



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.9 OF 2017**

**BETWEEN**

**DAVID NYARERU BOSIRE.....PETITIONER**

**AND**

**SIMON NJUGUNA T/A BELLA VISTA LOUNGE.....1<sup>ST</sup> RESPONDENT**

**ZEBEDEE MIGOSI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner, David Nyareru Bosire alleges that he was unlawfully detained by the respondents at Bella Vista Lounge and his personal effects confiscated on the night of 6<sup>th</sup> February 2016 for allegedly failing to pay a bill of Kshs. 4,020/=. He claims that the respondents released him at 5 p.m. the following day, which caused him to lose his job as he failed to attend important meetings due to his detention. He filed his petition dated 6<sup>th</sup> February, 2017 claiming a violation of his fundamental rights and has sought the following reliefs against the respondents;

a. A declaratory order against the respondents that the petitioner’s Rights to Freedom and Security of a person Article 29 (a) & (d) and 31 (a) (b) and (d) were violated when the petitioner was detained without his consent at the 1<sup>st</sup> respondent’s premises at Bella Vista from 6/2/2016 to 7/2/2016;

b. An order for compensation and / or general damages;

c. Specific damages of ;

i. 10% overcharge	Kshs 402.02
ii. Room cost	Kshs 1,500.00
iii. Lunch	Kshs 480.00
iv. Cost of phone	<u>Kshs. 12,800.00</u>
Total	Kshs. 15,182.02

2. The petitioner swore an affidavit in support of the petition on 6<sup>th</sup> February, 2017, which he adopted as his evidence together with documents annexed therewith.

3. His case is that on the night of 6<sup>th</sup> February, 2016, he had gone with his brother Joel Bosire to celebrate his birthday at Bella Vista Lounge and accumulated a bill of Kshs. 4,020.00 which he paid through his Visa card no. 413xxxxxxxxx466 issued by NIC Bank. He later realized that he had been charged an extra 402.02 and upon inquiring from the manager in charge, he was informed that the establishment charged an extra 10% when paying by bank card. The petitioner protested that he should have been informed about the charge beforehand and was tersely told by the manager that the practice had been going on for a long time and that he should move to a cheaper premise if he could not afford the extra charge.

