



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

PETITION NO. 1 OF 2017

**IN THE MATTER OF ARTICLES 2 (1) & (4), 10 (1) & (2), 19 (1) & (2), 20(1) & (2),
21 (1), 22(1), 27, 28, 29 (d), 48, 49 (1) (f), 50 (1), 165 & 258 OF THE CONSTITUTION, 2010**

AND

IN THE MATTER OF: VIOLATIONS AND/OR INFRINGEMENT

ON THE FUNDAMENTAL RIGHTS OF THE PETITIONER

AND

IN THE MATTER OF: THE ARREST AND DETENTION FOR MORE THAN 24 HOURS

AND IN THE MATTER OF: JOSEPH KIPKEMOI ARIAMBE

IN THE MATTER OF: ALLEGED THEFT BY SERVANT

IN THE MATTER OF: KISII CMCR NO. 321 OF 2017

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS & FUNDAMENTAL; FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

JOSEPH KIPKEMBIO ARIAMBE.....PETITIONER

AND

THE OFFICER COMMANDING POLICE STATION,

(O.C.S) KISII POLICE STATION.....1ST RESPONDENT

THE ANTI-BANK FRAUD UNIT.....2ND RESPONDENT

THE OFFICER COMANDING POLICE DIVISION

(O.C.P.D) KISII CENTRAL POLICE DIVISION.....3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION (DPP).....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

NATIONAL BANK OF KENYA LIMITED.....7TH RESPONDENT

THE HON. CHIEF MAGISTRATE'S COURT,

KISII LAW COURTS.....8TH RESPONDENT

JUDGMENT

THE PARTIES

1. The Petitioner who is a citizen of the Republic of Kenya and a resident of Kisii County brings this Petition on his own behalf.
2. The 1st Respondent is a public officer employed under the National Police Service Act. The 2nd respondent is a specialized unit charged with carrying out investigations pertaining to frauds occurring within the Banking sector.
3. The third respondent is a public officer employed by that National Police Service Act.
4. The 4th respondent is duly appointed under the provisions of the National Police Service Act and charged with the mandate of coordinating the operation of the police service.
5. The 5th Respondent is a constitutional body established under the provisions of **Article 157 of the Constitution, 2010** and charged with the mandate of conducting criminal prosecution.
6. The 6th respondent is the principal Legal Advisor to the Government of the Republic of Kenya, bestowed with the duty of advising the government, together with all government officers on legal matters.
7. The 7th respondent is a limited liability company duly incorporated pursuant to the Company's Act, Chapter 486, Laws of Kenya and carrying on banking business in accordance with the Banking Act.
8. The 8th respondent is a subordinate court established pursuant to **Article 169 of the Constitution 2010**.

