



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

PETITION NO. 09 OF 2015

BETWEEN

JUSTUS OCHIENG.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Background

1. The Petitioner, a journalist with the Star Newspapers, at the material time, on 01st October, 2014 did a story titled “Mystery over return of cop’s stolen money” on the basis of a report from a member of public that he had been robbed by a CID officer attached to Kisumu Central Police Station.
2. As a follow up, the Star Newspapers on 02nd October, 2014 ran an editorial titled “Arrest robber with CID day job” after which the Petitioner claims that he started to receive threats to his life from known Police officers as a result of which he made a report to Kisumu Central Police Station on 08th October, 2014.
3. The Petitioner complains that on 29th October, 2014, he went to the police station to make a follow up on his case but was arrested and detained until the following day, 30th October, 2014 within which time he was tortured by known police officers and treated with inhuman and degrading manner.
4. The Petitioner asserts that he complained about the police officers who tortured him to Nyando Police Station on 30th October, 2014 but no charges were preferred against them.

The Claim

5. It is the Petitioner’s case that his arrest and subsequent detention were a violation of his fundamental rights and freedoms and seeks a declaration that the Respondent’s conduct infringed his constitutional rights under Articles 25 (torture), 29 (freedom and Security of person), 33 (expression), 48 (access to justice), 49 (arrested persons’ rights) and 51 (Rights of persons detained, held in custody or imprisoned). In a nutshell, he posits that he was merely exercising his constitutional rights of expression when he on 01st October, 2014 did a story titled “Mystery over return of cop’s stolen money.”
6. The Petitioner stated that he was beaten as a result of which he suffered injuries as revealed by a P3 form which was produced as **PEXH. 4.**
7. In support of his claim, the Petitioner placed reliance on **Johnson Gacheru Ngigi v Inspector General of the National Police Service & Another [2019] eKLR** where the court adopted definition of torture and inhuman treatment in the European Court of Human Rights in the case of **Greek Case 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R** that;

“The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a

purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”

8. Additionally, Petitioner also relied on Samuel Rukenya Mburu vs Castle Breweries, Nairobi HCC 1119 OF 2003, where Justice Visram held that

“prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel.” while degrading punishment is “that which brings a person dishonour or contempt.”

9. Reliance was also placed on Jamlik Muchangi Miano v Attorney General [2017] eKLR where the court stated that:

“When a citizen is lawfully exercising his/her constitutional rights of expression as in the present case, his/her Fundamental Rights are not abrogated in toto.....”

10. In Dennis Itumbi v Attorney General & 2 others [2018] eKLR, Onguto J stated that:

“I am more than convinced that the framers of the Constitution did not intend that the Service continues to hold an arrested person even where it is obvious that they would not be taking such person to court.”

11. Flowing from the foregoing, the Petitioner seeks general damages in the sum of Kshs. 15,000,000/- for breach of his constitutional rights, special damages and costs of the petition.

Respondent’s Case

12. The Respondent’s response is contained in an affidavit sworn on 28th November, 2018 by **C.I CALLEB NATHA**, the deputy DCIO Kisumu.

asserts that Petitioner upon his arrest on 29th October, 2014 was informed the reason for his arrest having been accused of linking one Mr. Oswago to fraud and that it was while in the cells that he started screaming and insulting police officers. He concedes that the Petitioner was released the following day when he also complained that he had been assaulted by a known police officer, a report that was investigated and found to be untrue.

13. The Respondent submitted that the Petitioner was lawfully arrested on 29th October, 2014 was informed the reason for his arrest having committed criminal libel by linking one Mr. Oswago to fraud and that his freedom of expression was which is qualified by respect for the rights and reputations of others was not violated.

14. Respondent further denies that the Petitioner was tortured and in particular denied that torture was proved and support of this contention relied on Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR and the case of Lt Col Peter Ngari Kagume & Others v Attorney General [2009] eKLR on the submission that it is incumbent upon the petitioner to avail tangible evidence of torture and that the Court must be guided by evidence of probative value which the petitioner in the present case did not adduce.

15. In John Muruge Mbogo v Chief of the Kenya Defence Forces & another [2018] eKLR, the court held that:

“... there must be an element of force used to inflict pain in a human being’s body or mind which is a threat to life or health of the victim. In that case, therefore, there should be evidence through medical examination of physical injuries as a result of the treatment the person has been subjected to. The petitioner did not produce an acceptable medical report to show that he sustained the injuries as a result of the treatment he was subjected to while in detention. I am unable to find that there was torture as legally defined.”

16. Concerning the right to access to justice under Article 48, the Respondent submitted that the Petitioner’s advocate was notified of his arrest and he sent his representative one Shabban Opiyo Kassim who was granted access to the Petitioner.

ANALYSIS AND DETERMINATION

17. After careful consideration of the pleadings filed herein, the submissions made by the parties’ respective advocates and the authorities that they cited, I note that the issue for determination is whether the Petitioner’s fundamental rights under the Constitution were violated by the Respondent.

18. A Petitioner who desires the court to give judgment in its favour in a constitutional petition must meet the threshold of the principle of sufficient precision. In the case of Anarita Karimi Njeru V R (No 1) 1979 KLR 154 where the court stated that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

19. This position was emphasized by the Court of Appeal in Mumo Matemu Vs Trusted Society Of Human Rights Alliance & 5 Others [2013] e KLR when it stated:

“We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.”

20. Concerning Petitioner’s arrest, I have gone through the bundle of documents tendered by the Respondent and an extract of the OB No. 39 75/29/10/14 shows that he was arrested for libel. The Respondent’s case is that one Mr. Oswago had lodged a complaint against the Petitioner. From the foregoing, I am persuaded that the Petitioner’s arrest was lawfully and that he was informed the reason for his arrest. His contention that his right to freedom and security of person under Articles 29 and 49 were violated is therefore rejected.

21. The Petitioner has not tendered evidence with precision how his right to freedom of expression under Article 33 was violated and his claim under this Article therefore fails.

22. With reference to access to justice under Article 48, Shabban Opiyo Kassim testified that he was informed by the Petitioner’s advocate Mr. Edris Omondi to go check on the Petitioner who had been arrested and was being held at Kisumu Central Police Station. Clearly, there is undisputed evidence that the Petitioner’s advocate was notified of his arrest and he sent his representative who was granted access to the Petitioner.

23. I am therefore unable to find for the Petitioner that his right of access to justice was violated since no specific evidence was advanced to support this allegation.

24. Concerning allegations of torture under Article 25, the Petitioner tendered a medical examination form as PEXH. 4 which contains evidence of physical injuries in the form of generalised aches on cheeks, chest and abdomen as a result of the beating that he stated he was subjected to while in the custody of the police. His evidence that the injuries were occasioned at the police station was corroborated by his witnesses Shabban Opiyo Kassim who stated that he saw Petitioner being slapped and squeezed whereas Dickson Odhiambo Adala stated that he saw the Petitioner being slapped once. From the foregoing, I am persuaded that the Petitioner has demonstrated the element of force used to inflict pain on his body which amounts to torture and is entitled to some relief.

25. It is the duty of the advocates to avail relevant authorities to guide the court in arriving at a fair award. Itumbi case (above) did not relate to torture whereas the extent of torture and its effects in the Matiba case (above) is incomparable to this case.

26. In final judgment, I make the following orders

- 1) There shall issue a declaration that the Respondent violated the Petitioner’s constitutional rights guaranteed under Article 25 of the Constitution when force was used to inflict pain on his body**
- 2) I award the Respondent Kshs. 100,000/- for the generalised aches that he sustained on cheeks, chest and abdomen**
- 3) Special damages though pleaded were not proved.**
- 4) Respondent shall bear the costs of this petition**

DATED AND DELIVERED IN KISUMU THIS 30th DAY OF JANUARY, 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Petitioner - Ms Olonyi hb for Mr.Owini

For the Respondent - Ms Gathu hb for Ms.Langat