REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.50 OF 2013

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 25 OF THE CONSTITUTION OF KENYA

CHRISTIAN JUMA WABWIRE.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through an amended petition dated 27th may 2015 seeks the following reliefs:-

a) General damages for unlawful and wrongful arrest.

b) General damages for false imprisonment and torture.

c) General damages for malicious prosecution.

d) Declaration that his prior demotion and sacking were unlawful and general damages for wrongful dismissal and/or reinstatement.

e) Costs of the suit.

f) Interest.

g) Or that such other orders as this Honourable Court shall deem just.

2. The petitioner contend, that he was an employee of Kenya Army whereby he had served 15 years by the year 1992 when he was unprocedurally removed. He contend he was arrested on 12th November 1992 and detained for 71 days in violation of the Armed Forces Act, and later charged with the wrong provision of the law before the commandant instead of the court martial hence denied an opportunity to be heard contrary to the rule of Natural justice and as such his constitutional rights were infringed.

3. The petitioner further contend, that on 23rd November 1992 he was coerced to record a statement to the Military Police and on 30th November 1992 forcibly taken to Kilimani Police Station and interrogated by police officers during which period of detention he was treated in a cruel, inhuman and in dignity manner by being denied food, water, sleep, medical care and access to legal counsel and relatives. That while in detention his salary was illegally stopped, placing his health, welfare and education of his children in jeopardy. He further avers he was coerced into signing statements in utter violation of his rights as a member of Armed Forces of the Republic of Kenya and as enshrined in the Constitution of Kenya. That he was subsequently tried before a commandant convicted and sentenced to demotion from sergeant to senior Private and dismissed contrary to the law. He further avers the two sentences were both severe and illegal in the circumstances.

Respondent's Case

4. The Respondent filed grounds of opposition on 27th May 2015 raising five (5) grounds of opposition being as follows:-

a) That no evidence has been produced by the petitioner to prove that he was indeed employed by the Kenya Army.

b) That the petitioner has not demonstrated before the Honourable court how his constitutional rights were violated by the respondent.

c) That the petitioner has not proved before the Honourable court that he was treated in a cruel inhuman and degrading manner.

d) That the petitioner has not proved any of the allegations in the petition therefore the same lacks merit.

5. The petition filed herein is totally incompetent, incurably defective, and bad in law and should be dismissed with costs to the respondent.

6. The Respondent further filed a Replying affidavit sworn by Gilbert Gichuhi on 8th June 2017 in opposition to the petition and petitioner's supportive affidavit dated 10th January 2013.

Analysis and Determination of the Petition

7. I have carefully considered the petition, affidavit in support, further affidavit, Replying affidavit; grounds of opposition; the oral evidence given by the petitioner as well as parties rival written submissions and from the aforesaid the issues arising for consideration and determination are as follows:-

a) Whether the petitioner has set out a case for relief sought?

b) Whether the petitioner's fundamental rights and freedoms were violated?

c) Whether the petitioner is guilty of inordinate delay in bringing up the petition?

A) Whether the petitioner has set out a case for relief sought?

8. This petition was initially before Hon. Justice Mativo, who heard the petitioner's case before Hon. Lady Justice Okwany heard the Respondent's case. That pending filing and exchange of the submissions Hon. Lady Justice Okwany was transferred to Commercial Division. The file was transferred to her to write the judgment but she returned the same to Constitutional and Human rights for writing the judgment. I am alive to the fact that I did not see nor hear the petitioner and cannot make a comment on the demeanor of the witnesses in this matter.

9. The petitioner's amended petition is dated 27th May 2015. The Respondent contend, that the petition as drawn and filed fails to meet the irreducible minimum expected for a court to determine the dispute to be decided in a constitutional matter. The petitioner in support of this proposition has referred to the case of **Bethwell Allan Omondi Okal vs Telkom (K) Ltd (Founder) & 9 others (2017) eKLR,** in which the court cited with approval the case of **Thorp vs Holdswirtg [1876] 3 Ch. D. 637 at 639** where it was held that:-

"Pleadings are not just a formality: they are essential in order to frame issues for the determination by the court and to enable the parties know exactly what case they are expected to meet."

