



**Mathina v Mohammed & 3 others (Constitutional Petition E003 of 2022)
[2022] KEHC 13048 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E003 OF 2022**

LM NJUGUNA, J

SEPTEMBER 21, 2022

**IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ART 49(1) (A) (C) (F) AND
50(2) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE VIOLATION OF ARTICLES 28, 47, 50 OF
THE CONSTITUTION OF KENYA**

BETWEEN

JULIUS NYAGA MATHINA PETITIONER

AND

POLICE CONSTABLE FARAH MOHAMMED 1ST RESPONDENT

OCS SIAKAGO POLICE STATION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT

JUDGMENT

1. The petitioner herein filed a petition dated 28.04.2022 contemporaneously with a notice of motion and its supporting affidavit dated 28.04.2022 filed under a certificate of urgency.



2. When the Notice of Motion came up for hearing on the 18.05.2022, the court granted an order for temporary stay of proceedings in Siakago Criminal Case No. 215 of 2022 (Republic Vs Julius Nyaga Mathina) and directed that the main petition be heard on priority basis. The court directed the parties to file and exchange submissions to the petition and hence the Notice of Motion application was compromised.
3. In the petition, the petitioner seeks for orders that:
 - i. Declaration that the petitioner being detained at Siakago Police Station from 09.03.2022 to 16 .03.2022 was illegal, unconstitutional, null and void.
 - ii. A declaration that the 4th respondent's decision to charge the petitioner at Siakago Law Court in Criminal Case No. 215 of 2022 ; Republic v Julius Nyaga Mathina after the said detention is unconstitutional, null and void.
 - iii. An order for compensation of the petitioner for the said constitutional violations be made jointly and severally against the respondents.
 - iv. Costs.
4. The petition is premised on the grounds on its face and further supported by the affidavit sworn by the petitioner. The petitioner's case is hinged on the fact that the respondents arrested him and held him for more than seven days which was more than the period provided in the law and that they denied him the right to communicate with his family. As such, he alleged that the respondents abused their discretion in arresting and charging him.
5. The 1st – 4th respondents in response filed a replying affidavit sworn on 09.06.2022 by Rolex Nyoka, the Officer Commanding Station at Siakago Police Station wherein he has deposed that a case of malicious damage to property was reported at the station vide OB No. 29/5/2020 by one David Ileri who reported that a barbed wire fence that had been erected on Eliphas cousin's farm had been damaged by a person known to them, one Gitonga Ndungu whom they had claimed that his family had sold the farm to them some ten years ago. It was deposed that the owner of the parcel of land, one Hampton Ileri Njeru was at that material time in Nairobi undergoing treatment; and had sent the reportee to report the same to the police on his behalf. That the suspect thereafter went into hiding after having got wind of his impending arrest. It was his case that on 29.01.2021, the petitioner herein was arrested and booked vide OB 09/29/01/2021 at 0750 hrs and at that moment, he was informed of his rights and equally the reason for his arrest. He averred that the petitioner was thereafter released on cash bail of Kshs. 5,000/= and was to report to Siakago Law Courts on 09.02.2021 but instead, he failed to do so and therefore, the court issued a warrant of arrest and forfeiture of cash bail vide receipt No. FNAN – 0000313.
6. That on 09.03.2022, the petitioner was rearrested and placed under custody via OB No. 15/09/03/2022 at 1320 hrs. That contrary to the petitioner's averment that he was held for more than six days, he was held in custody without being released on cash bail as he could interfere with the evidence and equally being a flight risk. It was deposed that on 14.03.2022 and 15.03.2022, he was escorted to court but he could not plead to the charges since the court file was missing and the same could not be traced but finally, the petitioner took plea on 16.03.2022 and wherein he pleaded not guilty and was released on cash bail of Kshs. 20,000/=.
7. That the 1st and 2nd respondents exercised their mandate pursuant to Sections 24, 27 and 35 of the *National Police Service Act*, of carrying out investigations, collection of intelligence, effecting arrests and maintenance of law and order. The respondents averred that should this court grant stay orders



sought, then, the same shall be prejudicial to them in that, the issues raised by the petitioner amounts to defence in the criminal case and that the petitioner shall have a chance to challenge the prosecution's evidence during the trial. In the end, the respondents urged this court to dismiss the petition with costs, for reason of the same having failed to show that the respondents' actions were arbitrary, unlawful or unreasonable.