THE PETITIONER'S CASE

9. On 3rd February 2017, the Petitioner filed this instant Petition, which was supported by an affidavit he swore on the same date. Subsequently on 15th February 2017 the petitioner filed an amended petition seeking the following relief in their Petition:
 - a) Declaration that the Petitioner herein is entitled to the benefit of and protection under the Constitution, 2010, in the same manner as all other Citizens of the Republic of the Kenya in line with the provisions of Article 20 (1) & (2) thereof.
 - b) Declaration that the Arrest, Remand and/or Detention of the Petitioner herein in Police Custody for a period in excess of 6 days w.e.f 1st February 2017 to the 6th day of February 2017, amounts to and/or constitutes violation of the Petitioner's Constitutional and Fundamental Rights as established and sanctioned vide Article 49 (1) (f) of the Constitution, 2010.
 - c) Declaration that the intended Charges, vides KISII CMCR NO. 321 OF 2017, arraignment in court and/or prosecution of the Petitioner herein, founded and/or anchored on the Complaint leading to the arrest and detention of the Petitioner for a period in excess of 6 days w.e.f. 1st February 2017 to the 6th day of February 2017, are unconstitutional, unlawful, and illegal and void for all intent and purposes.
 - d) In the alternative and without prejudice to paragraph (c) hereof, a Declaration that any Charges vide KISII CMCR NO. 321 OF 2017 that may have been preferred against the Petitioner and anchored on the arrest and detention at the instance of the 7th Respondent in excess of the statutory period are valid.
 - e) An Order of Judicial Review in the nature of Certiorari to bring unto this Honourable Court and Quash the Charges, mounted and/or preferred against the Petitioner herein and the Proceedings and Decision, if any, vide KISII CMCR NO. 321 OF 2017, to the extent that the arrest and detention preceding the preference of the Charges and the arraignment in Court, violated and/or infringed upon the Petitioner's Constitutional and Fundamental Rights.
 - f) Permanent injunction restraining the Respondents, more particularly, the 1st- 4th Respondent from (sic) continue to hold and/or detain the Petitioner herein, either on the allegations fronted and/or lodged by the 7th Respondent or at all.
 - g) An Order of Judicial Review in the nature of Prohibition, to prohibit the 8th Respondent from entertaining, proceeding with, hearing, adjudicating upon and/or rendering a decision in the criminal charges levied against the Petitioner vide KISII CMCR NO.

321 OF 2017, anchored on and/or founded upon the complaint leading to the arrest and detention of the Petitioner for a period in excess of 6 days, contrary to and in contravention of the Constitution, 2010.

h) *Payment of General and Exemplary Damages on account of Breach, violation and/or infringement of the Fundamental and Constitutional Rights of the Petitioner.*

i) *Costs of the Petition be borne by the Respondents jointly and/or severally.*

j) *The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.*

THE PETITIONER'S CASE

10. The Petitioner avers that he is still an employee of the 7th Respondent as the operations manager. According to the Petitioner on 31st January 2017, officers of the 7th respondent informed him of loss of money within the 7th Respondent's – Kisii Branch office which occurred during his tenure as the Operations Manager. He was tasked to carry out background checks with a view of ascertaining the circumstances under which the money was lost. Upon carrying out the background checks he discovered that there had been misappropriation by the Chief Teller, who was the person responsible for custody of the monies once it is released from Treasury. However, on 1st February 2017 officers from the 2nd respondent in the company of officers of the 7th respondent arrested him and took him to the 1st respondent where he was booked and placed in the police cells. The officers of the 1st-4th respondents informed him that there were making arrangements to have him arraigned in court with a view of answering criminal charges allegedly arising from the loss of money.

11. The petitioner averred that he remained in police custody on 1st and 2nd February 2017 without indication as to when he would be taken to court. The Petitioner advanced that he was held in custody up to 6th February 2017 and when he was arraigned in court, he was charged with what the 1st-5th respondents deemed as holding charges vide **KISII CMCR NO. 321 OF 2017**. He contends that he was in police custody in excess of 6 days amounting to a violation of his constitutional and fundamental rights. He further contends that he was held in custody without release on bail terms contrary to **Article 49 (2) of the Constitution 2010**. He advanced that he was subjected to cruel and inhuman treatment and suffered psychological torture and mental anguish contrary to **Article 29 of the Constitution**. The petitioner contends that the actions of the respondents constitutes violation of the provisions of **Article 20 (1), 21 (1), 27 (1), 28, 29(f), 49 (1) (f) & (2) & 50 (4) of the Constitution, 2010**.

12. The plaintiff filed his submissions where he argued that he ought to have been arraigned in court within 24 hours pursuant to **Article 49 (1) (f) of the Constitution 2010**. He cited the case of **Albanus Mwasia Mutua v Republic Criminal Appeal No 120 of 2004** where the Court of Appeal emphasized the duty of the court to enforce the provisions of the Constitution. It was submitted that the petitioner has established a prima facie case that warrants the court granting permanent injunction.

