



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 237 OF 2015**

**DENNIS ITUMBI.....PETITIONER**

**AND**

**HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL, KENYA POLICE SERVICE....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In 2007/2008 Kenya witnessed unprecedented citizen and civil unrest. There was widespread violence and protest following the general elections held in December 2007. The violent protest and civil unrest were allegedly in pursuit of the overarching objective of free and fair elections or electoral justice. Subsequent independent commissions were however to reveal other underlying and non-electoral related reasons for the civil protests and unrests.

2. The protests and unrests affected almost one and all in other ways. Properties were destroyed. Injuries were sustained. Over 1000 deaths were recorded. Over half a million persons were displaced. The protests and unrest ceased when the international community in one way or the other intervened. The protests had been unlawful and as a result some of the protesters and others were called to account. Arrests were effected. As the dust finally settled, six Kenyans were indicted and ultimately arraigned before the International Criminal Court (ICC) at the Hague, Netherlands. The six included the current President of the Republic of Kenya and his Deputy. All the ICC cases were variously terminated or withdrawn between 2010 and 2016.

3. The instant Petition is remotely related to the events between 2010 and 2013. The Petitioner accuses the State of violating his constitutional rights even as the State contends that in arresting the Petitioner, the State was simply observing and complying with its obligations under the Rome Statute of the ICC. Ultimately, the central question is whether the Petitioner's constitutional rights were infringed.

**Background**

4. The claim as gleaned from the pleadings arose in these circumstances.

5. The Petitioner who describes himself as an investigative journalist was arrested by members of the National Police Service ( "the Service"), which is under the command of the 2<sup>nd</sup> Respondent, on 22 March 2012 as dusk settled. The Petitioner was thereafter detained and interrogated. He made statements. His house was searched pursuant to a warrant obtained on 23 March 2012. His personal equipment-phones, cameras and a laptop-were also seized. He gave his consent to the Service to examine the equipment. He was ultimately released. The Petitioner says he was released on 26 March 2012. The Service says it was on 25 March 2012. The Petitioner was released without any charges being preferred.

6. The Petitioner was being investigated pursuant to a request for assistance by the ICC for any available information on the Petitioner and also to investigate alleged illegal hacking of the ICC electronic media site touching on, concerning and involving the Kenyan cases then before the ICC.

7. The Petitioner was released without any charges being preferred. No report too on the Petitioner was availed or forwarded to the ICC. An investigation report dated 3 May 2012, was incomplete as the Service sought statements from five other individuals, all who were out of

jurisdiction. As at the time of filing of the Petition, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents stated that the matter was still under investigations.

### **The Claim**

8. The Petitioner seeks a declaration that the Respondent's conduct throughout has infringed the Petitioner's constitutional rights under Articles 27 (equality/ freedom from discrimination), 29 (freedom and Security of person), 31 (privacy), 48 (access to justice), 49 (arrested persons' rights) and 50 (fair trial). The Petitioner also seeks orders to bar the Respondents from arresting, filing criminal charges and or prosecuting the Petitioner of any criminal charges related to the Kenyan situation at the ICC. Finally, the Petitioner seeks damages for the violation of his Constitutional rights.

9. The claim is largely pegged on the facts outlined above (in the background part of this judgment). Additionally, the Petitioner relied on the fact that long after his release the Petitioner on 28 September 2012 filed an application before the ICC challenging the legality of his arrest. The ICC dismissed the Petitioner's motion and held that the Office of the Prosecutor at the ICC had not instigated or requested for the Petitioner's arrest.

### **The Response**

10. In resisting the claim, the Respondents filed Grounds of Opposition on 22 January 2016 and also pleaded on the merits through a Replying Affidavit.

11. The Grounds of Opposition as filed by the 1<sup>st</sup> Respondent were basically to the effect that;

11.1 the Petition did not disclose any violation of the Petitioner's constitutional rights and fundamental freedoms.

11.2 the provisions of Article 50 of the Constitution did not apply as the Petitioner had not been arraigned before any court and charged with any offence.

11.3 the rights under Articles 27, 29, 31 and 49 were not absolute rights.

12. The response to the merits of the Petition was contained in the Replying Affidavit filed by John Kariuki on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 2 November 2015.

13. The merits were controverted as follows; that

13.1 the ICC had complained of hacking and possible interference with the ICC witnesses and the witness email accounts, and the ICC thus specifically on 27 September 2011 requested Kenya to track the hackers who had made unauthorized access to the ICC site.

