



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

PET. NO. 10 OF 2016

KEREMENSIA BONARERI ONGERI.....PETITIONER

VERSUS

1. THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR.....1ST RESPONDENT

2. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. By the Petition dated 3rd May 2016 the petitioner seeks the following reliefs: -

- 1. Special damages of Kshs. 109,350/=.**
- 2. A declaration that the petitioner is not a child trafficker and that her constitutional rights were violated following her arrest and detention.**
- 3. Compensation for violation of her rights.**
- 4. A permanent injunction restraining the respondents, their agents, employees and/or servants from harassing, intimidating, arresting and/or interfering with the petitioner's constitutional rights and freedoms.**
- 5. The costs of the petition.**

2. In her statement of facts which she adopted as evidence at the hearing, the petitioner, an elderly lady aged 67 years states that on 28th May 2015 at about 10am her area Chief together with officers attached to the Kiambere Administration Police Camp arrested her and went and locked her up in the Chief's office for about 8 hours. Thereafter she was taken to Nyamira Police Station. She was not told the reasons for the arrest until the next morning when the Officer Commanding Station (OCS) Nyamira informed her that they wanted to charge her with child trafficking. However, on 2nd June 2015 she was released unconditionally on a police bond. It did not end there and on 28th April 2016 she was picking tea with her granddaughter Priscillah Mokeira Makori (Pw2) when she was again picked by the same police officers ostensibly because the Chief wanted to see her. They did not tell her why the Chief wanted to see her. She nevertheless obeyed and accompanied them to the police post but the Chief was not there. This time they asked her where her grandchildren were but they would not take her answer that her son, the father of the children, had gone to Nairobi with them. She stated that on this occasion she was detained for two days only to be released without charge. She stated that the genesis of this harassment was that her son had quarrelled with his wife and he had taken their children who his wife had left with their grandmother to Nairobi without his wife's knowledge. The arrests and detention were to compel her to say where the children were as her daughter-in-law had reported her children missing. It was her evidence that when she returned home her household goods had been stolen. She produced a list of the stolen goods and attached to them a value of Kshs. 109,200/= which she claims as special damages. She produced copies of police bonds issued by Nyamira Police Station one dated 29th April 2016 requiring her to appear before the Nyamira Court for child stealing and the other 28th May 2015 requiring her to appear at Nyamira Police Station for child trafficking. The petitioner's granddaughter Priscillah (Pw2) testified that she was with the petitioner on the two occasions she was picked by the police officers. She stated that the officers did not at the time of the arrests inform the petitioner why they were arresting her. The petitioner stated that the officers arrested her despite telling them that the children had gone with their father.

3. The respondents called one witness – Ong'ere Nyakundi Onyancha. He testified that he was the Senior Chief for Ochoro Location. He admitted that he knew the petitioner. He stated that on or about 26th May 2015 the petitioner's daughter-in-law reported to him that she had gone home one day and found her husband and their children who were girls aged 3 and 4 years old gone. He advised her to report the matter to the OCS Nyamira but before then he had referred her to the clan elders for arbitration. The next thing that happened was being called to the State Law office in Kisii to write a statement explaining why he had arrested the petitioner. He denied that he sent

administration policemen to arrest the petitioner. He urged this court to consider the depositions in his affidavit and stated that he was not aware that the petitioner's house was broken into and her goods stolen.

4. Counsel for the appellant submitted that the arrests and subsequent detention were arbitrary and violated the petitioner's rights to freedom and security of the person under **Article 29 of the Constitution**. Counsel submitted that for not informing the petitioner the reason for her arrests until 2 days later and also for failing to bring her before a Court of Law after the arrests and instead releasing her without charges, the respondents violated her rights under **Article 49 of the Constitution**. Counsel submitted that for this the petitioner is entitled to an award of general damages. Relying on the case of **Daniel W. Waweru & 17 others Vs. The AG Nyeri C/A 89 of 2010**, Counsel proposed an award of Kshs. 200,000/= for each arrest. Counsel also relied on the case of **GBM Kariuki Vs. AG [2016] eKLR** and submitted that there is no law that allows police or chiefs to arrest a person for an offence committed by that person's adult child.