THE RESPONDENTS' CASE

13. Eliud Byama, the Deputy Officer Commanding police station of Kisii Central police station filed a replying affidavit on 28th February 2017. He averred that the delay in arraigning the Petitioner in court was not occasioned by the 1st, 3rd and 4th respondents but by the nature of the complaint under investigations. He explained that the investigations commenced after it was discovered that a total of Kshs 16,158,200/- had been stolen. On 1st February 2017 the petitioner was arrested under the directions of the Investigation Officer, CI Gilbert Fondo of the Banking Fraud Investigation unit Kisumu. The Petitioner was booked at Kisii police station with a commitment from the in charge of the Banking Fraud Investigation Unit that the suspect will be collected and escorted to Kisumu Central Police Station on the following day. The Petitioner was collected by agents of the 2nd respondents for transportation to Kisumu in order for the Petitioner to answer charges preferred against him. A crime and incident report was prepared with details of the petitioner, complainant and investigating officer.

14. A replying affidavit sworn by Maureen Mbelete was filed on behalf of the 5th respondent. She advanced that the detainment was not malicious or in any way intended to violate the rights of the applicant. She advanced that the 3 day delay was explained in the affidavit of the 2nd respondent.

15. The 1st – 6th respondents filed their written submissions on 18th November 2020. They identified three issues:

- a) *Whether the detention was unlawful;*
- b) *Whether the criminal case should be dismissed or declared nullity*
- c) *Who should bear the cost of the suit*

16. It was submitted that the petitioner having been charged with an offence punishable by 7 years imprisonment it was justified for detaining him for more than 1 day. There was reasonable cause to believe that the petitioner was culpable as he was the operations manager of the 7th respondent who was the complainant. It was submitted that the right to be released on bail was not absolute and in this case public interest overrode the petitioner's right to freedom. There was also a likelihood that the petitioner would interfere with the evidence. They relied on the case of **Republic v Daniel Ndegwa Wachira [2015] eKLR**.

17. They submitted that the criminal case against the petitioner should proceed and cited the case of **Charles Murimi Mbaka v Republic eKLR** and **Republic v David Geoffrey Gitonga Criminal Case No 79 of 2006**. Finally it was advanced that the petitioner ought to bear the

cost of the suit.

18. The 7th respondent filed its replying affidavit deposed by Augustine Wanjala. He averred that the 7th respondent on 28th January 2017 discovered that cash which the 7th respondent's Kisii branch had repatriated to the Kisumu center on 27th January 2017 was less by Kshs 9,470,000/-. Upon investigations it was discovered that a Kshs 5,734,000/- was also missing at the Treasury and the Automated Machines (ATMS) had a deficiency of Kshs 912,200/-. The matter was reported at the 2nd respondent's office in Kisumu to assist in investigations. It alleged that the petitioner had at all times signed documents confirming that the 7th respondent's Kisii branch treasury was in order. The petitioner's co-accused Mr. Geoffery Koech who was the Chief Teller disappeared upon discovery of fraud but was arrested in Nairobi on 1st February 2017. He was handed over to the 2nd respondent and he confessed to the fraud and further implicated the petitioner. According to the 7th respondent, it only reported the loss to the police but had no control over the investigations. The deponent advanced that there is overwhelming evidence against the petitioner in **Kisii Criminal Case No 321 of 2017** and he further averred that the case should not be defeated by the current petition before the court. According to the 7th respondent the petitioner had failed to demonstrate the damage he suffered due to the alleged unlawful detention.

19. In their submissions the 7th respondent argued that the investigations, arrest, detention and preferring charges fell within the mandate of the National Police Service and the Director of Public prosecution and the alleged infringement could not be leveled against the 7th respondent. In support of its case it cited the case of **Geoffrey K. Sang v Director of Public Prosecution & 4 others [2020] eKLR**. They also advanced that the petitioner failed to frame the alleged violated rights with precision as is required for constitutional petitions. They pointed out that the petitioner failed to outline in great precision how his right under **Article 29 of the Constitution** was violated. They cited the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No 290 of 2012**.