13.2 the investigations by the officers of the service had led the investigators to the Petitioner hence his arrest and detention.

13.3 The investigations had been conducted in accordance with and within the parameters of the law.

13.4 The Petitioner gave his consent to his house being searched as well as to his personal equipments and gadgets being examined.

13.5 The investigations are still on-going and thus incomplete as the Respondents still await statements from various persons who are not within the jurisdiction.

### **Submissions**

#### *Petitioner's submissions*

14. Mr. Moses Chelanga who urged the Petitioner's case filed written submissions as well as two lists of authorities.

15. Mr. Chelanga started his submissions by faulting the Petitioner's arrest by the Respondents when it was clear that he would not be charged in court. Referring to the determination by the ICC made on 19 November 2012, counsel submitted that the ICC had neither requested for any assistance or for the arrest of the Petitioner and according to counsel there was thus a blatant abuse of the process by the Respondents.

16. Counsel complained that the constitutional and institutional independence of the Respondents' offices was being eroded in so far as the Respondents had left themselves to the whims of the ICC. In this regard, counsel referred to the fact that there was no closure to the investigations as the ICC had not availed an individual to give a statement to the local investigators.

17. Mr. Chelanga urged the court to bring an end to what he referred to as "a charade of investigations" as the ICC had already determined that the Kenya Government was not cooperating with the ICC. According to counsel the longer the investigations were kept pending without closure the more the Petitioner was prejudiced. Counsel relied on the case of **Ex parte Stephen Oyugi Okero [2015]eKLR** for the proposition that the court could direct the office of the Director of Public Prosecutions to make a decision within a specified period of time on what to do with a suspect being investigated.

18. On the issue of violation of the Petitioner's right as an arrested person, counsel submitted that the Respondents had owned up to detaining the Petitioner for a period of more than 24 hours and there was thus no excuse as there was non-compliance with clear and specific provisions of the Constitution. Counsel referred the court to the case of **Musili Mwendwa v Attorney General & 3 others [2016] eKLR** to urge for damages for such unlawful detention. Counsel then suggested an award of 50,000,000/= as reasonable compensate for the Petitioner's alleged tribulations.

#### *Respondents' submissions*

19. Ms. Linah Wawira appeared for the 1<sup>st</sup> Respondent.

20. Ms. Wawira submitted that in so far as the 1<sup>st</sup> Respondent is concerned and in relation to the claim for violation of the Petitioner's right of access to information under Article 35, the Petitioner had failed to show the information held by the State and to which access had been denied.

21. With regard to the alleged violation of Article 27, Article 31 and Article 48 rights, Ms. Wawira's submissions were that the Petitioner had failed to show how the rights protected by the Constitution under these Articles had been violated but had merely pleaded these Articles. While on Article 50, counsel submitted that as the Petitioner had not been charged before any court of law, the rights reserved for accused persons could not apply.

22. On the issue of being detained beyond 24 hours, the 1<sup>st</sup> Respondent insisted that as the detention occurred over the weekend the Respondents could not be held to have violated the Petitioner's rights as an arrested person.

23. Ms. Wawira relied on various authorities including **Rose Wangui Mambo & 2 others v Limuru County Club & 17 others [2014] eKLR**.

24. Mr. David Ndege urged the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' case.

25. While not contesting the fact that the Petitioner was arrested on 22 March 2012, Mr. Ndege submitted that the arrest was procedural and was part of the investigations then being undertaken by the Respondents at the behest of the ICC. Counsel further insisted that both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were merely executing their respective constitutional mandates as enshrined under Article 157 and Article 244 of the Constitution.

26. Counsel further submitted that the Petitioner had also failed to particularize the alleged violations while insisting that the investigating process was carried out in accordance with the law. Curiously, counsel made no specific submission on the allegation that the Petitioner's right as an arrested person had been violated only insisting that the police officers were still investigating hence the continued detention.

#### **Discussion and determination**

27. I have carefully reflected on the pleadings as well as the submission and I am able to quickly isolate two core issues for determination. First, is whether the Petition is aptly drafted to meet the threshold set in constitutional litigation. Secondly, is whether the constitutional rights and guaranteed freedoms of the Petitioner were violated as alleged by the Petitioner.

28. It is now relatively well settled that any complainant approaching the court through a constitutional petition is duty bound not only to plead the specific provisions of the Constitution and the rights or freedoms allegedly infringed but also to set out with specificity the manner of infringement. This is to be done with reasonable precision, not absolute precision: see **Anarita Karimi Njeru –v- Republic [1976-80] 1 KLR 1272**. Once the court is able to painlessly identify the complainant's claim and case the threshold must be deemed to have been met as the Respondent is thus able to respond to any claim.

29. The Petitioner in the instant case has laid out his case. It is simple. He complains about the un-ending investigations. He complains that in the process he has not been afforded the benefits, nay; rights and freedoms guaranteed by the Constitution. He then identifies the specific provisions of the Constitution and proceeds to outline what happened and what makes him believe that his rights were infringed.

30. I have read and re-read the Petition. It is wordy and prolix. It is however not hard to understand the Petitioner's complaints. This may actually also be inferred from the Respondents' detailed and comprehensive responses.

31. I am satisfied that the Petition meets the drafting muster. It can be easily understood what violation is alleged and under what circumstances. I would not accept the contention and submission by the Respondents that the Petition is frivolous and wanting in material particulars.

32. Secondly, has the Petitioner proven that his rights and fundamental freedoms were violated by the Respondents? I will endeavor to answer this question under various sub-headings.

33. The Petitioner chiefly complains about his arrest and detention beyond the prescribed constitutional time-line. Additionally, the Petitioner complains about not being afforded the equal protection of the law, being denied a fair hearing, not being granted access to justice and also want of fair administrative action, besides being denied access to information and his privacy being violated.

34. I must point out that the burden is upon the Petitioner to prove on a balance of probabilities any of the alleged violations: see **Githunguri Dairy Farmers Cooperative Society Ltd v Attorney General [2016] eKLR**. This burden is discharged by the Petitioner availing such

relevant and admissible evidence and not pegging his case on presumptions.

35. There is generally no dispute on the factual evidence. Only two aspects of the affidavit evidence seem to have generated controversy.

36. The parties are in agreement that the Petitioner was being investigated and was ultimately arrested for alleged hacking (obtaining access albeit illegal) into the ICC electronic media. The Respondents contend that the Petitioner's arrest was at the prompting of the ICC. The Petitioner says otherwise and insists there was no basis. Secondly, the parties also disagree on when the Petitioner was released or how long the Petitioner was detained. The Respondents or at least the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents insist that the Petitioner was released from custody on 25 March having been arrested on 22 March. The Petitioner contends that he was only released on 26 March after spending four days in custody.

37. With the factual aspect not in contest, I now proceed to determine the issues of the alleged violations.

#### ***Privacy- Article 31***

38. The Petitioner had alleged that his right to privacy had been violated. In this respect, the Petitioner pointed to the searches and seizures of his house and equipment/property respectively. The equipment included the Petitioner's mobile phones and laptops which the Respondents' experts examined and gained access to the private material contained therein. It emerged, in evidence, that the Respondents had been conducting their own surveillance on the Petitioner as well as on other citizens internet operations and access.

39. At the oral hearing of the Petition, Mr. Chelanga informed the court that the Petitioner had abandoned his pursuit of the alleged violation of the right to privacy. The decision to abandon that aspect of the claim in my view was well informed.

40. Fundamental rights and freedoms are not water-tight or inalienable. This is with the exception of the Article 25 rights. The right to privacy is thus not absolute. With regard to the power to search and seize which is an overriding power of the state for the protection of social and personal security, the law clearly regulates when such power may be interfered with. A person's home or property or even his own person may not be searched and neither will the possessions be seized except under a warrant of the court properly and regularly obtained: see Part VII of the National Police Service Act No 11A of 2011.

41. The Respondents in the instant case obtained the requisite warrants from a court of law prior to the searches on the Petitioner's home. The Respondents also obtained the Petitioner's consent to examine his equipment and it was not suggested that the consent had been granted under any duress. The Respondents could not certainly have been held to be in violation even if the Petitioner had pursued this claim. I will not address the issue of denial of right to privacy any further even though the Petitioner had raised a pertinent question on the effect of State's surveillance on its citizenry in relation to this right.

#### ***Equality and discrimination – Art. 27***

42. The Constitution expressly provides that all persons are equal before the law and must be accorded equal protection and benefit of the law. Discrimination is also expressly prohibited whether on the grounds specified or otherwise. Equality of all being is paramount under our Constitution.

43. The European court of Human Rights has observed that discrimination means treating differently without any objective and reasonable cause persons in relatively similar situations: see **Willis v United Kingdom**, case No. 36042/97 ECHR 2002. See also **Peter Waweru v R [2006]eKLR** and **Githunguri Dairy Farmers Cooperative Society Ltd v Attorney General & 2 others [2016] eKLR**. There is need for a Petitioner to show arbitrary differentiation which imposes burdens, disadvantages or obligations not imposed on others. The Petitioner needs to show this by evidence or arguments.

