



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PETITION NO. 1 OF 2020

WESELY MARIGA SIRIMANI.....1ST PETITIONER

BERNARD ONCHARI MABUOGA.....2ND PETITIONER

VERSUS

KIPKEBE LIMITED.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

By the amended Petition dated 12th November 2020 the Petitioner seeks orders for:

- “a) A Declaration that the holding of the Petitioners by the Respondents jointly and or severally without taking them to court amounted to a breach of the Petitioners’ rights to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause.**
- b) A Declaration that the confiscation of the Petitioners livestock and refusal to release it to the Petitioners who were the rightful owners even after extorting them amounted to a violation of the Petitioners right to acquire and own property of any description and in any part of Kenya.**
- c) A consequent order of mandamus directed at the 1st and 2nd Respondents to release the herd of 8 goats, 1 kid and 5 sheep to the Petitioners at the premises of the 1st Respondent being Kipkebe Limited.**
- d) Compensation for the loss of three kids and three goats as well as a refund of all the monies extorted from the Petitioners by the Respondents.**
- e) An award of damages for compensation for the violations of the Petitioners rights.**
- f) The cost of the petition.**
- g) Interest on (d) & (e) above to the Petitioners from the date of the judgment until full statement.**
- h) Any other relief that the Honorable court is pleased to issue in the circumstances.”**

The Petitioners’ case is that on the evening of 13th July 2020 they noticed that their herd of 8 goats, a kid and 5 sheep were missing from their homestead and upon carrying out a search they learnt that the livestock had been confiscated and detained by the 1st Respondent’s guards. On 14th July 2020 the Petitioners visited the 1st Respondent’s premises to make enquires but they were kept waiting at the security office until 1:00pm when they were arrested by police officers in plain clothes and taken to a police camp within the 1st Respondent’s premises. Thereafter the Petitioners were detained at the camp until about 7p.m. when they were released on condition that they would pay to the 1st Respondent Ksh. 1000 and Ksh. 1500 respectively for each kid and goat. The Petitioners were also required to pay Ksh. 1000 per goat and sheep to the 1st Respondent before their livestock could be released. It is their case that on 16th July 2020 at 3:46pm the 1st Petitioner paid Ksh. 7000/- to the 1st Respondent through a till number and was issued with a receipt. However, the 1st Respondent refused to

release his livestock and directed him to look for the 2nd Petitioner. The 1st Petitioner averred that on 17th July 2020 he met the 2nd Petitioner who informed him that he had hired an advocate who had sent a demand letter to the 1st Respondent seeking the release of the livestock but that the advocate tried to serve the demand letter on 18th July 2020 but was told to return on a weekday; that on 20th July 2020 the Petitioners served the demand letter on the 1st Respondent who received the letter only to be told that their livestock had been handed over to the Anti-Stock Theft Police. The Petitioners contend that they tried to report the matter to Nyamira Police Station but they were denied audience. The Petitioners aver that the illegal detention of their livestock deprived them of a source of income. They further averred that the detained livestock were lactating and that some of the lambs and kids had died for lack of milk and that they were forced to buy milk to feed the surviving ones.

The 1st Respondent responded to the petition by way of a replying affidavit dated 15th July 2020 sworn by Silas Juma Njibwakale, the Managing Director of the 1st Respondent, where he deposed that on 14th and 15th July 2020 the Petitioners let loose their livestock which invaded the 1st Respondent's farm and destroyed the tea plantation; that the 1st Respondent made efforts for a better part of the day to trace the owners of the animals but without success; that when it became late they reported the matter to the Anti-Stock Theft Police Unit as they did not have a place to hold the livestock; that on 17th July 2020 the Petitioners presented themselves to the 1st Respondent and a mediation chaired by the Chief and local elders was held to reach an amicable agreement on the release of the livestock to the Petitioners and compensation to the 1st Respondent for the destruction caused by the animals; that it was agreed that the Petitioners were to pay Ksh. 7000/- as compensation to the 1st Respondent and that as the meeting ended late in the evening it was agreed that the Petitioners were to collect the livestock the next day. It is the 1st Respondent's case that the Petitioners failed to collect the livestock as agreed and the 1st Respondent reported the matter to the Anti-Stock Theft Unit and handed over the livestock to them. The 1st Respondent denied being served with a demand letter from the Petitioners' advocates and deposed that when they were served with the court order and pleadings in this case, they informed the process server that the livestock was available for collection from the Anti-Stock Theft Unit. He further deposed that this petition does not raise any constitutional issues and the same is an abuse of the court process as the Petitioners are merely seeking to gain compensation and damages despite agreeing to and paying Ksh. 7000/- to the 1st respondent. He contended that the petitioners were peddling falsehood so as to sway the mind of the court to award them damages.

The 2nd and 3rd Respondent responded to the amended petition by way of Grounds of Opposition dated 30th November 2020 wherein they stated:-

“1. That the constitutional petition and Notice of Motion filed by the Petitioner is blatantly incompetent as the Petitioner failed to set out with reasonable precision that of which he complains and the manner in which his constitutional rights have been infringed by the 1st Respondent.

2. That the Petitioners have not adduced any evidence to demonstrate violation or imminent threat of their constitutional rights.

3. That the Petitioners have not demonstrated a prima facie arguable case on breach of any constitutional provisions or fundamental and human rights or any other provision of the law by the 2nd and 3rd Respondent.

4. That the petition before the High Court referred to Article 25, 28, 29, 40, 47 48 and 49 of the Constitution in its title. We wish to reaffirm the principles holding on this question in Anarita Karimi Njeru [1979] eKLR in view of this, the petition before the High Court did not meet the threshold established in that case.

5. That the petition had been prematurely brought before this Honourable Court.

6. That both the application and petition raises mere and baseless accusations against the 2nd and 3rd Respondent without any justifiable proof.

7. That both the petition and application raises unsubstantiated claims as against the 2nd and 3rd Respondent with a view of dragging the police in personal disputes.

8. That both the petition and application is misconceived, frivolous, vexatious and improperly before the court and an abuse of the court process.

9. That both the petition and the application is an abuse of this honorable courts time and should be dismissed with costs.”

Submissions

Parties agreed to canvass the petition by way of written submissions and the same were duly filed.

The Petitioners relied on their submissions dated 9th June 2021 where Counsel framed the following six issues for determination: -

a) Whether or not the Petitioners' rights to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause by the Respondents jointly or severally?

b) Whether or not the Petitioners' rights either individually or in association with others, to acquire and own property of any description and in any part of Kenya was violated?

c) Whether the decision by the 1st and 2nd Respondent arresting the Petitioners and unilaterally deciding to impose the fine amounts to not only extortion but also depriving the Petitioners of their right to be heard as well as administrative action that is expeditious, efficient, lawful, reasonable and procedurally fit?

d) Whether or not the Petitioners' deserve compensation for the loss of three kids, three goats and a refund of all the monies extorted from them by the Respondents as well as interest on the same?

e) Whether or not the Petitioners deserve an award of general damages for compensation for the violation of their rights?

f) Who is to bear the cost of this petition.

On the first issue, counsel submitted that on 14th July 2020 the Petitioners were detained for six hours hence depriving them of their freedom arbitrarily and without just cause contrary to Article 29 of the Constitution. He contended that this fact was not denied by the 2nd Respondent and that the same remained uncontroverted.

On the second issue counsel submitted that the fact that the livestock belonged to the Petitioners was not denied. He submitted that the Respondents had no justification to confiscate the livestock but should have instead arrested and presented the Petitioners before a court of law where the matter would have been adjudicated. It was counsel's further submission that the 1st Respondent misled the court when he claimed that the parties held a meeting on the evening of 17th July 2020 where it was agreed that the Petitioners' were to pay Ksh. 1000/- for every goat and sheep. Counsel submitted that the 1st Petitioner paid the extorted amount of Ksh. 7000/- on 16th July 2020 and not on 17th July 2020, as evidenced by the receipt issued by the 1st Respondent and the Mpesa message received by the 1st Petitioner, a day before the alleged meeting contrary to the allegation by the 1st Respondent. It was counsel's further submission that the Respondents violated the Petitioners' right to own property. Counsel urged this court to also consider the conduct of the Respondents who acted in contempt of the court's order to return the livestock.

On the third issue Counsel for the Petitioners submitted that if the 1st Respondent was aggrieved by the trespass and destruction of the tea by the Petitioners' livestock, the legal and lawful step would have been to report the matter to the police and have the matter go through the criminal process. Counsel contended that the 1st Respondent acted arbitrarily when it took matters into its own hands and thereby violated the Petitioner's right to a fair hearing, their right to be heard as well as right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fit.

On whether the Petitioners deserve compensation for loss of three kids, three goats and a refund of all the monies extorted together with interest, it was Counsel's submission that the monies were not lawfully obtained from the Petitioners but rather from their vulnerability and that the livestock died while in the unlawful custody of the Respondents and therefore the Respondents should be held liable.

On whether the Petitioners deserve an award of general damages for the violation of their rights Counsel submitted that the answer to this was in the affirmative as the Respondents unlawfully confiscated the Petitioner's livestock and extorted money from them. Counsel submitted that the Petitioners incurred the extra cost to collect the livestock approximately 30kms away after the Respondents failed to obey the court order issued at the interlocutory stage. Counsel submitted that not all the livestock were returned to the Petitioners and hence the Petitioners deserved compensation for violation of their rights under Article 23(3) of the Constitution.

On the issue of costs Counsel for the Petitioners submitted that costs are in the discretion of the court and they follow the cause. Counsel contended that the Petitioners had demonstrated the reasons that necessitated institution of this Petition. In conclusion, counsel for the Petitioners submitted that the Petitioners are seeking redress for the violation of their rights under Articles 28, 29, 40, 47, 48 and 49 of the Constitution and prayed that the court allows the petition with costs.

On his part Counsel for the 1st Respondent submitted that the 1st Respondent had articulated the facts of the case and how they came to be Respondents in this case, which deposition had not been controverted or rebutted by the Petitioners and such failure amounted to an admission of facts as held in the case of **REPUBLIC v MAKUENI DISTRICT LANDS TRIBUNAL & 4 OTHERS EX PARTE SHADRACK KIMUKA MUTULU [2018] eKLR**.

On the allegation that 1st and 2nd Respondent went to the Petitioners' home and confiscated the livestock and extorted Ksh. 7000/- from them Counsel for the 1st Respondent submitted that the Petitioners' livestock were left to roam and as a result strayed into the 1st Respondent's farm and grazed on the 1st Respondent's tea hence destroying it. Counsel contended that when the 1st Respondent's security got wind of the trespass they went to the farm and found children herding the livestock but on seeing them the children fled leaving the livestock behind. Counsel submitted that the security guards took the livestock to a safe place to mitigate the damage occasioned as they searched for the owners. Counsel submitted that the Petitioners later went to claim the livestock triggering the discussions that led to the Petitioners offering to pay Ksh. 7000/- as compensation for the damaged tea. Counsel stated that the Petitioners were supposed to collect the livestock at the end of the meeting but the meeting ended late in the night and it was agreed they would do so the next day but the Petitioners did not return prompting the 1st Respondent to report the matter to the Anti-Stock Theft Police and to surrender the cattle there for safe keeping. Counsel submitted that the Petitioners rights were not violated. Counsel stated that the Petitioners did not prove the allegations of violation as provided under Sections 107-112 of the Evidence Act. Counsel for the 1st Respondent further submitted that the 1st Respondent had gone out of its way to care for the Petitioner's livestock and even expended money to treat the livestock that had become sick which would not have been the case if it had bad intentions. Counsel submitted that the Petitioners wanted to gain monetary enrichment through the current proceedings by lying that the 1st Respondent occasioned the loss of three livestock which was contrary to their statement in the contempt proceedings. Counsel contended that the law requires citizens to report any infringements against them to the police and the police are required to take action as held in the case of **ROBERT OKERI OMBEKA v CENTRAL BANK OF KENYA [2015] eKLR**. He contended that when the Petitioners failed to collect their livestock, the 1st Respondent discharged its duty and reported and handed over the

livestock to the police who deal with cases pertaining to livestock. Counsel submitted that the Petitioners had a duty to ensure that while enjoying their right to property they equally respected and upheld the rights of other parties. Counsel contended that the Petitioners cannot seek to benefit from their wrongful acts as it is a principle in equity that the court will not aid a wrong doer for his commissions or omissions. To support this submission counsel cited the case of **PETER OMOKE OMONYI V CHARLES KAMAU MUTHONI [2017] eKLR**.

