



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CONSTITUTIONAL PETITION NO. 2 OF 2017**

**(CORAM: R. E. ABURILI - J.)**

**ERICK ODHIAMBO WAYOGA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Petitioner herein **Erick Odhiambo Wayoga** petitions this court vide his undated petition seeking for declaration that his right under **Article 49(1)(f)(i)(ii) of the Constitution** was violated and that he be entitled to compensation by the Respondent Republic; and that he be allowed to sue as a pauper.

2. The Court observes that the Petitioner is a long serving convict having been convicted and sentenced to death which was commuted to life imprisonment for the offence of Robbery with Violence contrary to **Section 296(2) of the Penal Code**, in the year 2014. He claims that he was arrested on 5/9/2014 and arraigned in court on 8/9/2014 three days later and that therefore his right to be arraigned before court within 24 hours of his arrest was violated.

3. In addition, that his rights under **Article 27(1)(2) of the Constitution** were violated. He claims that he is rightly before this court.

The above averments are contained in a Petition and what appears to be a “**supporting affidavit**” which, however, is allegedly sworn before a Senior Resident Magistrate, Siaya, but no signature of the commissioning Magistrate.

4. In his oral submissions in court, the Petitioner claims that having been kept in police cells for 4 days in 2014 before being arraigned court without explaining the delay thereof, his rights were violated hence he should be compensated.

5. In opposing the petition, Mr. Okachi, SPPC submitted that the Petitioner had not furnished the court with evidence of violation of his rights. That he was availing new issues which were not placed before the Lower Court. That this is a wild petition and that the charges against him were brought to court within the stipulated time frame hence the Petitioner is on a fishing expedition hence the petition does not attract the discretion of the court and that the same should be dismissed.

6. In a rejoinder, the Petitioner submitted that he did not know what the law says and that he was assisted by the paralegals.

7. I have carefully considered the Petition which is not supported by any document not even a charge sheet or proceedings before the trial court to demonstrate the merit of the orders sought. There is not even an affidavit which is capable of being considered by this court.

8. The Appellant, as correctly submitted by Mr. Okachi, Senior Principal Prosecution Counsel appears to be on a fishing expedition to gain benefits in the form of compensation after failing to successfully challenge his conviction as the court register shows that following his conviction, he appealed vide Siaya HCRA 4/2016 and his appeal was dismissed on 13/10/2016. A properly convicted criminal, in my view, should not be allowed to benefit from his crime by burdening taxpayers. The petitioner has not annexed even a copy of proceedings in the trial court or on appeal to demonstrate that indeed there is room for this court to find that his rights were violated by his alleged arraignment before court, 4 days after his arrest or within 24 hours.

9. In addition, the Petition does not disclose against whom damages would be ordered in the compensation claim.

10. The Republic of Kenya in all petitions must be represented by a relevant office that defends the public interest and that has authority to incur expenditure. In this case, the Respondent would be the Attorney General who is not a party.

11. Therefore, whereas this court agrees that **Article 49(1) of the Constitution** guarantees rights of arrested persons including the right to be

informed promptly, in language that the person understands of the reasons for the arrest; the right to remain silent; the consequences of not remaining silent; to communicate with an advocate and other persons whose assistance is necessary; to be brought before the court as soon as reasonably possible, but not later than twenty four hours after being arrested or if the 24 hours ends outside ordinary Court hours, or on a day that is not an ordinary court day, the end of the next day; and whereas this court would not hesitate to find that there would be a violation of the **Constitution** when a person is held beyond the 24 hours irrespective of the reasons, for reasons that the tenor and effect of the above provision is to protect any person in Kenya from unwarranted arrest and detention for any period over 24 hours or for the period necessary to secure his production in court of the next available date; and whereas detention beyond 24 hours may only be authorized by a court as provided by **Article 49(1)(f) of the Constitution**;

12. However, apart from a statement by the Petitioner which is a bare statement unsupported by any evidence of his arrest on 5/9/2014 and arraignment in court on 8/9/2014, there is nothing to demonstrate that the Petitioner was held in custody beyond the 24 hours claimed before being arraigned in court and if so, in which proceedings, as not even a charge sheet or proceedings in the trial court were availed. He who alleges must prove. The Petitioner has merely made allegations of fact and wants this court to fetch for him evidence to aid him enforce alleged violation of his rights under **Article 49(1) of the Constitution**. That cannot be the case where there is even no proper respondent before the court to answer to those issues of whether or not the Petitioner was detained beyond 24 hours and whether he was any malicious intention for doing so or whether such delay was ever explained to the trial court.

13. Accordingly, I find the petition herein to be mischievous, frivolous and vexatious. The same is hereby dismissed. Had the Petitioner succeeded in his petition with proof, which he has not, I would have awarded him a sum of Kshs. 10,000/= for the alleged violation of the right to be arraigned in court within 24 hours from time of arrest. However, as the Petition has not succeeded, I award him nothing.

14. I dismiss the petition with no Orders as to costs. File closed.

*Dated, Signed and Delivered in open court at Siaya this 19<sup>th</sup> Day of February 2019.*

**R.E. ABURILI**

**JUDGE**