



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 407 OF 2017**

**PETER KARIUKI MACHARIA.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....RESPONDENT**

**JUDGMENT**

1. **Peter Kariuki Macharia**, the Petitioner, filed a petition dated 21<sup>st</sup> August 2017 against the Attorney General seeking the following reliefs.

*(i) The Honourable Court be pleased to declare that your petitioner's fundamental right and freedom under Article 28 and 29(a) of the constitution have been and were (sic) contravened by a servant or agent of the government of the Republic of Kenya.*

*(ii) The Honourable court be pleased to declare that your petitioner is entitled to compensation for breach of his fundamental right and freedom under the Constitution.*

*(iii) The Honourable Court be pleased to make any orders it deems just.*

2. The facts giving rise to this petition are that on 16<sup>th</sup> December 2013, at around 9 am, the petitioner was going about his business within Nairobi, when he was arrested and taken to Kamukunji Police Station without being told reasons for his arrest. At the Police station, he was asked to produce a phone he was alleged to have stolen from one **Ogola** a person he did not know. He was locked up and held in custody until 18<sup>th</sup> December 2013 when he was produced in court and charged with the offence of stealing. He was released on bail but on 21<sup>st</sup> August 2015, the prosecution withdrew the charge against him. It is for the above reasons that the petitioner contends that his fundamental rights were violated.

3. The respondent filed grounds of opposition dated 30<sup>th</sup> October 2017 and filed in court on 1<sup>st</sup> November 2017, contending that the petitioner had not sworn that his constitutional rights had been violated and the manner of violation; that the petitioner did not show that the prosecution was done with malice in bad faith or that it constituted abuse of police powers; that the petition is frivolous and an abuse of the court process and that the petition does not meet the threshold of a constitutional petition.

***Evidence***

4. In his evidence, the petitioner testified that he used to work as a security guard and that on 16<sup>th</sup> December 2013 while at his place of work within Nairobi, he was confronted by a young man he did not know who claimed that he, (the petitioner), had stolen his phone. The petitioner testified that the young man followed him to a saloon and at that point he heard the young man calling police officers.

5. The petitioner told the court that police officers came and asked him to accompany them to the police station on allegations that he had taken the young man's phone, a claim he disputed. He testified that he was taken to Kamkunji Police station. He stated that the day he is alleged to have taken the phone was a Sunday and on that day he was a way at home. He stated that he was asked to pay Ksh22, 000 the phone's worth to secure his released but he did not have the money. He was therefore placed in the cell until 18<sup>th</sup> December 2013 when he was taken to court and charged with stealing. He produced a copy of the charge sheet as PEX1.

6. In cross examination, the petitioner stated that he was released on bail t but could not get out but he was released after 2 days when his son stood surety for him. He told the court that the complainant and his witnesses never attended court to testify leading to his release on 21<sup>st</sup> August 2015 under section 87(b) of the Criminal Procedure Code.

7. After close of the petitioner's case, the respondent did not call a witness. **Miss Mwasao** closed their case and opted to rely on written

submissions.

8. **Mr. Oluoch** relied on their written submissions dated 20<sup>th</sup> November 2017 and filed on the same day. It was submitted, first that the respondent did file a response to the petition as required by rule 16(1) of the **Mutunga Rules** which states that if a respondent does not respond within the time stipulated in rule 15, the court may hear and determine the petition in the respondent's absence. Rule 15 requires a respondent to file a response within 14 days after service.

9. The petitioner relied on the case of the **Very Rev. Jesse Kamau & Others v Attorney General** [2011]eKLR on the importance of rules of procedure as a the pillar for dispensation of justice. I point out here that according to the record, the respondent filed a response on 1<sup>st</sup> November 2017. The affidavit of service on record states that the respondent was served on 24<sup>th</sup> August 2017 which means the response was filed outside the 14 days required in rule 15. However, the fact that a response was filed though out of time, that alone cannot invalidate a response that has been duly filed and place on record before the petition is heard. The contention that the respondent did not file a response in time has no significance in this petition. In any case, a court of law is required to do substantive justice in terms of Article 159(2) (d) of the Constitution without undue regard to procedural technicalities.

10. Regarding the respondent's contention that the petition does not meet the threshold in **Anarita Karimi Njeru (supra)**, counsel submitted that the petition is pleaded in a precise and comprehensive manner and relied on the case of **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others** [2013]eKLR

11. Finally, it was submitted that the petitioner's rights and fundamental and freedoms were violated in that the petitioner's right to dignity was assaulted when he was arrested and detained at the police station and later charged in court in what he said were flimsy charges. Reliance was placed on the case of **Rashid Odhiambo Aloggoh & 245 Others v Haco Industries Ltd** (CA No 110 of 2011), for the submission that availability of other causes of action is not a bar to a party who alleges contravention of his rights under the constitution from instituting proceedings invoking those rights.

12. In terms of the level of damages the petitioner urged the court to grant general damages of Kshs500, 000/- and special damages of Kshs100, 000/-. He also asked for costs and interest.