In conclusion, Counsel for the 1st Respondent submitted that the Petitioners failed to demonstrate that their constitutional rights were violated or that they were extorted and urged the court to dismiss the petition with costs.

In their submissions dated 29th June 2021 the 2nd & 3rd Respondents framed the following issues: -

- “a) Whether the petition has met the constitutional threshold.**
- b) Whether the 2nd Respondent violated the Petitioners’ rights.**
- c) Whether the Petitioners are entitled to damages.**
- d) Whether the Petitioners are entitled to costs.”**

On the first issue Counsel for the 2nd & 3rd Respondents submitted that this petition does not meet the constitutional threshold as it failed to disclose with a reasonable degree of precision the manner in which the 2nd and 3rd Respondents violated the Petitioners rights. Counsel for the 2nd and 3rd respondents cited the case of **ANARITA KARIMI NJERU v REPUBLIC (1979) EKLK 154** and the case of **MUMO MATEMU v TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS (Civil Appeal No. 290 of 2012) [2013] eKLR**. Counsel submitted that mere allegations of violation of human rights or fundamental freedoms is not sufficient. For this submission Counsel relied on the case of **HO (suing through next friend PO (a minor) v PETER OBWOGO O the Secretary Board of Management St Joseph Boys High School & 3 Others [2016] eKLR**. Counsel contended that the Petitioners did not prove that their right to freedom had been violated as they failed to disclose who arrested them and which police station they were taken to, whether the report was recorded and whether they obtained an O.B extract.

On the second issue, Counsel submitted that under **Section 51 of the National Police Service Act** the 2nd Respondent has a mandate to maintain law and order and to preserve and maintain public peace and therefore that the 2nd Respondent had a duty to investigate any complaint and only needed to establish reasonable suspicion before preferring charges. In support of this submission Counsel cited the case of **REPUBLIC v COMMISSIONER OF POLICE & ANOTHER EXPARTE MICHAEL MONARI & ANOTHER [2012] eKLR**. Counsel contended that moreover **Article 24 (1)** of the Constitution provides that fundamental freedoms can be limited by law to the extent that the limitation is reasonable and justifiable.

On whether the Petitioners are entitled to damages, Counsel for the 2nd & 3rd Respondents submitted that the Petitioners failed to demonstrate in specificity how and who deprived them of their right to property and stated that the 2nd and 3rd Respondents did not violate those rights. Counsel relied on the case of **MBOGO & ANOTHER v SHAH [1968] EA 93** where the court stated that compensation was an appropriate and effective remedy for redress of an infringement of a fundamental right but it depended on the circumstances of the case and judicial discretion.

On the issue of costs, Counsel submitted that there was no violation of the Petitioners’ rights by the 2nd and 3rd Respondents as they only executed their statutory obligations and it would be unjust to condemn them to costs.

Having considered the petition, the responses thereto and the rival submissions of learned for the parties my finding is that the issues that arise for determination are:-

- 1. Whether this petition meets the constitutional threshold and whether the petitioners are entitled to the prayers sought.**
- 2. Who bears the costs of the petition.**

Issue No. 1.

The threshold for constitutional petitions are settled. In the case of **ANARITA KARIMI NJERU v REPUBLIC [1976-80] KLR 1272** it was held that a person who alleges a violation of his constitutional rights and freedoms must plead such violations with a reasonable degree of specificity. The above principle was reiterated in the case of **MUMO MATEMU v TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE 5 OTHERS [2013] eKLR**. After the party who alleges violation of constitutional rights has complied with the principle in the **ANARITA KARIMI NJERU case (Supra)** the party must then prove the violation. In the case of **MOHAMED ABDUBA DIDA V DEBATE MEDIA LIMITED & ANOTHER [2018] eKLR** the Court of Appeal citing with approval the Zimbabwean case of **CATHOLIC COMMISSION FOR JUSTICE AND PEACE IN ZIMBABWE v ATTORNEY GENERAL (1993) 2 LRC (Const.) 279** held:-

“.....this is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner’s knowledge. Once the case is made out the burden shifts to the other party.”