ANALYSIS AND DETERMINATION

20. Having considered the pleadings by the parties and their rival submissions the following issues are not in contention:

- a) That the 7th respondent reported an alleged theft that occurred in its Kisii branch offices and implicated the petitioner as the culprit.
- b) That the petitioner was arrested on 1st February 2017 following the complaint.
- c) That the petitioner was arraigned in court on 6th February 2017.

21. The importance of the protection of personal liberty was discussed in the case of in **Michael Rotich v Republic [2016] eKLR** where the court observed as follows;

Courts are under a constitutional duty to jealously protect this right to liberty and freedom. The right can only be curtailed in circumstances provided under the Constitution and Statute. In an Indian Supreme Court case cited by the State, Neeru Yadav –Vs- State of U.P. & Another Criminal Appeal No.2587 of 2014, the court held at Page 12:

“...we are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of constitutional right and accentuated further on human rights principles. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order.”

22. The first issue that arises is thus whether the 5 day detention period was an infringement of the Petitioner's rights under **Article 49 (1) (f) of the Constitution**.

23. In this case it is not in dispute that the 7th respondent discovered that it lost money and the petitioner had been informed of the situation. The petitioner admits that he was arrested and at paragraph 13 of the amended petition, he was remanded at Kisii police station on allegation of theft by servant. Although the petitioner was booked and remanded on 1st February 2017 he was not presented before court until 6th February 2017 contrary to **Article 49 (1) (f) of the Constitution**. It provides as follows;

“49. (1) An arrested person has the rights-

(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 the 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 with **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**;

“8. There is no paradox or absurdity in the requirement of the 24 hour rule and the need for conclusive investigations into crime for the prosecution to obtain evidence to support the charge. The requirement is not calculated to defeat the Prosecution's ability to investigate and prosecute cases. The object of the 24 hour rule is to obviate prospects of extra-judicial, pre-trial detention by police authorities in contravention of the cardinal principles of the criminal process of fair trial and innocent-until-proven-guilty.

9. Of course, the circumstances in which a crime has been committed may require immediate arrest of the suspect to prevent further crime, to prevent her escape or to protect the evidence or witnesses, and the nature of a serious crime, such as murder, may reasonably require more time to investigate. In the face of the 24 hour rule/requirement, the prudent thing to do is to delay the arrest until the investigations are complete and all prosecution evidence has been collected, except where the suspect is a flight risk or likely to escape, or other risk to the successful prosecution of the offence such as interference with the evidence or witnesses exists.”

25. In **Salim Kofia Chivui v. Resident Magistrate Butali Law Courts & Another [2012] eKLR**, where 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. There was no reason availed by the respondents why the appellant 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.

27. However, the 7th respondent submitted that it was not responsible for the violation of the petitioner's right because the mandate of investigation, arrest, detention and preferring of charges fell within the mandate of the National Police Service and the 5th respondent. I am constrained to agree with the 7th respondent's submissions on grounds that the 7th respondent could not have been responsible for any of the alleged violations as it was merely the complainant.

28. It is my finding that the petitioner's rights under **Article 49 (1) (f) of the Constitution** was breached by the police officers when they failed to produce him before a court on 2nd February 2017.

29. On the alleged breach of the right to bail under **Article 49 (2) of the Constitution**, the respondents argued that the offence with which the appellant was charged with was a serious offence which attracted 7 years imprisonment.

30. **Article 49 (2) of the Constitution** provides that ‘a person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months’. In **Republic v Danford Kabage Mwangi [2016] eKLR** the court held that

“My understanding of Section 49(1) (g) (h) is firstly that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right of an automatic bond or bail, are those charged with offences (which may be referred to as "petty offences") the punishment of which (if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months. Such offences are spread throughout the Penal Code, and other statutes containing penalty for breach thereof.”

31. The offence of stealing by servant is serious offence that attracts 7 years prison time if one is found guilty. In the circumstance, I am constrained to agree with the argument proffered by the respondents that the petitioner was not entitled to bail as per **Article 49 (2)** but had a right to bail pursuant to **Article 49 (1) (h) of the Constitution**. Thus the question that a violation of **Article 49 (2) of the Constitution** does not arise.

32. The Petitioner also failed to demonstrate that he was treated or punished in a cruel, inhuman or degrading manner while he was in police custody. The same was neither pleaded with precision as required. (See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No 290 of 2012**).

33. The only violation disclosed by the petition is the infringement of the petitioner's right under **Article 49 (1) (f) of the Constitution** and I must now turn to explore the remedies available to him.

34. The petitioner seeks an order to quash the criminal charges mounted against him as well as the proceedings before the Kisii Chief Magistrates Court in KISII CMCR NO. 321 OF 2017. Is this remedy available to the Petitioner?

35. In **Hussein Khalid And 16 others v Attorney General & 2 others [2019] eKLR** the Supreme Court held as follows;

“[122] Consequently, without downplaying the Appellants' allegations of infringement, we find that they have recourse under

Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** where it was stated that:

“The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.”

[123] Consequently, we are not persuaded, just like the High Court and the Court of Appeal, that this is an instance where this Court should intervene in order to quash the proceedings before the trial Court. The criminal proceedings pending before the trial Court should be allowed to continue expeditiously given the amount of time it has taken.”

36. The Court of Appeal in **Fappytan Mutuku Ngui v Republic [2014] eKLR** held that;

*“The correct position in law was set out in **Julius Kamau Mbugua v Republic (2010) eKLR** where the Court stated that the violation of the appellant’s right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights.”*

37. I have already held above that the petitioner has established that his right under **Article 49 (1) (f) of the Constitution** was violated. However, from the principles established from the above cases such violations in themselves do warrant the vitiating the criminal processes against the petitioner. I therefore hold that the criminal proceedings against the petitioner before the Kisii Chief Magistrates Court in KISII CMCR NO. 321 OF 2017 cannot be set aside or quashed and the only remedy available to the petitioner would be damages for the infringement of his constitutional rights.

38. 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. (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...”

39. On damages the petitioner proposed the award of Kshs 3,000,000 and Kshs 2,000,000/- as exemplary damages. They cited the case Of **Chrispine Otieno Caleb v Attorney General [2014] eKLR**. The suit being a malicious prosecution case, the court awarded the plaintiff therein plaintiffs Kshs 2,000,000/- as general damages for malicious prosecution, exemplary damages of Kshs 500,000/- and special damages of Kshs 800,000/-.

40. The case before me is a constitutional petition and not a malicious prosecution case. 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 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 reasonable practicable. The court awarded the petitioner therein Kshs 500,000/-.

41. In this case in this case the petitioner was in police custody for 5 days and in the circumstance, I find that damages of Kshs 300,000/- is appropriate.

42. The upshot is that the amended petition is meritorious and I proceed to grant the following orders:

1. 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 grossly violated by the Police officers who were when they failed to present the petition before court within 24 hours following his arrest.
2. That judgment be and is hereby entered in favour of the Petitioner against the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents jointly and severally for a sum of Kshs 300,000/= by way of general damages.
3. The 1st, 2nd, 3rd, 4th, 5th and 6th Respondents do pay the costs of these proceedings to the petitioner plus interests thereon at court rates.

DATED AND DELIVERED AT KISII THIS 26TH DAY OF MARCH, 2021.

R. E. OUGO

JUDGE

In the presence of;

Mr. Kipng'etich For the Petitioner

Miss Chepkirui For 1st to 6th Respondents

Mr, Ochieng h/b for Miss Musembe For the 7th Respondent

Ms. Rael Court Assistant