8. By a supplementary affidavit sworn on 17.06.2022, the petitioner in response to the respondents' replying affidavit deposed that the alleged chronology of events as deposed by the respondents is far from the truth. He denied ever being shown any warrant of arrest despite demanding the same, and further proceeded to annex a warrant which was issued in CR 106 of 2021 which is for Criminal Case No. E096 of 2021. He reiterated that he was detained without any particular reason and if at all the file went missing, which he denied, the respondents had the authority to charge him afresh. He contended that the decision to charge him was unfair, unprocedural as the owner of the land never made any complaint against him at the Siakago Police Station. He reiterated that the contents of the replying affidavit are false.
9. Directions were taken that the petition be canvassed by way of written submissions but the respondents did not comply with the directions.
10. The petitioner has submitted in reference to the following issues for determination to wit;
Whether the petitioner was detained from 09.03.2022 to 16.03.2022 and whether the same was legal.
11. It was submitted that in the annexed letter marked as JNM 2, the respondents admit that they detained the petitioner due to a missing file. That a right of an arrested person under *the constitution* cannot be limited for the reason that the file was missing. It was their submission that the petitioner's rights were violated for the reasons inter alia that: he was never shown the warrant of arrest, being put in detention, refusing his family to see him, failure to present him before a competent court within 24 hours; reliance was placed on the cases of *Matiba v Attorney General* (1990) KLR 666; *Cyrus Shakhbalanga Khwa Jirongo v Soy Developers Ltd & 9 others* (2021) eKLR.

Whether the decision to charge the petitioner was proper?

12. It was the petitioner's further submission that the decision to charge him after the alleged detention was contrary to provisions of Article 47 (1) of *the Constitution* and that in case of any adverse action, every person is entitled to written reasons for the action. It was submitted that the prosecution had a vendetta against the petitioner in that, in the first place, the offence was never reported by the owner of the property but by Eliphas Njuki Nthimba. That the same Eliphas Njuki Nthimba is the same person that the petitioner's family had sued to recover land stolen from them and as a result, this was a clear process to settle the vendetta.

Whether compensation orders should issue and what the quantum should be?

13. It was submitted that this court has powers under Article 23 (3) (e) where appropriate reliefs are needed and violations are proven. Reliance was placed on the case of *Alliow Somo Abidi & 2 Others v Minister for State for Provincial Administration & 3 Others* (2019) eKLR. In the end, it was prayed that the petition be allowed with costs and interests.
14. The respondents on the other hand came up with the main issues for determination as hereunder:



Whether the detention of the accused person from 09.03.2022 to 16.03.2022 was illegal.

15. It was submitted that according to the police reports, the petitioner was arrested on 09.03.2022 and was first presented to court on 14.03.2022 and as such, the petitioner's averment that he was presented to court on 16.03.2022 is unfounded. On whether his detention between 09.03.2022 and 14.03.2022 was illegal and whether the same entitles him to the damages sought in the prayers, it was submitted that courts have repeatedly held that an accused person in relation to Article 49 (f) of *the constitution* may be presented to court outside the 24 hour period as long as the prosecution offers a reasonable and justifiable explanation for the delayed presentation to court. Reliance was placed on the case of *Republic v Naomi Wangeci Chege* [2009] eKLR.
16. Further that, the petitioner was arrested on a Wednesday and was presented to court on Monday and given the fact that courts don't ordinarily sit over the weekend, the two days during which the petitioner could have been presented before the court was a short delay and in reliance to the case of *Paul Mwangi Murunga v Republic* Criminal Appeal No. 35 of 2006, a court can exercise its discretion and find that a two day delay may not be inordinate as long as the delay can be justified. That the petitioner was finally presented before the court and that he took plea on 16.03.2022 given that the previous two occasions that he was presented before court, the court file was missing and thus he could not be charged. That the fact that the petitioner had previously absconded and jumped bail, was also a reason enough to detain him. That it is not strange for court files to go missing at the registry and that in this case, the same was beyond the police officer's control.

Whether the decision by the Director of Public Prosecution to charge the petitioner was proper.

17. The respondents submitted that Article 157 gives the Director of Public Prosecution mandate to prosecute, and the decision to prosecute the petitioner was independently made upon a review of evidence gathered, submitted as required by the law. Reliance was placed on the case of *James Ondicho Gesami v The Attorney General & Others*, Petition No. 376 of 2011 and that the Director of Public Prosecution does not need consent of any person or authority to charge a person as it is an independent constitutional organ under *the constitution*.
18. Further that, the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court. [See *Uwe Meixner & another v Attorney General* [2005] eKLR]. It was submitted that the petitioner has been economical with truth given that he was previously arrested on 29.01.2021 and later released on a police bail of Kshs. 5,000/= under condition that he was to appear in court on 09.02.2021 but he absconded. In the end, the respondents urged this court to dismiss the petition as he is not deserving of the orders sought in the petition.
19. I have considered the petition herein, the responses and written submissions made by the parties. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by *the Constitution* and the statutes.
20. 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').
21. From the face of the petition, the same has been brought inter alia under Articles 22(1), 49 (1)(a)(c) and (f) and 50(2), 28 and 47 of *the Constitution*. A cursory look at the orders sought to be enforced, the same include the rights of an accused person as envisaged under Article 49 of *the constitution*.



22. I have perused the materials before me and all the annexures and it is clear that the dispute herein relates to the alleged detention of the petitioner for more than the constitutionally allowed period of time in reference to article 49(f)(i). The petitioner made reference to various articles of the constitution and sections of the law which were apparently violated.

23. Article 49(1)(f) of the Constitution provides as follows:

- “ 49. An arrested person has the right -
- (1) (f) to be brought to court as soon as reasonably possible, but not later than-
- (i) twenty-four hours after being arrested; or
- (ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day”

24. The import of this provision is to protect arrested persons against unnecessarily long detentions by the police. Arrested persons are thus required to be presented to court in strict adherence to Article 49 (1) (f) of the Constitution. The importance of this provision was discussed by the court in Betty Jemutai Kimeiywa v Republic [2018]eKLR;

25. In Salim Kofia Chivui v. Resident Magistrate Butali Law Courts & Another [2012] eKLR, the court stated as follows:

“ ... I therefore find and hold that the petitioner’s right under Article 49(1) (f) were breached when he was arrested on 24th March 2011, detained in police custody and arraigned before the court in Butali on 29th March 2011”... “The tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty-four hours or for the period necessary to secure his production in court of the next available date in any other case an detention beyond 24 hours must be authorized by court as provided by Article 49(1) (g). Once the person’s attendance has been secure within the 24 hours, the court may order the person released or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.”

26. The reason given by the respondents why the applicant was not arraigned in court within the 24 hour period or why they failed to seek orders for continued detention from the court while conducting their investigations in accordance to Article 49(1) (g) of the Constitution is that, he was presented before the court but the court file was missing; according to the respondents, missing file in the registry is not anything out of the ordinary and further that, the petitioner had previously absconded and jumped bail, and hence sufficient grounds to detain him. On the other hand, the petitioner denied ever being shown any warrant of arrest despite demanding the same. He annex a warrant which was issued in Criminal case No. 106 of 2021 but which was for Criminal Case No. E096 of 2021. He reiterated that he was detained without any good reason and if at all the file went missing, which he denied, the respondents had the authority to charge him afresh. The petitioner has refuted this explanation. In my view, such an explanation from the respondents is absurd and thus it is my finding that indeed the petitioner’s rights under Article 49 (1) (f) of the Constitution were breached by the police officers when they failed to produce him before a court within the stipulated time. [See Joseph Kipkembio Ariambe v Officer Commanding Police Station, (O.C.S) Kisii Police Station & 7 others [2021] eKLR].



27. When faced with a petition seeking to arrest a criminal prosecution, the factors which a court ought to consider are well settled. For a start, the court ought to be extremely cautious in making its determination so as to avoid prejudicing the intended or pending criminal proceedings. The court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions and neither should it curtail the investigation mandate vested on the 2nd respondent.
28. However, the court may intervene where the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used to achieve some collateral purpose which are not geared towards the vindication of the commission of a criminal offence. [See *George Joshua Okungu & Another v The Chief Magistrates Court, Nairobi & Another* [2014] eKLR]. The court proceeded to state that:

“ 50. The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions or the authority charged with the prosecution of criminal offences to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings. That a petitioner has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is always open to the petitioner in those proceedings. However, if the Petitioner demonstrates that the intended or ongoing criminal proceedings constitute an abuse of process and are being carried out in breach of or threatened breach of the petitioner’s Constitutional rights, the Court will not hesitate in putting a halt to such proceedings. The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore, the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the Petitioner to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.

[See *R v Monopolies and Mergers Commission Ex Parte Argyll Group Plc* [1986] 1 WLR 763 and *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43 (HCK).”]

29. In the case herein, the petitioner has averred that he was arrested and detained for a period of seven days before he was taken to court. This fact has been admitted by the respondents but the reasons given for the said detention are not tenable. However, on whether the Petitioner was detained whereas he had not committed any offence, this Court finds that the issue hinges on evidence. It is a fact that the police had to carry out investigations in order to establish whether an offence was committed. The Petitioner’s contention is, hence, pre-emptive and hereby fails. [See *Simon Adede Ngiela v Inspector General of Police & another* [2022] eKLR]. And from the foregoing, I hold the view that the same cannot be obtained under the given circumstances.



30. I now turn to consider damages available to the petitioner. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* Civil Appeal No. 98 of 2014 [2016] eKLR had this to say in regard to damages:

“...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. 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...”

31. On damages the petitioner proposed the award of Kshs. 3,000,000/= and they cited the case of *Alliow Somo Abidi & 2 Others v Minister for State for Provincial Administration & 3 Others* (2019) eKLR. He also claimed costs and interests.

32. The case before me is a constitutional petition and in awarding damages this court shall be guided by the principles set out in *Gitobu Imanyara & 2 others v Attorney General* (supra). In *Lucas Omoto Wamari v Attorney General & another* [2014] eKLR the court found that the petitioner was unlawfully shot and injured and therefore his rights under section 71 of the former Constitution were violated. The court also found that his rights under section 72 of the former Constitution were violated when he was detained for more than 24 hours (for 13 days) without being brought to court as soon as reasonably practicable. The court awarded the petitioner therein Kshs. 500,000/-.

33. In this case the petitioner was in police custody for 7 days and in the circumstances, I find that damages of Kshs. 300,000/- are appropriate.

34. The upshot is that the petition herein partially succeeds and I proceed to grant the following orders;

- i. A declaration be and is hereby issued that the petitioner's Fundamental Rights and Freedoms under Article 49 (1) (f) of *the Constitution*, 2010 were contravened and violated by the Police officers when they failed to present the petitioner before court within 24 hours following his arrest.
- ii. That judgment be and is hereby entered in favour of the Petitioner against the 1st, 2nd, 3rd, and 4th Respondents jointly and severally for a sum of Kshs. 300,000/= by way of general damages.
- iii. The 1st, 2nd, 3rd and 4th Respondents do pay the costs of these proceedings to the petitioner plus interests from the date of this judgment at court rates.

35. For avoidable of doubt, prayer number (11) of the petition is disallowed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Petitioner



.....for the Respondents