44. In this regard, the Petitioner simply submitted that his investigation and arrest was outside the structures of the International Crimes Act 2008 as well as of the Rome Statute. I did not hear the Petitioner to allege that the Respondents had acted selectively in investigating or arresting him. I however understood the Petitioner to complain that he was not under investigation by the ICC.

45. My review of the evidence and submission does not reveal that there has been any differentiation fetched upon the Petitioner as to lead to an inference of the Respondents being selective and thus discriminatory. Kenya is a state party to the Rome Statute and is duty bound to assist the ICC as may be appropriate. The evidence reveals that the ICC sought specific assistance from Kenya in re the Petitioner. The Respondents moved thereafter pursuant to constitutional and statutory provisions to investigate the Petitioner.

46. The mere fact of investigation and arrest cannot be deemed discriminatory unless the Petitioner points to a selective approach which he has not. I would tend to agree with the Respondents that the Petitioner has not shown that he was discriminated against and not afforded the full benefit of and protection of the law.

#### ***Access to information and justice- Article 35 and Article 48***

47. Article 35 expressly protects a citizen's right of access to information.

48. The Access to Information Act 2016 has sought to promote this right of access to information. There is no doubt that the right of access to information is fundamental to the realization of other rights including the right of access to justice as well as freedom of expression.

49. The Petitioner complains that he sought information from the 1<sup>st</sup> Respondent on the role of the ICC on his arrest. He had wanted to

challenge his arrest and the legality thereof before the ICC Chambers. The information was not availed. Information was not availed even though the 1<sup>st</sup> Respondent had in his possession the official request for assistance by the ICC.

50. The Petitioner, in my view, has on a balance of probabilities demonstrated that he requested for information which was in possession of the 1<sup>st</sup> Respondent and which information was sought with a legitimate aim of utilizing the same to further a right. The 1<sup>st</sup> Respondent failed or neglected to act. This occasioned the Petitioner unnecessary prejudice as he proceeded to challenge his arrest without crucial documents. He made a decision which perhaps with the sought information at hand, in hindsight, he may not have made.

51. The policy should be for access and release of information in the hands of a public officer rather than denial of information. The 1<sup>st</sup> Respondent settled for the latter and I found that unacceptable given that no reason has been advanced for such denial. The 1<sup>st</sup> Respondent, in my view, violated the Petitioner's right of access to information.

52. I am unable however to find for the Petitioner that his right of access to justice was violated. No specific evidence was led towards this and no arguments too were advanced to support this allegation

***Fair administrative action and fair trial- Article 47 and 50***

53. I will consider the alleged violation of the right to fair administrative action and to fair trial together.

54. The Petitioner's complaint in this regard is that the investigations are taking far too long to lead to any fair process. The Petitioner submits that the long process of investigations is likely to taint any trial. According to the Petitioner, ultimately evidence may dissipate and crucial witnesses may not be traced and those who are there may have lost their memories.

55. It is however the Respondents submission that the Petitioner's right to fair administrative action is not likely to be violated by the continued investigations. The Respondents also contend that as long as the Petitioner is not yet an accused person, there no possibility of Article 50 rights (right to fair trial) being violated. The Respondents are dependent as well simply on the nature and circumstances of the case.

56. I would agree

57. The circumstances leading to the Petitioner being investigated and ultimately arrested are not in dispute. The complainant was not a 'local' complainant. It was the ICC that prompted the Respondents. There has been a delay in the investigations but it would not serve the societal interests any better if the investigations were now brought to a halt. I also view it premature for the Petitioner to lodge a complaint about his possible trial.

58. Investigations ordinarily are the beginning of criminal processes. Investigations unearth such evidence that may lead to a person's culpability. It may also unearth evidence which exculpates. It is not guaranteed that the only evidence to be discovered and generated by any investigation into alleged criminal offences is such as to lead to an indictment.

59. In the instant case, the uncontested picture conveyed to the court by the Respondents was one of a complex technical investigatory process involving persons across various continents. The nature of the transnational investigations dictates that the court exercises reticence and allows the constitutional and statutory process to be completed.

60. I am prepared to state that the Petitioner will be perfectly entitled to revisit these allegations of violation of his Article 48 and Article 50 rights, at a later stage. He will then be at liberty to demonstrate any prejudice. For now, it may be viewed that the court is just as speculative as the Petitioner if I were to agree with the Petitioner that his rights to fair trial will be trampled. For now as well, I must dismiss this aspect of the Petitioner's claim.

