



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. E001 OF 2020

IN THE MATTER OF ALLEGED THREAT OF CONTRAVENTION OF ARTICLES (22), (23) AND (29(a)) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF WRONGFUL ARREST, DETENTION, AND WRONGFUL AND MALICIOUS PROSECUTION OF THE PETITIONER

BETWEEN

ERASTUS MAINA KARANJA..... PETITIONER

AND

THE MACHAKOS COUNTY GOVERNMENT..... RESPONDENT

JUDGEMENT

1. The Petitioner commenced these proceedings by way of a Petition dated **8th September, 2020**. It is deponed that the Petitioner was unlawfully arrested, detained and prosecuted in the **Resident Magistrate's Court Machakos** in **Traffic Case No. 8 of 2017** with the offence of obstruction of County Officers contrary to **Section 18 (1) (a)** of **Machakos County Commuter Motor Vehicle Act, 2015**.
2. The Petitioner being aggrieved by the judgement of Hon. C.K. Kisiangani filed a Petition of Appeal to the High Court against the whole of the decision in **HCCA No. 13 of 2018** where **Hon. Justice G. V. Odunga** allowed the appeal, set aside the Appellant's conviction and quashed the sentence.
3. According to the petitioner, by unlawfully arresting, detaining and prosecuting him, the Respondent breached his fundamental rights and freedoms guaranteed by the Constitution and as a result of the alleged violations, the Petitioner sought the following reliefs:
 - a) **A declaration that the arrests, prosecution and eventual conviction and sentencing were unlawful.**
 - b) **A declaration that Petitioner rights to liberty were violated.**
 - c) **A declaration that the Petitioner is entitled to compensation from the Respondent.**
 - d) **Costs of this petition.**
4. The Petition was supported by affidavit of Erastus Maina Karanja sworn of the **8th** of September, 2020.
5. It is the Petitioner's case that he was arrested on **3rd** February, 2017 by two employees of the Machakos County Government.
6. The Petitioner states that he was charged with 3 counts respectively namely; picking passengers on a non-designated area contrary to **section 8 (2)(a)** of the Machakos Commuter Vehicles Act, 2015; causing obstruction on the road while picking passengers contrary to **section 18 (1) (ii)** of the Machakos Commuter Vehicles Act, 2015; and resisting lawful impoundment of motor vehicle registration number

KCK 876e, contrary to **Section 18(1)(a)** of the Machakos Commuter Vehicles Act, 2015.

7. The Petitioner states that at the trial the prosecution called two (2) witnesses and so did the defence, but before being placed on his defence, the Petitioner was acquitted of count 2 under **Section 210** of the **Criminal Procedure Code** due to lack of evidence.

8. The Petitioner states that he was also acquitted on count 1 as the trial court indicated that the prosecution did not prove the charge beyond reasonable doubts.

9. The Petitioner states that on count 3 the trial court indicated that the prosecution had proved the count beyond reasonable doubt.

10. The Petitioner states that the trial court sentenced him under count 2 by ordering him to pay a fine of Kshs. 5000/= in default to serve two months' imprisonment.

11. The Petitioner states that he was convicted under count 3 and sentenced for count 2 that he had been acquitted from.

12. The Petitioner further states that being dissatisfied with the conviction and sentencing contained in the judgement dated **25th January, 2018** he filed a Petition of Appeal on **8th February, 2018** in the High Court at Machakos where Hon. Justice G. V. Odunga found merit in his appeal and proceeded to allow it by setting aside the Petitioner's conviction and quashing the sentence.

13. The petitioner, thus seeks compensation as a result of the losses and suffering in the hands of the Respondent.

14. Opposing the Petition, the Respondent through Robert Maitha, the Chief Officer, Department of County Administration and Inspectorate Services swore an affidavit dated **1st February, 2021**. In the said affidavit, the deponent deposes that on 1st February, 2017 three officers from the Respondent while on patrol spotted motor vehicle registration number KCK 876E stop to pick up passengers at Susu Centre, within Machakos County, a non-designated area. The officers tried to impound the said motor vehicle but it took off and since they had parked the patrol vehicle on the opposite side of the road, pursuing the said motor vehicle could have been unsafe for other road users.

15. Maitha further deposed that the motor vehicle was impounded on 3rd February, 2017 after being spotted in a bus park and the driver was approached, and notified that he was under arrest for loading passengers at a place not permitted.

16. Maitha further deposed that the Petitioner was found guilty on the third count as he resisted lawful impoundment of the motor vehicle. He maintained that the arrest was not unlawful since the county officer has the power to arrest, tow and detain vehicles where provisions have been contravened as stipulated under the Machakos Commuter Vehicles Act, 2015.

17. Maitha further deposed that the right to freedom and security of the person is not an absolute right as it has limitations and does not curtail the obligation of state agencies to enforce regulations. He urged the court to dismiss the Petition with costs to the Respondent.

18. The Petition was canvassed by way of written submissions.

19. The Petitioner filed his submissions on 2nd March, 2021. In his written submissions, the Petitioner submits that his rights under Article 29 of the Constitution of Kenya, 2010 were violated as demonstrated by the two judgements dated 25th October, 2018 and 25th February, 2020.

20. It was further submitted on the petitioner's behalf that his arrest, as the arresting officer indicated, was based on belief and not any investigation. The arresting officers used their power of arrest unlawfully and curtailed the liberty of the Petitioner which had to be restored by the Honourable High Court. Counsel urged this court to grant the prayers sought.

21. The Respondent filed its submissions on **2nd June 2021**. In its written submissions, the Respondent submitted that the mere fact that a person has been acquitted of a criminal charge does not necessarily entail malice on the part of the Respondents. Counsel for the Respondent relied on the case of **James Karuga Kiiru v. Joseph Mwamburi & 3 Others, Nrb C.A. No. 171of 2000**. Counsel further noted that the Petitioner has to prove the essentials of malicious prosecution which he has failed and that the Respondents had no malicious intent in prosecuting the Petitioner and that the arresting officers reasonably believed that the Petitioner was the driver of the said motor vehicle on that material day.

22. Counsel for the Respondent further submitted that there was no violation of the Petitioner's right to liberty as guaranteed under Article 49 (f) of the Constitution of Kenya. Counsel submitted that the Petitioner was brought before a court of law not later than 24 hours after being arrested.

23. Counsel for the Respondent further submitted that before one can be compensated for unlawful arrest, wrongful confinement and malicious prosecution there are four ingredients that ought to be satisfied. The same are laid out in the case of **Kenya Flourspaar Company Limited v. William Mutua Maseve & Another (2014) eKLR** where the case of **Murunga vs. Attorney General (1979) KLR138** was cited, therein the four ingredients were analyzed. **"These ingredients are criminal proceedings must have been instituted by the defendant, the defendant must have acted without reasonable or probable cause, the defendant must have acted maliciously and the criminal proceedings must have been terminated in the plaintiff's favour."**

It was submitted that the petitioner has failed to unite all the above ingredients of malicious prosecution and therefore not entitled to any compensation and hence the Petition ought to be dismissed with costs.

24. I have considered the instant petition, the pleadings by both parties as well as the submissions made by both counsel for the Petitioner as well as the counsel for the Respondent together with authorities cited. In my humble view, the main issues for determination in the instant petition are:

a) Whether the arrest and prosecution of the petitioner was illegal and unlawful or actuated by malice and conducted in violation of the petitioner's Constitutional rights;

b) Whether the petitioner entitled to any compensation?

c) What orders should this court make?

25. On the first issue which is quite broad, Article 49 of the Constitution guarantees arrested persons certain rights. The said Article embodies rules which have always been regarded as vital and fundamental for safeguarding personal liberty in almost all legal systems where the rule of law prevails. The abovementioned Article provides:

49. Rights of arrested persons

(1) An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of (i) the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than— (i) twenty-four hours after being arrested; or (ii) 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;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(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.

(2) 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.

26. Article 9(1) of the International Convention on Civil and Political Rights (ICCPR) basically prohibits arbitrary arrest and detention and the use of the term, "arbitrary" simply covers unjustifiable deprivation of liberty rather than seeking to list exhaustively all permissible causes of deprivation of liberty.

27. The Petitioner herein alleges that his right was violated on the account of his arrest, detention and prosecution being unlawful. Wrongful arrest involves deprivation of a person's liberty; it consists of arresting and holding a person without legal justification. Thus liability thereof is strict, and a party need not show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. It is one that falls under action injurium, and so proof of damage is not necessary to support the action. Even if no pecuniary damage has been suffered, the court will award a contemptuous figure for the infringement of the right to liberty.

28. As a general rule, an arrest of a suspect should not be made unless and until his or her case has been investigated with sufficient evidence requiring an answer on the complaint. The starting point for the investigating officer is not to depart from the enforcement of a right to a fair hearing and due process.

29. Having set out the constitutional and statutory provisions upon which the Petitioners' arrests were based, I must now interrogate whether in the circumstances, the arrest of the petitioner was unlawful resulting in alleged unlawful detention and prosecution of the Petitioner.