5. On the special damages, Counsel submitted that these are in respect of the household goods the petitioner lost when thieves broke into her house when she was in police custody. He submitted that upon her release from custody she reported her complaint vide an OB No. 12/29/5/2015 and as the amounts indicated in the petition were not challenged it should be assumed they were admitted and ought to be allowed.

6. Counsel for the respondents did not file submissions.

7. This petition is anchored on the Bill of Rights contained in Chapter Four of the Constitution of Kenya. **Article 19 (1) of the Constitution** states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. **Article 19 (2)** sets out the purpose of recognizing and protecting human rights as: -

- To preserve the dignity of individuals and communities and;
- To promote social justice and the realization of the potential of all human beings.

8. **Article 19 (3)** then states: -

“(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.”

9. **Articles 20 and 21 of the Constitution** enjoins all state organs, state officers and public servants to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

10. The right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened is provided under **Article 22 of the Constitution** and the authority of this court to uphold and enforce the Bill of Rights is provided at **Article 23 and Article 23 (3)** gives this court power to grant appropriate relief, including: -

“(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and

(f) an order of judicial review.”

11. The petitioner claims that her rights were violated and she has sought a declaration, damages as well as injunctive orders.

12. The issues for determination therefore are: -

(i) Whether the petitioner's rights under the cited Articles of the Constitution were violated.

(ii) Whether she is entitled to the reliefs sought.

13. Having considered the evidence adduced by both sides I am satisfied that the petitioner's rights were violated. Senior Chief Ong'ere Nyakundi (Dw1) confirmed that on or about 26th May 2015 he received a telephone call from the petitioner's daughter-in-law complaining that her children were gone. The petitioner's evidence is therefore not farfetched. Although the Chief denied it the petitioner proved on a

balance of probabilities that on two occasions she was picked up from her home by administration police officers from the Chief's camp. Her evidence was corroborated by Priscillah Mokeira (Pw2), her granddaughter, who was present on both occasions. The petitioner's evidence that she was taken to Nyamira Police Station where she was locked up in the cells only to be released without charge the next day on both occasions was not controverted. The petitioner was not criminally responsible for the actions of her son which in any case are civil in nature and it is my finding therefore that the arrests were arbitrary and hence a violation of her right. As an arrested person she had a right under **Article 50 (6) of the Constitution** to be taken before a court as soon as was reasonable but not later than 24 hours which was not done. Instead in total violation of her rights the police locked her up and then released her the following day without charge. Every arrested person has a right to remain silent, **Article 50 (1) (b)** and also not to be compelled to make a confession or admission that could be used in evidence against them – **Article 50 (1) (d)**. It is evident that by the arbitrary arrests and unlawful imprisonment the respondents intended the petitioner to disclose the whereabouts of the reportee's children yet she had disclosed to them that the children had been taken away by their father. The petitioner being their grandmother did not mean that she could stop their father from taking them with him. I am satisfied that the petitioner is entitled to the reliefs sought save for the special damages which she specifically pleaded but did not strictly prove.

14. On the general damages, Counsel cited the case of **Daniel W. Waweru & 17 others Vs. The Hon. Attorney General Nyeri C/Appeal No. 89 of 2010** where the appellants were awarded Kshs. 100,000/= each for unlawful arrest and false imprisonment. The appellants there were confined for a few hours and only once. The petitioner in the instant case was arrested twice and confined for several hours on both occasions. The awards in that case are also four years old and taking all that into account I am persuaded that an award of Kshs. 200,000/= (two hundred thousand shillings only) is reasonable.

15. Accordingly, judgement is entered for the petitioner against the respondents jointly and severally for: -

- (a) General damages in the sum of Kshs. 200,000/=.
- (b) A permanent injunction restraining the respondents, their employees, servants and/or agents from harassing, intimidating, arresting or in any way interfering with the petitioner's rights and freedoms over the matter of custody of the children of the marriage between her son John Ongeru and his wife.
- (c) Costs of the suit.
- (d) Interest at court rates from the date of this judgement.

It is so ordered.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE