



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CONSTITUTIONAL PETITION NO. 11 OF 2019

DAVIS MOKAYA ONDIMU.....PETITIONER

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

JOSEPH MWIKA SENIOR SUPERINTENDANT OF POLICE,

SUB-COUNTY POLICE COMMANDER

KAJIADO NORTH.....2ND RESPONDENT

MESHACK LANGAT, INSPECTOR OF POLICE

IN CHARGE PETTY CRIME-NGONG

POLICE STATION.....3RD RESPONDENT

CHARLES NYARIBO, CHIEF INSPECTOR OF POLICE

SOB NGONG DIVISION.....4TH RESPONDENT

JUDGMENT

1. The Petitioner, Sub County Criminal Investigations Officer stationed at Loima Sub County in Turkana County then, filed an amended petition dated 19th September, 2019, against the four named respondents for unlawful arrest, torture and detention, a breach of his rights and fundamental freedoms guaranteed by the Constitution.

2. The Attorney General, the 1st respondent, was sued in his capacity as the Principal legal adviser to the national government and who has the constitutional mandate to protect and uphold public interest. The 2nd respondent is the Sub County Police Commander a police officer in charge of Kajiado North Sub County; The 3rd respondent (**Meshack Langat**) is named as an inspector of police in-charge of petty crimes, but has not been included in the description part of the petition, while the 4th respondent is named as the staffing police officer within Kajiado North Sub County.

3. The petitioner averred that his wife, the late PC Elizabeth Munania Nyenze, a police officer died leaving behind one child. Two of the deceased's sisters, **Stellar Mwikali Kimanzi** and **Scollar Kamene Reeves**, took the child into their custody and denied him access to the child. On inquiry, he was informed that **Scollar Reeves**, intended to adopt the child and take him to Italy where she is married and resides. He was also barred him from planning and attending his wife's burial.

4. He averred that he filed a suit before the Children's court at Milimani (**Children's Case No. 1255 of 2018**) and obtained orders for custody of the child which were served on **Stella Mwikali Kimanzi**. He then proceeded to Stella Mwikali's residence at Kerarapon within Ngong Township in the company of two police officers from Kerarapon Police Post to get the child for purposes of attending burial the following day. They were, however, denied entry to the home. At about 20.45 pm Mwikali's husband arrived with police officers in two police vehicles and who were acting under the instructions of the 4th respondent and arrested him on allegations of creating disturbance.

5. The petitioner further averred that the police officers tortured him and denied him audience despite showing them the court order. They

took him to Ngong Police Station and placed him in the cells. They assaulted him causing him severe injuries. When he gained consciousness the following day, he found himself at **Zamzam Medical services**. He was later discharged and was returned to the Police Station where he was held until 5.15 pm and released by the 4th Respondent and instructed to report back to the station on 30th October, 2018. They also denied him an opportunity to communicate with his family or an Advocate in violation of his rights guaranteed under Article 49 of the Constitution.

6. It was the petitioner's case that he requested to make a report of assault at the station and be issued with a P3 form but it was declined by the officers who were acting on the instructions of the 2nd and the 4th respondents.

7. After he was released, he reported the matter to the Internal Affairs Unit and the Complaints Section at the National Police Service through letter dated 18th October, 2018 and received on 23rd October, 2018, and the matter is under investigation.

8. He asserted that despite the fact that his complaint was still pending, he received a signal from the 2nd respondent to report to him on 2nd July, 2019 for purposes of taking plea at Ngong Law Court on charges under section 95(1) (b) of the Penal Code. According to the petitioner, the decision to prosecute him contravened the Constitution. given that there had been inordinate delay in the investigations since 2018. He also stated that he was not given a chance to tell his side of the story and the decision to prosecute him may have been propagated by the people against whom he was pursuing a complaint hence there was conflict of interest.