***Right to freedom and security of person and right of arrested person – Article 29 and Article 49***

61. I will consider these two rights simultaneously as well due to their correlation.

62. The Petitioner holds the Respondents responsible for his unlawful detention beyond the constitutional 24 hours. The Petitioner also complains that he was unreasonably and unlawfully denied his liberty.

63. There is no doubt that the Constitution prohibits the denial of liberty to any person. So important is the right that even where the Constitution has allowed liberty to be taken away as in the case of lawfully arrested persons, clear constitutional safeguards are in place: see Article 49. A citizen will not be deprived of his freedom and liberty with ease.

64. Article 49 of the Constitution allows arrested persons to be kept in custody but for a maximum of 24 hours from the time of his arrest. And, it matters not the circumstances. The arrested person even if he cannot be charged in court must be brought to court within 24 hours, then he must be released or the reasons for his continued detention explained to him by the court. The Service is to surrender the arrested person to the jurisdiction of the court

65. In the instant case, two significant facts emerge.

66. The Petitioner was detained beyond 24 hours following his arrest. Secondly, the Petitioner was arrested when it was apparent he should not have been arrested in the first place.

67. The Respondents explanation is that the Petitioner's arrest was occasioned by the ICC. Secondly, the Respondents also state that the 24 hour time line was lawfully breached as it fell into a weekend.

68. I have reviewed the evidence.

69. The ICC did not prompt the arrest of the Petitioner. The ICC had simply asked the Respondents to avail information on the Petitioner and investigate the alleged transgressions. It beats reason why the Respondents did not simply interrogate the Petitioner who was apparently very cooperative and even consented to his equipment being examined. I also do not find the excuse of the weekend falling into place and not allowing the Respondents to release the Petitioner tenable. What happened to the free police-bonds? One may ask. Likewise, if the Service could move the court for warrants on 23 March, it beats reason why the Service did not bother to ask the court for more time. The Respondent's officers in my judgment overreached themselves. It did not matter what the ICC was involved, it mattered more that a citizen's liberty was at stake.

70. The Service was in my view too heavy handed and anxious to have the Petitioner in custody for no particular reason. This was rather arbitrary and intentional.

71. In interpreting Article 49 of the Constitution, an interpretation which best promotes the right must be accorded. Even though Article 49 allows the Service to hold an arrested person post the prescribed 24 hours where the twenty fourth hour falls on a day that is not a court day, 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. There is no need in such an instance to hold a person over the weekend or over a public holiday. The constitutional dictates and spirit would demand that the individual's liberty and freedom be promoted rather than denied in such cases.

72. The Respondents no doubt knew that the Petitioner was still unlikely to be charged in court. There was no need to continue to detain the Petitioner even if the hour fell into a non working day , which I doubt.

73. I find that the Respondents without just cause violated the Petitioner's right to security and freedom of person and also the Petitioner's right as an arrested person.

#### **Conclusion and disposal**

74. I am satisfied in the circumstances that petitioner has been able to demonstrate and establish to the acceptable and required standard that the Respondents violated the Petitioner's right of access to information and further that the Respondents violated the Petitioner's rights as an arrested person. The Petitioner's right of security and freedom of person and liberty was also transgressed by the Respondents.

75. The Petitioner is consequently entitled to some relief. The Petitioner has sought damages and I agree he is indeed entitled to some recompense for the violation of his constitutional rights especially the right to personal freedom and liberty. Damages would be appropriate in the circumstances of this case to vindicate the Petitioner.

76. In final judgment, I make the following orders

76.1 There shall issue a declaration that the Respondents violated the Petitioner's constitutional rights guaranteed under Article 29,35 and 49 of the Constitution when he was denied information sought by the 1<sup>st</sup> Respondent and also detained beyond the prescribed 24 hours officers of the 2<sup>nd</sup> Respondent.

76. 2 award the Petitioner the global amount of Kshs 5,000,000= for the violations to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for the violation of the Petitioner's constitutional rights.

77. I also award the successful the Petitioner costs of the Petition.

78. I indeed finally apologize to the parties and their counsel for the delay in rendering this decision. The circumstances have been duly explained to the parties by the Deputy Registrar under cover of a letter dated 22 December 2017. The anxiety occasioned is rued.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of January, 2018.**

***J.L.ONGUTO***

**JUDGE**