13. The respondent also relied on their written submissions dated 18<sup>th</sup> January 2018 and filed on 21<sup>st</sup> January 2018. For the respondent, it was submitted that the petitioner has failed to show through evidence that the arrest and prosecution was done out of malice or in bad faith, and that the arrest and prosecution constituted an abuse of the court process. Secondly, it was submitted that section 24 of the National Police Service Act mandates the police to protect property, investigate crimes and apprehend offenders. In that regard, it was contended that the police cannot be faulted for performing their statutory duties unless it is shown that the arrest was arbitrary and without just cause.

14. Reliance was place on the case of **Abdiwahab Ibrahim Ali & another v Inspector General of National Police Service & 3 Others** [2017]eKLR for the submission that section 24 sets out functions of the police service and therefore a petitioner has to demonstrate that the prosecution constituted on abuse of process police powers or was malicious; and the Supreme Court decision in **Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 8 others** [2014]eKLR (page 61, 349) for the submission that a party invoking Article 27(1) of the constitution has to show the rights said to have been infringed as well as the basis of his grievance. It was the respondent's contention that the petition fails to meet the threshold of a constitutional petition and should be dismissed.

15. I have considered this petition, the response, evidence and submissions. I have also considered the authorities relied on. The petitioner was arrested and charged in Court on allegation of stealing. He was later discharged under section 87(a) of the CPC. He filed this petition claiming that his constitutional right and fundamental freedom were violated by the act of arrest and prosecution.

16. In his evidence, the petitioner stated that he was arrested on the morning of 16<sup>th</sup> December 2013 and held at Kamukunji Police Station until 18<sup>th</sup> December 2013 when he was charged in court. He pleaded not guilty to the charge and was released on bail. He did not succeed to come out until 21<sup>st</sup> December 2013. He was finally discharged in 2015 in what he says was to failure of complainant to attend court. He therefore prays that he be compensated for the violations.

17. The petitioner was arrested by police officers who under the law, are mandated to preserve law and order and protect property. The petitioner was arrested for alleged stealing. He was indeed produced in court charged and in accordance with the law. It is true that he was discharged for whatever reason but he underwent due process.

18. The law is clear that the burden of proof is on the party who wants the court to give judgment in his favour. That duty does not shift. In that regard, Section 107(1) of the evidence Act Cap 80 provides: **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"** Section 109 of the same Act further provides that **"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"**

19. This being a claim for violation of rights and fundamental freedom the petitioner was bound to show that the police did not act in accordance with the Constitution or the law. Article 244 of the Constitution spells out objects and functions of the police service to strive for the highest standards of professionalism and discipline prevent corruption and promote and practice transparency and accountability; comply with **constitutional standards of human rights ad fundamental freedoms** among others.

20. In line with the above provisions of the law, the Court of Appeal stated in the case of **Jenifer Nyambura Kamau v Humprey Mbaka Nandi** [2012] eKLR that according to Section 108 of the evidence, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. And In the case of **Kirugi & Another v Kibaya & 3 Others** [1987] KLR 347 the same Court reiterated that the burden of proof was always on the balance of probabilities.

21. The issue of arrest and prosecution has been the subject of judicial decisions and in particular that the police have a duty to perform and unless it is shown that they acted with malice. In the case of **Jediel Nyaga v Silas Muckeke 1987 (CA NO 59 of 1987)** the Court of Appeal stated that ***“The appellant having reported to the police about the respondent’s action of damaging his crops, the police took over the matter to investigate the respondent for a possible offence... Once the appellant gave the report, he ceased to have anything to do with the matter.”***

22. ***Robert Keri Ombaka v Central Bank of Kenya [2015] eKLR*** the Court of Appeal observed;

***“In this appeal there is no evidence that the respondent made a “false” report or that it was actuated by “malice”, or that his prosecution was brought “without reasonable or probable cause”.. That a suspect was acquitted of a criminal case is not a ground for filling a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established.”***

23. Section 24 of the National Police Service Act is clear on the exercise of Police Powers. The petitioner has not demonstrated that the police violated Article 244(c) and failed to comply with constitutional standards of human rights and fundamental freedom. All that the police did was arrest the petitioner and he was aware that the arrest and arraignment in court was on suspicion of stealing. There is also no evidence that police did not act in accordance with the Constitution and the law. Without evidence that the constitution and or the law were violated, the claim that the petitioner’s rights and fundamental freedoms were violated remains hollow.

24. Regarding arrested and prosecution the police performed a duty the law requires of them and if the arrest and prosecution is to be faulted, the petitioner must show through evidence that the arrest was arbitrary; was malicious; was in bad faith and amounted to abuse of the court process. No such evidence has been adduced that there was abuse of the court process.

25. In the premise, I am not satisfied that the petitioner has made out a case either for violation of constitutional rights and fundamental freedoms or that the arrest and prosecution was actuated with malice; was arbitrary, or amounted to abuse of police powers and therefore abuse of the court process. Consequently the petition dated 21<sup>st</sup> August 2017 is declined and dismissed with no order as to costs.

**Dated, Signed and Delivered at Nairobi this 3<sup>rd</sup> Day of August 2018**

**E C MWITA**

**JUDGE**