9. According to the petitioner, the Director of Public Prosecutions while being guided by the constitution and the law, including section 50 of the Office of Director of Public Prosecution Act and Part 4B of the National Prosecution Policy 2015, ought to have considered the strength of the rebuttal evidence before preferring any charges, but he, petitioner, had not been given an opportunity to tell his side of the story as required under Article 47 of the Constitution. It must be noted here that the Director of Public Prosecutions in not a party to the amended petition and therefore any complaint against his office are not justified.

10. The Petitioner asserted that by charging him with the criminal offence, the provisions of section 88(3) of the National Police Service Act would apply notwithstanding the outcome of the criminal process and this would consequently interfere with his rights under Articles 27, 28 and 29 of the Constitution. He further stated that section 89 of the Act will affect his position, livelihood and professional development for reasons other than the advancement of the ends of justice.

11. He asserted that, there being a conflict of interest, the 2nd respondent ought to have excused himself from handling the matter. He acted beyond his powers which is a preserve of the station as required by Police Standing Orders, 2015.

12. He also averred that the 1st respondent failed to ensure that the 2nd, 3rd and 4th respondents were well informed and advised on the rights of arrested persons and the need to conduct themselves well in discharging their official functions. The 2nd respondent also failed to ensure that investigations and any recommendations to prosecute were done in accordance with the law and that the 3rd respondent failed to exercise independent command by engaging and deploying officers who strive for the highest standard of professionalism and discipline, prevent corruption, comply with the Constitution and respect for human rights and fundamental rights and freedoms.

13. It is the Petitioner's contention therefore, that the respondents' actions and or omissions contravened Articles 10, 232, 157 (11), 244 and 51 of the Constitution. He sought the following reliefs:

i. A declaration that the respondents have violated the principles enshrined in Articles 10, 21, 22, 23, 26, 27, 28, 29, 47, 48, 50, 157, 165, 232, 258 of the Constitution.

ii. A declaration that the 2nd, 3rd and 4th respondents have not acted in accordance with the law as expected in Article 157(11) of the Constitution.

iii. A declaration that the decision and an order of the 2nd, 3rd and 4th respondents to remand the petitioner in custody on 18th October, 2018 for an offence of creating disturbance in a manner likely to cause a breach of peace violated the principle enshrined in Article 49(2) of the Constitution and was therefore unconstitutional.

iv. An order for adequate compensation for damages for unlawful arrest and incarceration and for deprivation of the constitutional rights to freedom of movement and the liberty by the respondents.

v. This Honorable Court to issue further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the constitution and in the context of the declarations made.

vi. The cost of this petition be awarded to the Petitioner as against the respondents jointly and severally.

Respondents' response

14. The respondents filed a replying affidavit by the 2nd respondent, sworn on 8th November, 2019. He deposed that he received a distress call from the Officer in Charge of Station (OCS) Ngong police station, requesting for police reinforcement in a case of creating disturbance at a residence at Kerarapon within his jurisdiction and he sent three police officers as requested. The the petitioner was threatening the security of everyone at the scene which forced police officers to arrest him for creating disturbance in a manner likely to cause breach of peace.

15. He deposed that the petitioner resisted arrested but was escorted to Ngong police station where he was booked under OB 103/18/10/2018 for creating disturbance in a manner likely to cause breach of peace and placed in cells. He stated that the petitioner was taken to hospital for treatment the following day after experiencing convulsions and foaming in the mouth while in the police cells. He was then returned to the cells and later released at about 5pm (15.22 hours) and directed to report back to his (the 2nd respondent's office) which he did not do.

16. After investigations by the DCI, the ODPP Kajiado recommended that the petitioner be charged under section 95(1) (b) of the Penal Code and although a warrant of arrested was issued and a charge sheet prepared the Petitioner is yet to plead. According to the 2nd respondent, the petition is intended to frustrate further investigations and any likely prosecution that the petitioner may face. It is also meant to intimidate the respondents from discharging their duties.

17. He contended that they acted within the law and deposed that the Constitution, in particular, Articles 245 and 259(3) (a) and sections 35 and 51 of the National Police Service Act. He maintained that he and the 3rd respondent are obligated to investigate and apprehend any alleged offenders and the court can only interfere if they discharged their mandate contrary to the Constitution and the law which the petitioner had failed to demonstrate.

Petitioner's submissions

14. The petitioner submitted through his written submissions dated 12th October, 2020, that he had the right to bring an action on his own behalf under Article 22 of the Constitution and the **Mutunga Rules**. He relied on **Jacob Nyandega Osoro v Chief Justice of Kenya & another** [2018] eKLR.

15. He submitted that his arrest and detention violated his constitutional rights as the respondents did not act within the law. He argued that the power to arrest without a warrant under section 36 of the Criminal Procedure Code could be challenged in court when exercised in violation of human rights.

16. According to the petitioner, his arrest and detention was a violation of Article 49 (2) of the Constitution given that he was arrested on allegations of an offence that carries a maximum sentence of 6 months. He asserted that arrest and detention of a suspect is generally considered an infringement of the right to liberty and freedom of the person, inherent right to human dignity; right to privacy, and the right to equality and freedom from discrimination guaranteed under Articles 28, 29, 31 and 27 of the Constitution which the respondents did not justify. He relied on **Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)** [2018] eKLR.

17. It was the petitioner's argument that Article 25 of the Constitution guarantees freedom from torture and cruel, inhuman or degrading treatment or punishment and the respondents cannot rely on section 36 of the Criminal Procedure Code to shield their unlawful actions. He cited **Re S v Walters & another, In re: Ex parte Minister of Safety and Security and Others** (CCT28/01) [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) in support of his case.

18. The petitioner further argued that the respondents did not demonstrate that they had followed the procedure under the Kenya National Police Service Act, thus their actions amounted to an infringement of his right to human dignity guaranteed under Article 28 of the Constitution. He maintained that detaining him in police cells for more than 19 hours violated his right under Article 27 (4). He relied on **Republic v Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 others exparte Kenya Country Bus Owners Association & 8 others** [2014] eKLR.

19. According to the petitioner, he was tortured and subjected to inhuman and degrading treatment during arrest and while in police cells. He was handcuffed and the handcuffs tied to the roof of the vehicle to perpetuate torture. He was also beaten while in the police cells and regained consciousness the following day at Zamzam Medical Services. "The 2nd, 3rd and 4th respondents' actions were aimed at causing him psychological and emotional pain to ensure that he and his son did not attend his wife's burial, a clear violation of his fundamental rights." He submitted.

20. Regarding damages, he prayed for general and punitive damages, arguing that by virtue of Article 23 (3)(e) of the Constitution, the court should award adequate compensation on finding that the respondents violated or infringed his rights and fundamental freedoms. He relied on **Kenneth Stanley Njindo Matiba v Attorney General** [2017] eKLR.

21. On quantum, he urged for general damages of Kshs. 10,000,000 and a similar figure for punitive damages. He relied on **Akusala A. Boniface v OCS Langata Police Station & 4 others** (Petition No. 351 of 2017) [2018] eKLR; **Daniel Waweru Njoroge & 17 others v Attorney General** (Civil Appeal No. 89 of 2010) [2015] eKLR and **Mohamed Feisal & 19 others case** (supra). He also prayed that the respondents be condemned to pay costs personally and cited the decision in **Jack Coetzee v National Commission of Police & Another** (CCT124/12) [2013] ZACC 29. He argued that section 66 (1) of the National Police Service Act is only applicable where the act complained of was done in good faith for the performance and execution of the functions, powers or duties of the service which was not the case herein.

Respondents' submissions

22. The respondents filed written submissions dated 21st December, 2020. They submitted that the petitioner was lawfully arrested and placed in cells for 19 hours which was also lawful. They also submitted that they did not violate the petitioner's rights and fundamental freedoms guaranteed under Articles 49(2), 27, 28, 29 and 31. They argued that by virtue of section 24 of the National Police Service Act, they were mandated to maintain law and order, preserve peace, investigate crimes and apprehend offenders among others.

23. The respondents contended that they can also arrest without warrant for offences falling under section 29 (a) and (b) of the Criminal Procedure code; section 58 of the National Police Service Act and section 1 (3)(a) (b) Chapter 15 of the National Police Service Standing

Orders. In the respondents' view, the Constitution and article 9 of the International Covenant on Civil and Political Rights (**ICCPR**) recognize instances where persons can be deprived of liberty if it is done in observance of the rule of law. They argued, therefore, that the petitioner's arrest was lawful as it was a response to a private citizen's distress call as he threatened a breach of peace.

24. Regarding the petitioner's allegations that he was assaulted, they contended that he was arrested using reasonable force, notwithstanding that he tried to resist. They also maintained that he was in police custody for 19 hours which was lawful. They contended that releasing an arrested person on police bond is not an automatic right but discretionary and the Officer in Charge of Station may exercise this discretion for offences contemplated under Article 49 (2). They also argued that Article 49(2) should be construed to bear a permissive connotation and does not impose a strict mandatory obligation.

25. It was the respondents' case that the petitioner was held for period allowed by law and, therefore, they did not contravene the Constitution. They relied on *The Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR (Advisory Opinion No. 2 of 2012) and *Eliud Gakunju Ngutha & 3 others v Attorney General & 3 others* [2012] eKLR on interpretation of the Constitution.

26. On the allegation that the police tortured and subjected the petitioner to cruel, inhuman and degrading treatment, they relied on the definition of torture in **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**, to argue that the petitioner did not adduce evidence to demonstrate the alleged torture or mistreatment. They maintained that the petitioner is not entitled to the reliefs sought since he had not demonstrated the unlawfulness of his arrest or show that the grounds for his arrest were unreasonable. They relied on *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, for the argument that the state bears responsibility for the constitutional violations and not the individuals who committed the atrocities. They also relied on section 66 (1) of the National Police Service Act which protects police officers from personal liability.

27. The respondents argued that the South African case of *Jack Coetzee v National Commissioner of Police and Another* (CCT 124/12): [2013] ZACC 29: 2013 (11) BCLR 1227(CC) (29 August 2013) cited by the petitioner was for leave to appeal the decision of the Supreme Court of Appeal on the costs awarded and was, therefore, not applicable. They also argued that the High court decision condemning police officers to pay costs personally was overturned and set aside by the Supreme Court of Appeal in its decision in *National Commissioner of Police v Coetzee* (649/11) [2012] ZASCA 161 (2012) [17].

28. The respondents also argued that any damages awarded under public law for violations of constitutional rights of individuals by the state should not be punitive but only suffice to vindicate the victim. They further argued that the petitioner is not entitled to any damages as he did not demonstrate that the respondents' actions were actuated by malice. They urged the court to find that their actions were within the law; were in good faith and in execution of their statutory duty. They urged the court to dismiss the petition with costs.

Determination

29. I have considered the petition, the response and submissions by parties. I have also considered the decisions relied on. Two issues arise for determination. First, whether the petitioner's rights were violated and, depending on the answer to this issue, whether he should be compensated.

30. The petitioner's case is that he was unlawfully arrested, police officers who tortured and detained him for 19 hours in violation of his fundamental rights and freedoms. He stated that in furtherance of the torture, police officers tied his hands on the roof of the police vehicle when he was being taken to the police station; beaten him while in police cells and he had to be taken to hospital for treatment. He was returned to the cells but was later released with instructions to report back on another dated. These acts, he argued, violated his rights and fundamental freedoms.

31. The respondents denied that the petitioner was unlawfully arrested, mistreated or tortured. According to the respondents, the petitioner was arrested for threatening a breach of the peace and although he tried to resist, he was eventually taken to the police station and placed in cells. He developed convulsion while in police cells and was taken to hospital for treatment and later returned to the cells. They maintained that he was in police custody for only 19 hours before he was released which was lawful. They, therefore, denied that the petitioner was tortured or that his rights and fundamental freedoms were violated.

32. The undisputed facts in this petition are that the petitioner was arrested at a home at Kerarapon where he had gone to pick a child he said was his. He stated that he was in the company of two police officers from Kerarapon Police Post. Police officers were sent to the home ostensibly to maintain law and order, responding to a distress call from the owner of the home for fear of a threat to breach of the peace. Police officers sent to the scene on sensing more trouble, called for reinforcements which was answered and more officers sent.

33. The petitioner was arrested and taken to Ngong Police Station where he was booked and placed in cells. He later developed health problems and was taken to hospital for treatment. He was returned to the police cells but was eventually released after nineteen (19) hours. It is on the basis of these facts that the petitioner has filed this petition pleading that his rights and fundamental freedoms were violated. The respondents' contention is that the petitioner's conduct was criminal and that was why he was arrested. They denied that the petitioner's rights were violated.

34. I have carefully read the pleadings as well as the record. It is not clear from where the police officers, the petitioner said accompanied him to pick the child were and what they did during the petitioner's arrest. Both the petitioner and the respondents were silent on this although both sides claim it was police officers from Kerarapon Police Post that were involved.

35. According to the respondents, the petitioner was arrested because of a distress call that had been made leading to the response. The petitioner did not deny that there was such distress call or that the police were not responding to the distress call. He did not tell the court how the police came to know he was at the homestead for them to go and arrest him. He stated that the husband to his deceased wife's sister went with the police when he was waiting at the gate after he was denied entry to the home. What is clear is that the petitioner was at the

home when the police went there and that was where he was arrested. There is, however, no independent evidence to assist the court determine on what exactly happened at the scene.

36. The petitioner argued that he was tortured by the police who unlawfully arrested and detained him for 19 hours. He stated that his hands were also tied to the roof of the police vehicle as he was driven to the police station. The respondents' case was that the petitioner tried to resist arrest but was eventually arrested and taken to the police station as a suspect. They denied that he was in any way tortured or subjected in an inhuman or degrading treatment.

37. Article 19 of the Constitution declares that the Bill of Rights is an integral part of our democratic state and is the framework for economic, social and cultural policies. It emphasizes that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The rights and freedoms in the Bill of Rights belong to individuals and are not granted by the state.

38. On the other hand, Article 20(1) provides that the Bill of Rights applies to all law and binds all state organs and persons. Sub Article (2) states that every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the right and fundamental freedom. This court, as a state organ is, therefore, bound to enforce and protect the enjoyment of the rights and fundamental freedoms in the Bill of Rights.

39. The petitioner's claim is that his rights and fundamental freedoms were violated as he was subjected to torture, inhuman and degrading treatment. The Constitution protects everyone's right from torture and inhuman treatment. In that respect, Article 25 is clear that the freedom from torture and cruel, inhuman or degrading treatment or punishment is a non derogable right. In other words, this is an absolute and inalienable right that cannot be limited. A claim by anyone that he has been tortured or treated in a dehumanizing manner by those responsible for protecting his life and property, is a grave and serious indictment that a court that is obligated to enforce and protect rights and fundamental freedoms should not take lightly.

40. It is, however, incumbent upon the person making the claim of torture or inhuman and degrading treatment, to establish the claim to the satisfaction of the court, if the court is to remedy that violation. This is because the Court has been clothed with jurisdiction under Article 165(3) (b) and (d) (ii) of the Constitution to determine whether rights or fundamental freedom in the Bill of Rights have been denied, violated, or infringed. And as this court observed in *Miguna Miguna v Dr. Fredrick Okengo Matiang'i, Cabinet Secretary for Ministry of Interior and Coordination of National Government & 7 others* [2018] eKLR, it must be everyone's obligation to uphold the Constitution, respect, enhance and protect human rights and fundamental freedoms because they are the foundation of the rule of law and good governance.

41. The petitioner's claim as well as the response thereto were through affidavit evidence. Apart from what the deposed in the affidavit and stated in his written submissions, he did not adduce any other direct evidence to show that he was indeed tortured given that the respondents also denied his claim through depositions in their replying affidavit. For instance, the petitioner did not adduce medical evidence to show that what he treated for when he was taken to hospital. He stated that he was taken to hospital following beatings by police officers but the respondents refuted the claim and contended that he developed convulsion and difficulty in breathing necessitating his being taken for medical attention. This leaves the court without clear evidence from either side on why the petitioner was taken to hospital. It would have been proper for the petitioner to adduce evidence that would have assisted the court determine this issue given that he was the one alleging that he was taken to hospital following the torture he was subjected to while in the hands of the police.

42. The petitioner and the respondents are in agreement that he was released from police custody the same day he was discharged from hospital and, therefore, he had an opportunity to get medical documents to show why he had been taken to hospital and what he was treated for. That, without a doubt, would have established if he was indeed tortured by the police as he asserted.

43. The law places the burden on the person who alleges existence of certain facts and who wishes the court to find in his favour based on those set of facts. Sections 107 through 109 of the Evidence Act place the burden of proof on the petitioner to prove his claim on a balance of probabilities. Section 107 is clear that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Further, section 108 provides that the burden of proof in civil proceeding lies on that person who would fail if no evidence at all were given on either side. It is in that context that section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

44. Clearly, from a legal stand point, the petitioner had the burden to prove on a balance of probability, that he was tortured or subjected to inhuman and degrading treatment by the respondents or their juniors which was in violation of his rights and fundamental freedoms. This he did not do.

45. In *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR, the Supreme Court stated on the evidential burden of proof:

[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

46. The petitioner did not discharge his burden of proof that he was tortured and or subjected to inhuman and degrading treatment. He did not show what he was suffering from when he was taken to hospital so as to shift the burden to the respondents to explain, if at all, how and why he (the petitioner) sustained injuries, if any, while in police custody.

47. This court as the custodian of the constitution, the rule of law and protector of human rights and fundamental freedoms, has not only a

duty but also an obligation to ensure that every person acts within the law and respects human rights and fundamental freedoms in the Bill of Rights. The respondents and their juniors are not exempted from observing the Constitution and in particular human rights and fundamental freedoms. Indeed, Article 244 of the Constitution is clear that one of the objects and functions of the National Police Service in which the respondents serve, is to comply with constitutional standards of human rights and fundamental freedoms.

48. The petitioner did not discharge the burden placed on him by the law to warrant this court to return a favourable verdict that the respondents or those acting under them tortured him and as a consequence, violated his rights and fundamental freedoms.

49. The petitioner further argued that his arrest was unlawful and that the intention to prosecute him was not made in good faith. The respondents maintained that the petitioner was arrested for committing an offence, namely, causing a disturbance which was likely to cause a breach of the peace. It was their case that police arrested the petitioner while exercising their constitutional and statutory mandate.

50. Whether or not the petitioner was lawfully arrested or, put differently, whether the police had reasonable grounds to arrest the appellant is again a matter of evidence. As I have already stated, this petition was conversed through affidavit evidence and written submissions without the benefit of cross examination. This court was left in a difficult position to tell whose version, between the petitioner and the respondents, to believe.

51. The petitioner again argued that he was detained for nineteen (19) hours which was unlawful. Both the petitioner and the respondents agree that he was in police custody for 19 hours but was released. Article 49(1)(f) of the Constitution provides that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than twenty-four hours after being arrested. There is no doubt that the petitioner was released before the constitutional timeline lapsed. There would be no basis for the petitioner to argue that the period he was held in police custody was unconstitutional and was in violation of his constitutional rights and fundamental freedoms.

52. Having considered the petition, the response submission, the Constitution and the law, I am not satisfied that the petitioner has made a case for grant of the reliefs he sought. Consequently, the amended petition is declined and dismissed. Each party shall however bear their own costs.

Dated, Signed and Delivered at Kajiado this 24th day of September 2021.

E C MWITA

JUDGE