10. In the instant petition, and looking at the petition, it is clear that the petitioner has stated in the title of the amended petition, that the petition is brought under Article 25 and 22 of the Constitution of Kenya 2010. Upon a very careful perusal and consideration of the body of the petition, the petitioner has failed to demonstrate how the said Article 25 and 22 have or were violated against him by the state. The petitioner is required to have set out with reasonable degree of precision, that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to be infringed. This is lacking in the petition. The petitioner in the petition alleges to have been denied accessing legal counsel and that he was treated in a cruel, inhuman and in indignified manner. That apart from such a statement the petitioner has not set out the allegations with a reasonable degree of precision, nor the manner in which the alleged infringement occurred and who was the perpetrator.

11. From the pleadings and as drawn and filed, I find that the petitioner's pleadings do not meet the standard or the required threshold to give fair notice to the Respondent's on the case the respondent is expected to meet. It should not be ignored that pleadings are tenet of substantive justice, as they give fair notice to the other party and enables the other party know the case they are about to meet. It is trite that reasonable precision in framing of issues in constitutional petitions is necessary as it gives fair notice to the other party and ensures the other party knows exactly what case it expects to deal with. From the above the petitioner has failed to satisfy the conditions set out in the **Mumo Matemo vs Trusted Society of Human Rights Alliance and 5 others (2014) eKLR, (supra).** I therefore find the petitioner has not sufficiently set out a case for the reliefs sought.

B) Whether the petitioner's fundamental rights and freedoms were violated?

12. The petitioner in support of the petition herein gave evidence as **PW1** and produced several exhibits in support of his petition which he adopted in support of his petition. The Respondent called **DW1** who admitted the petitioner's exhibits and stated the petitioner was charged of conspiring to defraud the defence forces of fuel worth Kshs.71, 655/05 using a forged **LPO** in which he admitted in his Replying affidavit. The petitioner opted to appear before commanding officer for summary trial instead of court martial and under all the due process. It is Respondents' contention, that the petitioner committed an offence and therefore there was no wrongful arrest or false imprisonment. The Respondent denied, that the petitioner was tortured as he was held by his fellow solders/peers as they do not torture each other. It is contended he was provided with food, drinks and access to medical treatment usually given to solders held during trial and investigation. It is

further contended the punishment meted, demotion and sacking was lawful and within the law and that there was no wrongful dismissal.

13. The petitioner contend, that he was arrested and held in various military guard rooms for a total of 71 days without being charged before a court martial or being brought before commanding officer to deal with a summary manner and that no special reports were made to explain the delay; which the petitioner urges amounts to a gross violation of his rights as per the Constitution of Kenya 2010 under Article 49 of the rights of an arrested person.

14. The rights of an accused person under Article 49 of the Constitution of Kenya are not absolute as they are limited under Article 24(5) of the Constitution. The limiting of legislation in regard of the petitioner's case are contained in section 54 and 140 of the Defence Forces Act 2012, where it is stipulated the maximum period one can be held in custody even with an explanation is 42 days. The petitioner was in custody for 71 days hence urging that his constitutional rights were violated and deserves compensation.

15. The petitioner on punishment contends, the maximum punishment provided for under section 68 of the Defence Forces Act 2012 is 2 years imprisonment but the petitioner was sentenced to reduction of rank from sergeant to a senior private and dismissed from service.

16. Under **section 70 of the Defence Forces Act No. 12,** the Respondent contend it is provided for power to arrest offenders who are subject to that Act and found committing an offence under the Act or are alleged to have committed an offence or are reasonably suspected to have committed an offence under the Act.

17. Under **section 78 of the Defence Forces Act 2012** it is provided:-

> **"1) Instead of the accused being tried by court martial-**
>
> > **a) The commanding officer of the accused may deal summarily with the charge if it is for an offence prescribed as one which a commanding officer may deal with summarily;**
> >
> > **b) The appropriate superior authority may deal summarily with the charge if it is for an offence prescribed as one which the appropriate superior authority may deal with summarily."**

18. Under **section 80 and 82 of the Defence Forces Act No. 12,** it provided where a person subject to the Act is accused of an offence, the commanding officer is mandated to investigate the charge and thereafter deal with the charge summarily if the charge is one which he has power to deal with as such. It is further stipulated, that where a commanding officer deals with a charge summarily and records a finding of guilty, the punishment which he has power to administer are clearly set out under section 82 of the Defence Forces Act 2012, and include dismissal and reduction of rank. However it is submitted, a finding of dismissal and reduction of rank could not be recorded before the accused was given an opportunity of choosing whether he should be tried by a court martial. Under section 82(5) (b) of the Defence Forces Act 2012, where the accused do not chose to be tried by a court martial, the punishment of dismissal or reduction of rank would be conferred by the commander.

19. Section 83 of the Defence Forces Act 2012 provides for reviewing authority which has mandate to review a finding or award where a charge is dealt with summarily and where it appears to the reviewing authority that the punishment awarded was invalid, too severe, too lenient or that the award included two or more punishments which could not be awarded in combination. In the instant petition it is clear the authority had power for reasons set under section 83 to substitute such a punishment. The reviewing authority under section 83(4) of the Defence Forces Act 2012 can refer the matter to any officer superior in command to the officer who dealt summarily with the charge or the commander.

20. In the instant petition the petitioner deponed, that he was charged with two others for conspiracy to defraud the Armed Forces of fuel worth Kshs.71, 655.05. **DW1** in his affidavit and evidence confirmed of the illegality. He testified the petitioner was arrested as a result of the aforesaid offence. The petitioner in view of the alleged offence was arrested, interrogated and tried as provided and in accordance with law upon violating army regulations. The arrest, interrogation and trial was lawful and in accordance with the defence Forces Act 2012. Further the Respondent's witness **DW1** testified, that the armed forces are allowed by law to cooperate with civil police during arrest and trials. That the petitioner did not rebut, that hence he has not demonstrated, that his interrogation by police officers at Kilimani police station was unlawful and contrary to the law. Further it has been shown, that summary trial, that is conducted by the commander is provided for by the Defence Forces Act 2012 and that the punishment meted upon the petitioner is also provided for. The petitioner's contention, that the sentence meted upon him were too severe and illegal on the ground that he was punished twice for same offence was controverted by **DW1** who testified that once a punishment for reduction of rank was meted, then dismissal would follow. The punishment given to the petitioner being of reduction of rank and dismissal is not double punishment as it is inevitable, that upon reduction of one's rank one has to be dismissed. Further of great importance the petitioner herein did not attach nor produce evidence in respect of his certificate of discharge which would have been of relevant information on this issue.

21. Further the petitioner averred, that on 1st January 1993, he lodged an appeal to the commander of the Kenya Army, seeking review of the sentence, which is provided for under section 83 of Defence Forces Act 2012 and that on 19th March 1993 Brigadier Waitiki responded to his request for review. It is of great interest to note, that the petitioner herein has not bothered to release any information as regards the outcome of the review nor provide in evidence copies of the said letters, yet issues raised of being charged with the wrong provision of the law and being denied legal counsel would have been dealt with sufficiently at the review or appeal stage in the petitioner's purported appeal. In view of lack of evidence and lack of supportive documents, I find the petitioner has failed to demonstrate there was any appeal or review instituted by the petitioner, and as such the petitioner failed to challenge the punishment meted on him by the commander.

22. It is petitioner's contention, that he was held in detention for a period of 71 days, that he was treated in a cruel and degrading manner, that his salary was stopped and that he was denied legal representation. The Respondent has denied all the aforesaid allegations. It is incumbent upon the petitioner having alleged the above to have called evidence to proof the allegations. The petitioner has not called

evidence to the effect, that he demanded to be represented by a counsel of his choice and the same was denied. He did not produce any proceedings to that effect or letter of complaint.