Odunga J elucidated this principle in the case of **LUCY NYAGUTHII WACHIRA v COUNCIL FOR LEGAL EDUCATION & 3 OTHERS [2017] eKLR** when he stated: -

“The law is, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests on the state or authority limiting the fundamental right or freedom. As was held in LYOMOKI and OTHERS v ATTORNEY GENERAL [2005] 2 EA 127, the principles of constitutional interpretation are that firstly, the onus is on the petitioners to show a prima facie case of violation of their constitutional rights. Thereafter the burden shifts to the council to justify that the limitation to the freedom from discrimination in the impugned decision is justified.”

The Petitioners herein cited several Articles of the Constitution where they allege that their rights and fundamental freedoms were violated. It was indeed not disputed that their livestock was confiscated by the 1st Respondent. It is my finding however that the 1st Respondent gave a plausible explanation for impounding the same. The explanation was that the livestock which had been left to be herded by children strayed into the 1st Respondent’s tea plantation and destroyed the crop and that when the children saw the security officers of the 1st Respondent they ran away and abandoned the cattle. I am persuaded that the 1st Respondent acted reasonably in impounding the livestock to await the owners to claim it as it did. I am also persuaded that after the Petitioners turned up and claimed the cattle the 1st Respondent entered into talks with them and it was agreed that the 1st Respondent would release the livestock but on condition that the Petitioners paid compensation for the damaged crop. It is my finding that indeed the 1st Petitioner paid Kshs. 7,000/- and was issued with a receipt. I am not persuaded that the 1st Petitioner was extorted to pay the money as otherwise he would not have been issued with a receipt. On the contrary, I find that the 1st Petitioner paid the sum of Kshs. 7,000/- freely and voluntarily upon entering into an agreement with the 1st Respondent following destruction of its tea crop by his livestock. I agree with counsel for the 1st Respondent that indeed this petition was brought to counter the agreement which the Petitioners had with the 1st Respondent. The 1st Respondent’s evidence (in the replying affidavit) that the agreement was that the Petitioners were to take their livestock that same day but were prevented from doing so by the fact that the meeting ended late was not controverted. The Petitioners knew very well that their cattle had damaged the 1st Respondent’s crop and had agreed to compensate the 1st Respondent and go away with their livestock but instead of keeping their end of the bargain they abandoned their cattle and instructed an advocate to file this petition. I am satisfied that he 1st Respondent had no alternative but to cede the cattle to the Anti-Stock Theft Unit as it did. I am not therefore persuaded that the 1st Respondent violated the Petitioners’ right to property as alleged.

On the issue of unlawful detention, the Petitioners’ allegation that they were arrested and detained by the police for six days was not proved. It is clear from the affidavit of the 1st Respondent that it was the Petitioners’ livestock that was impounded and detained but not the Petitioners themselves. If indeed they were arrested, then they should have given this court the names of the officers that arrested them. They also claimed to have made an attempt at reporting the matter to Nyamira Police Station but were not given an audience. That is very easy to say but for this court to believe them they required to tender evidence that they indeed went to the police station to report, the name of the officer they attempted to make the report to and what steps they took upon being ignored by the officer because as we all know the force has a chain of command as well as reporting lines. It is not therefore enough to merely allege that one went to a police station but they were ignored.

The upshot is that I am not satisfied that the Petitioners proved their case against the Respondents on a balance of probabilities to warrant this court to find in their favour and to grant them the prayers sought. Indeed, I find that the case does not meet the threshold for a constitutional petition as the remedies sought could as well have been sought in a civil case. My so stating finds support in the holding in the case of **HARRISON v ATTORNEY GENERAL of TRINIDAD AND TOBAGO [1980] A C 265** cited with approval in the Kenyan case of **ALPHONSE MWANGEMI MUNGA & 10 OTHERS v AFRICAN SAFARI CLUB LIMITED [2008] eKLR**. In the said case it was held that: -

“....The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

In the case of **ALPHONSE MWANGEMI MUNGA & 10 OTHERS (supra)** the court, and I agree with it, emphasized that ***“parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not.”*** As in that case I do not see why the Petitioners moved to this court by way of a Constitutional Petition if all they wanted was to set aside the agreement they had entered into with the 1st Respondent in regard to the damaged tea crop. In the premises I find no merit in the petition and it is dismissed in its entirety.

Costs follow the cause and the Petitioners shall therefore bear the costs of the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER, 2021.

E. MAINA

JUDGE