4. Displeased by the incident, the petitioner finished his refreshment and made to leave the establishment. He claims that he was stopped by the manager who told him that he was disrespectful and that he would face the music. It was then that two staff members came and asked him to pay a bill of Kshs. 4,422.22/= to which he replied that he had paid and showed them a bank text message confirming the same. The petitioner avers that he and his brother were barred from leaving the premises. A waiter at the counter informed them that he had been told not to let him leave until he paid Kshs. 4,422.22 cash but later allowed his brother to leave. He sent his brother to withdraw some money from the ATM but his brother came back saying that he had insufficient funds. After sometime, the petitioner asked his brother to book a room upstairs which he did and paid Kshs. 1,500/= cash. When the petitioner tried to go to the room to sleep, the waiter stopped him. The petitioner states that he gave the waiter his phone in good faith to see the confirmation message from the bank but the waiter took the phone and handed it to his boss. He gave the waiter his Visa Bank card to verify payment from the P.O.S system but this was confiscated as well.
5. It was only after informing the waiter that he it was illegal to detain him instead of taking him to the police station that he was allowed access to the room he had booked on condition of him surrendering his identity card.
6. The following day that was Sunday 7<sup>th</sup> February 2016, at about 8 a.m. the petitioner alleges that he tried to leave the accommodation section to try and sort out the issue but was told by the security personnel that he was not allowed to leave. He pleaded with the security personnel to escort him to the lounge section since he had an important meeting at 3 p.m. the same day. At the lounge, he was informed that unless he paid Kshs. 4,400/= he was not allowed to leave the premises. His phone was returned and he was able to call the bank to confirm the transaction but the waiter declined to speak with the bank on the line. He sent his brother to withdraw some money with his ATM card which had also been returned to him. His brother was only able to withdraw Kshs. 1,500/= which the establishment declined to take. At around 11.50 a.m., the 2<sup>nd</sup> respondent arrived. The petitioner tried to explain his predicament and even called the bank to confirm the transaction to no avail. The manager returned the petitioner's bank card and identity card after a brief exchange but declined to hand over his phone saying it would be returned once the petitioner had paid the cash. The petitioner produced a copy of an acknowledgment written by the 2<sup>nd</sup> respondent confirming that the phone had been retained.
7. Later on, the manager left after instructing the staff to confirm he had paid for his room. The petitioner says that he was detained until around 5 p.m. when the clerk endorsed a confirmation that he had paid for the room. He also states that he had to take lunch worth Kshs. 480/= at the establishment.
8. After his release, the petitioner reported the matter to Kisii town police station vide OB No. 47/07/02/2016. He boarded a bus to Nairobi at about 10 p.m. and arrived the following morning at 6 a.m. He went home and proceeded to his place of work at around 9 a.m. When he arrived at the office, he realized that he had missed an appointment with a client scheduled for 8 a.m. An hour later, he was handed a dismissal letter by his firm citing misconduct for missing two important meetings with clients.
9. He went to the bank to inquire about the transactions and found out that the respondents had charged him Kshs. 8,844.44 which was double the amount he owed them. The bank proceeded to reverse Kshs. 4,422.22 to his account.
10. The petitioner testified that he was unable to communicate with anyone as his phone had been confiscated. He avers that he had to purchase a phone worth Kshs. 12,800/= and that the respondents returned the phone they had taken from him on 15<sup>th</sup> February, 2016. At that time he had already lost his employment and could not communicate with potential clients due to the loss of his contacts for 8 days.
11. In cross examination, the petitioner stated that he paid the bill on 7<sup>th</sup> February 2016 at 10.00 a.m. using his card and acknowledged that there was nothing to show he had made the payment on 6<sup>th</sup> February, 2016. He also stated that the bank documents showed he had paid the money on 8<sup>th</sup> February 2016 instead.
12. **Zebedee Migosi (PW 2)** the manager at Bella Vista Lounge, confirmed that the petitioner had visited the establishment on the evening of 6<sup>th</sup> February, 2016. He stated that the petitioner's brother Joel Nyareru requested for accommodation and paid for a room at around 8.59 p.m. The petitioner then proceeded to the bar where he stayed up to around 1:00 a.m. The petitioner accumulated a bill amounting to approximately 4,422/= and upon being requested to pay, by his colleague Jackline Mutange, he offered to pay through his debit card. There was no confirmation of payment when the petitioner swiped his card. His second attempt was also declined owing to the fact that the petitioner's account had insufficient funds. The petitioner went to his room on his own volition and checked out on 7<sup>th</sup> February, 2016. That his colleague Jackline Mutange who had served the petitioner went to the petitioner's room to sort out the bill in order to be released from duty and the petitioner voluntarily handed in his Samsung mobile phone and identity card to keep as security for payment of the previous night's bill. He admits writing a note acknowledging receipt of the phone.
13. PW 2 further stated that the petitioner checked himself out of the room and surrendered the key at the reception at about noon. The petitioner had misplaced the receipt showing that he had paid for the room so PW 2 asked the person in charge of rooms to issue a note indicating that the room had been paid for which she did. The petitioner proceeded to purchase and eat his lunch peacefully before leaving the premises on 7<sup>th</sup> February, 2016. That it was only when the bank resumed business on Monday morning that they were able to confirm that the transaction had gone through without a confirmation receipt. They did not know where the petitioner had gone and that his phone had been available for collection as from 8<sup>th</sup> February 2016. They returned the petitioner's Samsung phone intact upon receiving a letter from his advocates demanding for the same.
14. Jackline Mutange swore an affidavit on 16<sup>th</sup> March 2017 confirming the PW 2's averments. She confirmed that when she went to request the petitioner to settle his bill in the room he had booked, he opened the door and voluntarily surrendered his Samsung mobile phone and national identification card to be kept as security for payment of the previous night's bill. She categorically denied the petitioner's claim that he had been unlawfully detained and harassed.
15. The establishment's owner Simon Njunguna (PW 1) also swore an affidavit on 16<sup>th</sup> March 2017 and testified confirming his employees' averments. He regrets any inconvenience, but denies liability on his part or any the part of his employees

## **ANALYSIS AND DETERMINATION**

16. The parties filed their respective submissions which I have considered as well as their depositions and oral evidence. The following issues arise for determination;

- a. Whether the petitioner's rights under Article 29 (a) & (d) were violated by the respondents and/ or their agents/ employees;
- b. Whether the respondents illegally searched his person and seized his possession in violation of his rights as protected under Article 31 (a) (b) (d) of the Constitution; and
- c. Whether the petitioner's consumer rights as protected under Article 46 of the Constitution and under Sections 12 (p) and (2) (r), 13 and section 15 of the Consumer Protection act 2012 were infringed by the respondents by charging him an extra 10% for goods and / or services.