23. Section 107 of the Evidence Act provides, that he who alleges must prove. The petitioner failed to call evidence to prove his allegation. In the case of **Lt. Col Peter Ngari Kaguma and others vs AG, Constitutional Application No. 128 of 2006** it was held:

> **"…. it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses…… the court is deal 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… However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened….."**

24. I am alive to the fact, that the petitioner in his petition alluded to various constitutional violation, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought.

C) Whether the petitioner is guilty of inordinate delay in bringing up the petition?

25. The repealed Constitution of Kenya and Constitution of Kenya 2010 are silent on issue of limitation of time in regard to filing of constitutional references founded on violation of fundamental rights and freedoms. It should be noted that the courts have expressed themselves, that there is no limitation period to seek redress for remedy in respect of violations of human rights and fundamental freedoms. However the court have through various decisions expressed themselves, that it is imperative for a claimant to demonstrate justification for prolonged delay, especially in light of the fact, that avenues and mechanism for addressing violations have been in existence. It is clear, that every delay requires a justifiable and reasonable explanation inspite of there being no limitation period in seeking redress for post violations of human rights and fundamental freedoms.

26. In the case of **Njuguna Githura vs Attorney General (2016) eKLR**, the court relied on the decision in **High Court Petition No. 306 of 2012 Ochieng' Kenneth K' Ogutu vs Kenyatta University and 2 others,** where it was held:-

> **"There is a great danger that parties are abusing the constitutional protection of rights to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu J observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra):-**
>
> **"Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay." The learned Judge thereafter concluded that: "In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a "constitutional issue" after the expiry of the prescribed limitation periods."**

27. Further in the case of **Lt. Col. Peter Ngari Kagume and others vs Attorney General (supra)** the learned Judge stated that:-

> **"A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases…. Delays have to be explained and claims brought within a reasonable time depending on the circumstances even where the Constitution does not expressly stipulate the limitation period."**

28. In the instant petition the proceedings complained of took place in 1992 and the present petition was not filed till 2013 and amended in 2015, a period of 21 years. I have taken time to peruse the petition and supportive affidavit as well as the submissions by the petitioner and it is importantly noted that there is no cogent explanation of the delay in filing this petition after 21 years since the incident complained of took place. Where an inordinate delay occurs it is incumbent upon the petitioner to explain satisfactorily the reason for delay or give plausible explanation for the delay, for failure to require plausible explanation to be given would open floodgates of litigation. There is a need for a petitioner in an ordinately delayed petition to demonstrate justification for prolonged delays especially where avenues and mechanisms for addressing violations have been in existence. This court cannot presume the reason for delay unless it is pleaded by a petitioner who has delayed in seeking redress within a reasonable time from the court, that there are justifiable and reasonable grounds for the inordinate delay. Where such grounds are not pleaded, it is safe for the court to find that the petitioner has not demonstrated the inordinate delay is justified and is satisfactory. In view of absence of satisfactory explanation of the delay, I find, that petitioner is guilty of inordinate delay and as such the petition herein is an abuse of the court process. I find an inordinate delayed constitutional reference cannot be allowed to circumvent the limitation period by filing a constitutional reference instead of a suit claiming damages for wrongful dismissal. It would be wrong for the petitioner to seek to hide under the pretex, that the constitution reference do not have a limitation period and that inordinate delays are not supposed to be justified and explained satisfactorily.

29. Upon consideration of the petition herein, I find the petitioner has failed to avail credible evidence in support of the alleged violation of his constitutional rights. I find the Respondent has demonstrated the process of arrest and trial of the petitioner was conducted in accordance with the provisions of the law and was lawful. The petition was lodged 21 years from the time of the proceedings thus in 1992, hence the delay in filing the petition is inordinate and the delay has not been explained satisfactorily or at all.

30. The upshot is that the petition is without merit and is accordingly dismissed but due to the nature of the petition I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

.....

J .A. MAKAU

JUDGE