rights of the arrested person are observed.”
23. Having been arrested on a formal complaint in respect of facts that disclosed the commission of an offence recognized by the law, the Petitioner has no basis for asserting that his arrest violated *the Constitution*. The respondents were performing their duties when they acted on the complaint of the father of S which disclosed that a minor who had gone missing was most likely to have been engaging in unlawful sex with a certain person. The investigations of the respondents disclosed that person to be the Petitioner. Up to the point of the arrest of the Petitioner and his being escorted to the hospital together with the child for examination, one cannot say the rights of the Petitioner were violated. The respondents were within their constitutional and lawful powers in taking the steps they took.
24. It is not disputed that after arresting the Petitioner, the respondents went and searched his house and recovered certain items which he could not account for. The Petitioner’s case is that the respondents violated his rights by searching his house without a search warrant. The Petitioner seems to suggest that his house should not have been searched because the allegation that led the respondents to his house had no nexus with the offences for which he was eventually charged. It is his submission that the respondents’ action was driven by malice and hunger for money.
25. The Petitioner’s argument is without merit. There is no averment by the Petitioner that Section 57 of the *National Police Service Act*, cap. 84 which allows police officers to carry out searches of premises and vehicles in specified circumstances was violated by the respondents. For the Petitioner to succeed he ought to have stated the manner in which the law was violated in order for the burden to shift to the respondents to demonstrate that they did not break the law.
26. The undisputed evidence on record is that by the time the Petitioner led police officers to his house, he had already been informed by the police officers that they were going to look for S. In the process



of searching for S in his house the police officers came across other items which they suspected to have been stolen and took possession of the same. However, the police officers never lost sight of the issue that made them arrest the Petitioner in the first place. That is why they went to the butchery and arrested the girl. The Petitioner and the girl were later escorted to hospital for medical examination. Upon review of the evidence that had been collected, the police correctly reached the conclusion that there was insufficient evidence to prosecute the Petitioner in connection with the disappearance of S from her parents' home.

27. In my view, there was nothing wrong with the police having the Petitioner prosecuted in connection with the items that were recovered during the search of his house. The charges facing the Petitioner are found within the laws of Kenya. Whether he committed those offences is a matter to be determined at the trial based on the evidence that will be presented by the prosecution.
28. There is the claim by the Petitioner that the respondents violated his constitutional right by arresting him without a warrant of arrest. He did not point to any specific constitutional provision which provides that a person suspected of committing a criminal offence will not be arrested without a warrant of arrest. Indeed, Section 58 of the *National Police Service Act*, Cap. 84 authorizes a police officer to arrest a person without a warrant of arrest as follows:

“Subject to Article 49 of *the Constitution*, a police officer may without a warrant, arrest a person—

- (a) who is accused by another person of committing an aggravated assault in any case in which the police officer believes upon reasonable ground that such assault has been committed;
 - (b) who obstructs a police officer while in the execution of duty, or who has escaped or attempts to escape from lawful custody;
 - (c) whom the police officer suspects on reasonable grounds of having committed a cognizable offence;
 - (d) who commits a breach of the peace in the presence of the police officer;
 - (e) in whose possession is found anything which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing;
 - (f) whom the police officer suspects upon reasonable grounds of being a deserter from the armed forces or any other disciplined service;
 - (g) whom the police officer suspects upon reasonable grounds of having committed or being about to commit a felony; or
 - (h) whom the police officer has reasonable cause to believe a warrant of arrest has been issued.”
29. At Section 2, the *Criminal Procedure Code*, cap. 75 defines a “cognizable offence” to mean an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant. The charges preferred against the Petitioner included obtaining registration by false pretense contrary to Section 320 of the *Penal Code* and having suspected stolen property contrary to Section 323 of the *Penal Code*. The First Schedule of the Criminal Procedure Code indicates that these are cognizable offences for which the police may arrest without a warrant of



- arrest. In any event, what initially led the police to the Petitioner was the suspicion that he may have committed serious crimes under the *Sexual Offences Act*. The respondents are therefore correct when they submit that they had reasonable cause to arrest the Petitioner. The Petitioner has failed to prove that there was ulterior motive for his arrest.
30. There is the claim by the Petitioner that his right to be presented to the court within twenty-four hours of his arrest was violated by the respondents. Article 49(1)(f) of *the Constitution* provides that an arrested person should be taken to court as soon as reasonably possible but not later than twenty-four hours after arrest; or 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. The parties are in agreement that the Petitioner was arrested on a Thursday in the morning and the twenty-four hours' period within which he ought to have been taken to court therefore lapsed on Friday in the morning. They also concur that he was not taken to court until Monday.
 31. The Petitioner contends that the failure by the respondents to take him to court on Friday violated his right under Article 49(1)(f). Related to this contention is his claim that he was denied the right under Article 49(1)(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. On this ground, the Petitioner argues that the cash bail of Kshs. 20,000/= granted to him by the police late on Friday was discriminatory because the operator of the butchery from where S was arrested was granted cash bail of Kshs. 5,000/=.
 32. The respondents reply to the Petitioner's arguments by submitting that they did not take the Petitioner to court on Friday because the court was not sitting on that day and that the Petitioner was given cash bail of Kshs. 20,000/= which he did not raise. According to the respondents, the Petitioner's rights were thus not violated.
 33. I have perused the averments of the parties, and where applicable, the documents exhibited in support of the averments. Annexed to the respondents' replying affidavit is a letter dated July 1, 2021 addressed to the Director of the Internal Affairs Unit of the National Police Service by the Senior Principal Magistrate of Eldama Ravine Law Courts. Through that letter, the Magistrate confirms that the court did not sit on March 26, 2021 since it had scheduled to attend mobile court circuit at Olkokwe. It is therefore clear from the letter that there was no court to which the Petitioner could have taken to by the respondents on Friday. It is not disputed that the Petitioner was indeed taken to court on Monday which was the next court sitting. There was therefore no violation of the Petitioner's right to be presented to court within the timeframes specified in Article 49(1)(f) of *the Constitution*.
 34. On the alleged violation of the right to bail, I note that the crimes allegedly committed by the Petitioner and the butchery operator were not the same. It is likely that the butchery operator was arrested for employing a child and the Petitioner was arrested for sexual offences. On top of that, the Petitioner also faced theft charges. The bail terms for the Petitioner and the butchery operator could not have been the same in such circumstances. The respondents cannot be said to have discriminated against the Petitioner. That there was no discrimination was confirmed by the fact that the Petitioner and the butchery operator were all eventually not charged with any offence arising from the disappearance of S from her home.
 35. There was a suggestion by the Petitioner that the respondents ought to have released him on cash bail of Kshs. 5,000/= because when he was taken to court he was released on cash bail of Kshs. 5,000/=. What amounts to reasonable cash bail varies from one police officer to another and one magistrate or judge to another. It cannot be said the cash bail of Kshs. 20,000/= set for the Petitioner by the respondents was unreasonable simply because when he was taken to court the magistrate released him on cash bail of Kshs. 5,000/=.



36. Having considered all the arguments raised in the petition, I arrive at the inevitable conclusion that there is no merit in the same. The Petitioner has not established grounds for grant of any of the reliefs sought in the petition. The petition is therefore dismissed.
37. As for the issue of costs, I find that the Petitioner should not be saddled with costs as he was pursuing a claim of alleged violation of constitutional rights. The appropriate order on costs is therefore to direct the parties to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 28TH DAY OF JUNE, 2022.

W. KORIR,

Judge of the High Court