17. **Article 29 ( a ) & ( d )** of the **Constitution** protects the freedom and security of a person in the following terms;

*29. Every person has the right to freedom and security of the person, which includes the right not to be—*

*(a) deprived of freedom arbitrarily or without just cause;*

*(d) subjected to torture in any manner, whether physical or psychological;*

18. The petitioner relied on a similar case where D.S. Majanja J. in **Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai Petition No. 156 of 2011 [2013]eKLR** held as follows;

*Article 24(1) of the Constitution is clear that a right or fundamental freedom in the Bill of rights is not to be limited except by law and only to the extent that such limitation is reasonable and justifiable in an open and democratic society. Leon testified that it was in line with the hotel's policy that persons be held until clearance of dues owed to the hotel. The rights guaranteed under the bill of rights as I have cited, cannot be limited in a way other than by law and even then, the limitation ought to be justifiable in 'an open and democratic society' as contemplated under Article 24. Article 2 is clear that the Constitution is the supreme law of the land and "binds all persons and all State organs at both levels of government." All persons must include even corporate entities such as the 1st respondent by dint of Article 260 of the Constitution which defines the term 'person' to include "a company, association or other body of persons whether incorporated or unincorporated." Article 3(1) is categorical that, "Every person has an obligation to respect, uphold and defend this Constitution."*

19. The duty of establishments to uphold the rule of law and desist from detaining their patrons in lieu of unpaid bills has been reemphasized by the courts in various decisions. In **Tryphosa Jebet Kosgey v Elgon View Hospital [2016] eKLR** as well as **Christine Kidha v Nairobi Women's Hospital [2016] eKLR** the courts held that it was unlawful and arbitrary for the hospitals to hold the petitioners for non-payment of hospital bills.

20. That being said, it remained the duty of the petitioner to prove his case in accordance with **Section 107 (1) and 109 of the Evidence Act Cap 80** which provide that one must prove the facts he asserts to exist.

21. To prove his case, the petitioner stated that he had gone to the 1<sup>st</sup> respondent's establishment known as Bella Vista Lounge, to celebrate his birthday together with his brother on the evening of 6<sup>th</sup> February, 2016, but was detained for about 15 hours for allegedly failing to pay his bill of Kshs. 4,020.00/=. He says his ordeal began when he questioned the establishment's policy of charging an extra 10 % for bank transactions which he submitted was a violation of his consumer rights as protected under Article 46 and **Sections 12 (2) (p) &(r), 13 & 15 of the Consumer Protection Act 2012**, which provide as follows;

*12 (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.*

*(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations—*

*(p) a representation that misrepresents the purpose of any charge or proposed charge;*

*(r) unconscionable representation.*

*13. (1) It is an unfair practice to make an unconscionable representation.*

*15. Prohibition of unfair practices*

*(1) No person shall engage in an unfair practice.*

*(2) A person who performs an act referred to in sections 12, 13 and 14 shall be deemed to be engaging in an unfair practice.*

*(3) It is not an unfair practice for a person, on behalf of another person, to print, publish, distribute, broadcast or telecast a*

*representation that the person accepted in good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of business.*

22. The petitioner states that the 2<sup>nd</sup> respondent promised him dire consequences which came soon afterwards. He claims that upon inserting his card on the portable Point of Sale (POS) machine, the system showed that the transaction had been approved but two staff members came and informed him that he had not paid his bill.

23. The petitioner claims that he was detained in the premises until 5 p.m. the following day and had to seek accommodation at the establishment and take lunch there as well and that his phone, bank card and identity card were withheld by the respondents. He was therefore unable to communicate and missed an important meeting at 3 p.m. on 7<sup>th</sup> February 2016 and that he also missed an important meeting with a client at 8 a.m. on 8<sup>th</sup> February 2016, and lost his job as a result.

24. The petitioner's account is utterly refuted by the respondents. The respondents admit that the petitioner visited their Lounge in the evening of 6<sup>th</sup> February 2016 together with his brother. They stated that at the petitioner's brother paid for a room at about 8:59 p.m. and produced a receipt proving this. The 2<sup>nd</sup> respondent and one Jackline Mutange, who had served the petitioner that evening claim that the petitioner went to the bar and stayed up to around 1:00 a.m. When asked to pay his bill which had accumulated to Kshs. 4,422/= the petitioner offered to pay it via his debit card. The petitioner swiped the card twice and each time there was no indication of payment.

25. According to the respondents, the petitioner voluntarily went to the room he had booked earlier and when asked to clear his bill by Jackline Mutange, he handed his Samsung mobile phone and identity card to keep as security for payment of the night's bill. They deny holding the petitioner against his will and say his phone was available for his collection as early as 8<sup>th</sup> February 2016, when they were able to confirm from the bank that the transaction had gone through.

26. Upon considering the rival versions and observing the witnesses testify before me, I am more inclined to accept the respondents' account of what transpired. During cross-examination, the petitioner accepted that his brother had booked a room at 8:59 p.m. on 6<sup>th</sup> February 2016 as indicated in the receipt annexed to the 2<sup>nd</sup> respondent's supporting affidavit and marked "ZM 1". The petitioner stated that he did not dispute the receipt which shows that he went to the respondents' establishment much earlier than he had admitted.

27. The respondents say that after paying for the room the petitioner went to the bar, where he stayed up to 1:00 a.m. and accumulated a bill of approximately 4,422/=. The said bill was never produced before the court to ascertain the petitioner's allegations that he had been charged a fee of 10% for transacting using his debit card. Much as the petitioner claimed that the respondents had confiscated the bill, he was under a duty to prove his claim.

28. His brother who was presumably with him during the entire incident was not called to testify in support of the petitioner's case. Nor did the petitioner call a witness from the bank to corroborate his claim that he had paid the bill in the morning of 7<sup>th</sup> February, 2016 using his debit card and received confirmation for it. The court is therefore entitled to draw an adverse inference on such a failure to call witnesses.

29. The petitioner also accepted that there was nothing, including the alleged text message from the bank, to show he paid the bill when he said he did. He's own documents showed that the payment was made on 8<sup>th</sup> February, 2016. In his submissions, the petitioner stated that bank transactions made over the weekend are posted on the next business day but once again failed to adduce evidence to prove that this is a common trade practice.

30. In my view, the petitioner was the author of his own misfortune. For the reasons already given, I believe the respondents when they say that the payment made by the petitioner using his debit card was not successful and that he gave his mobile phone as security for the bill. I also believe that the petitioner went to the room he had booked earlier that evening of his own volition and took lunch the following day at the same establishment of his own free will. The fact that the petitioner failed to produce a receipt for his new mobile phone which he allegedly bought when the respondents confiscated his older phone did not help his case.

31. Furthermore, had the petitioner been keen on attending to his employer's duties, nothing would have been easier for him to do than communicate with his employer and inform him of his current predicament. He allegedly sent his brother to withdraw some money for him from the bank and one would presume that the petitioner would have also sent his brother to relay the message of his inability to attend the meeting if his claim that he had been unlawfully held was genuine. Given the importance his employer obviously gave his clients it is very likely that he would have made the necessary arrangements to remedy the situation.

32. I align myself with the sentiments of Nyamu J. (as he then was) when he held as follows in the case of **Peter Ngari Kagume & 7 Another v Attorney General Constitutional Appli 128 of 2006 [2009] eKLR**

*Turning to the alleged violation as aforementioned, it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms...*

*It is most probable that in the prevailing circumstances then, the Petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners.*

33. I am also of the view that the respondents were not the proper party to sue in this instance. For this and for the reasons already given above, I dismiss this petition with costs to the respondents.

**Dated, signed and delivered at Kisii this 20<sup>th</sup> day of September 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

Mr. Ondande h/b Mr. Nyareru For the Petitioner

Mr. Godia For the Respondent

Mr. Omwoyo Court Clerk