30. There is plenty of case law on false arrest. In **Daniel Waweru Njoroge & 17 Others v Attorney General Civil Appeal No. 89 of 2010 [2015] eKLR** the court held:

"False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetrated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement.

Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort.”

31. In a constitutional democracy like our own, it is imperative for citizens to have confidence and trust in the institutions established to safeguard the rule of law. In this regard the citizens expect the police officers in going about their duties to be fair, transparent and accountable in executing duties on behalf of the state. This means that chapter four of the supreme law of the land should at every juncture be the guiding light when effecting arrest and detention of suspects alleged to have committed cognizable offences.

32. It must be emphasized that reasonableness and rationality of the decision to arrest where deprivation of individual liberty of a person is concerned should be consistent with the constitution and international standards in upholding the rights of the individual. I have no quarrel with the arrest as it's provided for in the law. What is at stake is the failure by the Respondents to demonstrate that they took proportionate measures to ensure compliance with the constitution more so Article 49.

33. This court has found that the arrest of the Petitioner was unlawful. It therefore follows that the arrests were in contravention of Article 29(1) which protects the Petitioners from being deprived of their freedom without just cause. Similarly, the detention deprived the Petitioner of his freedom of movement guaranteed under Article 39(1).

34. It is my view that the claim for unlawful arrest and detention/false imprisonment and injury of reputation is one and the same thing as malicious prosecution. This is so because when a person is arrested and detained and not prosecuted, he could claim that that arrest and detention that did not materialize into prosecution was actuated by malice – See **JOSEPHAT MUREU GIBIGUTA -VS- HOWSE & MC GEORGE LTD e KLR H.C. AT NAIROBI CIVIL CASE NO. 2646 OF 1993** in which Githinji, J (as he then was) stated: -

“In my view the arrest, detention and prosecution consists of one transaction which has given rise to the Plaintiff's claim. In the circumstances of this case the cause of action for damages for unlawful arrest and false imprisonment arose only when Plaintiff was acquitted.”

35. It is undisputed that following the High Court determination on his appeal that the Petitioner ought not to have been convicted in count III, the Petitioner's conviction was quashed and the sentence set aside.

36. The only issue is whether the conviction of the Petitioner was without any reasonable or probable cause and with malice. It is worth noting that from the judgment of the lower court, out of the seven accused persons, only the Petitioner was acquitted of the charge.

37. Damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be violators. Therefore, the Petitioner only need to prove that the arrest or detention was illegal. This was stated in the case of Mohamed Feisal & 19 others (supra) that a Petitioner does not have to prove that the Respondents had intention to act illegally or to cause harm.

38. Pursuant to the holding on liability as set out above its now my singular duty to navigate the discretionary jurisdiction on award of compensation by placing reliance on the past jurisprudence on this issue. Addressing itself to the question of damages, the Court of Appeal in **Gitobu Imanyara & 2 others v Attorney General Civil Appeal No. 98 of 2014 [2016] eKLR** had this to say:

“...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. For a determination on what concerns to keep in mind in awarding compensation for constitutional violations, I find solace in the **Constitutional Court of South Africa in Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291** where it held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

40. Drawing from the principles laid out in the judicial precedents above, I am of the opinion that where a Petitioner is entitled to compensation for a violation of his constitutional rights by the Respondent, such compensation ought to be both general and exemplary or punitive in nature. This is so because such an award is meant to vindicate the violation of the Petitioners rights and deter future infringements. In light of the violations occasioned by the respondents on the Petitioners rights as alluded to elsewhere in this judgement, I find that the Petitioners are entitled to general exemplary damages in addition to a declaration on the violation of their constitutional rights.

41. In the **Daniel Waweru Njoroge case (supra)**, finding in favour of the Plaintiffs in a tort for unlawful arrest, the Honorable judge awarded each Plaintiff a sum of KShs. 100,000/-. For the violation of the rights of an officer of the court who was acting in the general course of his duty to uphold justice, Okwany J. in the **Akusala case (supra)** citing the case of **Lucas Omoto Wamari v Attorney General & another [2017] eKLR**, awarded the Petitioner KShs. 2,000,000/-.

42. Guided by the precedents cited, I hereby award the Petitioner **KShs. 100,000/-** compensatory damages.

43. In the upshot, I find that the petitioner's petition has merit. Judgement is entered for the Petitioner as against the Respondent in the following terms:

a) A declaration that the arrests, prosecution and eventual conviction and sentencing of the Petitioner was unlawful

b) A declaration that the Petitioner's rights to liberty were violated.

c) A declaration that the Petitioner is entitled to compensation from the Respondent which is hereby assessed at Kshs. 100,000/=.

d) Costs of the suit shall be borne by the Respondent.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE