



**Esther Wanjiru Mbugua v Inspector General National Police Service & 3 others  
(Constitutional Petition E22 of 2021) [2022] KEHC 10740 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10740 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E22 OF 2021**

**JM MATIVO, J**

**JUNE 23, 2022**

**BETWEEN**

**ESTHER WANJIRU MBUGUA ..... PETITIONER**

**AND**

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

**OCS RUIRU POLICE STATION ..... 2<sup>ND</sup> RESPONDENT**

**DCIO MTWAPA POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**PC DENNIS ISEMEK ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Vide her Petition dated 22<sup>nd</sup> April 2021, the Petitioner avers that she was arrested in her house in Ruiru by police officers on 29<sup>th</sup> January 2021, at around 12:00 pm, but they failed to inform her the reasons for her arrest. Instead, they told her they were acting on request from Mtwapa Police Station, Kilifi County. She states that she was booked at Ruiru Police Station under OB No. 66 of 29/1/2021 at 1941 hours. Her request for release on cash bail was declined forcing her to remain in police custody over the week-end until 1<sup>st</sup> February 2021 at around 3:00pm when she was transported to Kilifi. On 2<sup>nd</sup> February 2021 at around 3:pm, she was arraigned at the Shanzu Magistrates court where the police applied for her to be detained for a period of 14 days at Mtwapa Police Station pending conclusion of investigations.
2. She avers that the deponent to the affidavit in support of the application for her detention misled the court that she was arrested on 30<sup>th</sup> January 2021 instead of 29<sup>th</sup> January 2021, she states that the court ordered that she be detained for 7 days, and that ideally, she ought to have been arraigned in court on 1<sup>st</sup> February 2021 and even if there was a need to detain her, then the police ought to have applied for her detention at the nearby Ruiru law courts.



She states that she was unlawfully held for 5 days together with criminals and social misfits. As a consequence, she claims to have suffered physically and psychologically. She states that her arrest and detention was caused by malice and ill will and it is a violation of various Articles of the Constitution and sections 4 and 7 of the Fair Administrative Act.<sup>1</sup>

3. She prays that this court finds and upholds that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents decision to detain her from 29<sup>th</sup> January 2021 to 2<sup>nd</sup> February 2021 violates her constitutional rights; that she be awarded damages for violation of her rights; and costs of this Petition and interests from date of judgment.
4. The Respondents filed the Replying affidavit of Dennis Isemek dated 20<sup>th</sup> December 2021, the investigating officer. The crux of his affidavit is:- that after concluding preliminary investigations he sought help from the DCI Ruiru to assist in arresting the Petitioner; that the Petitioner was arrested on 29<sup>th</sup> January 2021 at Ruiru after severally escaping police dragnet; that on 31<sup>st</sup> January 2021 PC Rose Lentiyo was sent to Ruiru to collect her with the assistance of SCCIO Kaloleni because the DCIO's Kilfi South motor vehicle had broken down; that the Petitioner was collected the following day, i.e on 1<sup>st</sup> February 2021 and they arrived at Mtwapa Police Station on 2<sup>nd</sup> February 2021; that the Shanzu court granted an order for her detention for a further seven days. Lastly, he that the Petitioner was arraigned in court charged with the offence of stupefying in order to commit a felony contrary to section 30 of the Penal Code<sup>2</sup> as read with section 275 of the Penal Code which matter is still proceeding.
5. The Respondents also filed a reply dated 13<sup>th</sup> January 2022. The substance of the response is that the Respondents mandate flows from Article 243 of the Constitution and sections 28 and 35 of the National Police Service Act. They denied violating the Petitioner's rights under Article 49 and added that the pre-trial detention was necessitated by exceptional circumstances. They stated that the Petitioner was arrested at Ruiru suspected of having committed the offence of stealing and stupefying revellers after being on the run since 6<sup>th</sup> October 2020. Lastly, that the delay in transporting her from Ruiru was due to logistical challenges.
6. In his submissions, the Petitioner's counsel argued that the Respondents actions violated Articles 2(1), 2(2), 2(3), 3 (1), 19(1), (2) & (3), 20 (1) (2) (3) (4), 21(1), 22 (1), 22(1), 23(1), 24, 25, 28, 29, 47(1) (2), 50(1) (2), 51 (1) of the Constitution. He cited *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*<sup>3</sup> in support of the proposition that the Petitioner has proved the alleged violations in that he has recounted the chronology of events from the point of arrest and argued that it matters not the violation was for one day. To buttress his argument, counsel cited Article 49 (1) of the Constitution and Article 9 of the International Covenant on Civil and Political Rights.
7. Additionally, counsel cited *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 others* which held that unlawful arrest and detention without justifiable reason is unjustifiable. He also cited *Daniel Waweru Njoroge & 17 others v Attorney General*<sup>4</sup> which listed the ingredients of false imprisonment. As for damages, counsel cited *Akusala A. Boniface v OCS Langata Police Station & 4 others*<sup>5</sup> in which the court awarded the Petitioner Kshs. 2,000,000/=.
8. The Respondents submitted that there was a good reason for the alleged infringement, and that the mandate of the police flows from Article 244 of the Constitution. Lastly, counsel submitted that the right to liberty is not absolute and cited *Michal Rotich v Republic*.<sup>6</sup>
9. It is useful to point out that the law contemplates lawful arrests and detentions. Article 9(1) of the International Covenant on Civil and Political Rights reads as follows: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be



- deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”
10. Article 29 of our Constitution provides that “every person has the right to freedom and security of the person, which includes the right not to be- (a) deprived of freedom arbitrarily or without just cause. Article 49 provides that an arrested person has the right (f) to be brought before a court as soon as is reasonably possible, but not later than –(i) twenty-four hours after being arrested; or (ii) if the twenty-four hours end outside ordinary court day, the end of the next court day.
  11. Its common ground that the Petitioner was arrested on 29<sup>th</sup> January 2021 in the afternoon. The next two days were a Saturday and Sunday. On Monday 1<sup>st</sup> February she was transmitted to Mtwapa and the following day she was presented before a Magistrate’s court where the police sought and obtained an extension to hold her. Even though she asked for 14 days, the court granted them 7 days. This is the scenario upon which this Petition is mounted
  12. For starters, every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The foundation of the courts power, as explained by the Supreme Court of India<sup>7</sup> is the theory that *the Constitution* which is the fundamental law of the land, is the ‘will’ of the ‘people,’ while a statute is only the creation of the elected representatives of the people; when, therefore, the “will” of the legislature as declared in the statute, stands in opposition to that of the people as declared in *the constitution*-the “will” of the people must prevail.
  13. The Articles referred to above all stipulate, albeit in somewhat differing terms, that a deprivation of liberty must in all cases be carried out in accordance with the law (the principle of legality). Furthermore, deprivations of liberty must not be arbitrary. As to the principle of legality, the right to liberty is violated if an individual is arrested or detained on grounds which are not clearly established by the legislation. Arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.
  14. In other words, remand in custody pursuant to lawful arrest must not only be “lawful” but also “reasonable” and “necessary” in all the circumstances for the aforementioned purposes. It is for the State to show that these factors are present in the particular case.
  15. The prohibition of arbitrariness also of course means that deprivations of liberty must not be motivated by discrimination, malice or arbitrariness. The expressions ‘lawful’ and ‘in <sup>7</sup> Supreme Court Advocates on Record Association & Others vs Union of India {1993} 3SCC 441 accordance with a procedure prescribed by law’ stipulate not only full compliance with the procedural and substantive law, but also that any deprivation of liberty be consistent with the purpose of Article 29 and 49 of *the Constitution* and not arbitrary.
  16. The main point for consideration in this Petition is whether the arrest and the confinement thereafter of the Petitioner was legal or illegal. To me the one day the Petitioner claims she was held unlawfully happens to be the day she was transported to Kilifi County, hundreds of Kilometers away from Thika. The Respondents have satisfactorily accounted for one day delay and upon arrival at Mtwapa, she was presented to a Magistrate who granted her extension of time. To me, the Petitioner has failed to establish that the arrest and detention was arbitrary, unreasonable, and undertaken contrary to the law. The claim for unlawful detention collapses.



17. As regards the Petitioner's grievance that the grounds of arrest were not communicated to her, Article 49 provides that an arrested person has the right to be informed promptly, in a language that the person understands the reasons for the arrest, the right to remain silent, and the consequences of remaining silent. This Article enshrines what are called the Miranda rights. The drafters of *the Constitution* did not specify whether the arrested person is to be informed orally or in writing. I am persuaded that the Petitioner was arrested on allegations that she had committed an offence and she was subsequently arraigned in court. On the whole, the Petitioner's Petition collapses. I dismiss it with no orders as to costs.

Orders accordingly. Right of appeal 30 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JUNE 2022.**

Digitally signed by Justice John M. Mativo

**JOHN M. MATIVO**

**JUDGE**

