



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 473 OF 2015

JOSEPH MWATHI NYANJUI.....1ST PETITIONER

VERSUS

ALPHONSE MANG'ENI.....1ST RESPONDENT

KENYA PRISON SERVICE.....2ND RESPONDENT

JUDGMENT

1. The Petitioner, **Japheth Mwathi Nyanjui**, is an inmate at Kamiti Prison. In his petition dated 28th October 2015, and filed in Court on the same day and the supporting affidavit of even date, he stated that on 19th September 2015 while at his Block F, the first respondent, **Alphonse Mang'eni**, assaulted him during routine inspection, looking for contraband items in the cells. He stated that the 1st respondent beat him severally and occasioned him injuries which necessitated treatment at Kamiti Health Centre.

2. The petitioner stated that the conduct of the respondent violated both the Constitution and the Law, and wants the 1st respondent held personally liable for the unlawful acts under Section 5 of the Persons Deprived of Liberty Act 2014.

3. The petitioner therefore sought the following reliefs:

1. A declaration that the rights of the petitioner under Articles 25(a), 27(1), 28, 29(c)(d)(f), 51 of the Constitution have been violated.

2. A declaration that the acts of the 1st respondent amounted to torture and in human and degrading treatment thus violating Articles 25(a), 27(a), 28, 29(c)(d)(e)(f), 51 of the Constitution.

3. A declaration that the 2nd respondent is in violation of the Constitution by failing to properly instruct the 1st respondent on the guiding principles of human rights, the Constitution and the rule of law.

4. A declaration that the 1st respondent has committed an offence within the meaning of section 5(2) of the persons deprived of liberty Act No 23 of 2014 and should be prosecuted.

5. A declaration that the petitioner herein is entitled to compensation as follows:-

a. the sum of ksh300,000/-.

b. general damages

c. medical costs

d. costs of this suit

6. A declaration that the 1st respondent meets the costs of this suit.

7. Any other orders that this Honourable Court may deem fair and just.

4. The respondents filed grounds of Opposition and replying affidavit through the 1st respondent sworn on 11th November 2016 and filed in Court on 15th November 2015. The 1st respondent stated that he was the weekend duty officer on the material day, 19th September 2015, when junior officers of the 2nd respondent carried out routine searches among inmates in Block F

5. He deposed that during the search, the petitioner resisted the search after he was found with a smart phone. The deponent was called and informed of the petitioner's conduct. He stated that he proceeded to Block F and noted that the petitioner had been found with a contraband item namely; a Smart Phone **ITEL 5120 SN 353599062714056**. The deponent denied that any of the inmates was assaulted during the search. The 1st respondent further denied that the petitioner was brutally assaulted or treated in an inhuman and degrading manner.

6. In the grounds of opposition, the respondents stated that the petitioner did not plead with precision how his rights and fundamental freedoms were violated under the cited Articles of the Constitution, that the petitioner had not shown through evidence that he was assaulted, tortured or treated in an inhuman and degrading manner, and that there was no demonstration on how the **Constitution** and or the law were violated.

7. At the hearing, the petitioner who was unrepresented relied on his written submissions filed in court on 18th July 2017. He submitted that he was tortured and treated in an inhuman manner contrary to **Articles 25, and 29** of the **Constitution**. He further submitted that the treatment was in contravention of the provisions of the Persons Deprived of Liberty Act and The United Nations Convention against torture.

8. The petitioner argued that neither the 1st respondent nor employees of the 2nd respondent are allowed to commit acts of torture against inmates, and contended that the treatment notes he attached to his affidavits were sufficient proof that he was indeed tortured and treated in an inhuman and degrading manner.

9. The petitioner went on to submit that the documents produced by the respondents did not show that the document supposedly submitting the recovered items to Mr Nyaga were forwarded. He also contended that the documents show that 7 cellphones were recovered from Block F but only 2 phones show that they were recovered from cell 41 and 46.

10. The petitioner went on to submit that his assault was captured by CCTV but the footage could only be produced through a court order. The petitioner asked the court to believe what he had stated in his pleading, since the respondents had not sought to cross examine him and relied in the case of **Jeniffer Muthoni Njoroge v Attorney General** [2012]eKLR for this submission.

11. According to the petitioner, if indeed he had been found with contraband goods, he should have been charged in Court for that offence. The petitioner further contended that it was difficult for him, as an inmate, to properly bring evidence before Court since he is held in the same facility where the 1st respondent works. He relied on the case of **Harun Thungu Wahaba & Others v Attorney General** Misc. Appl No 1411 of 2004 for that submission.

12. Regarding liability of the 2nd respondent, the petitioner submitted that the 2nd respondent is the employer of the 1st respondent hence it is liable for acts of its employees. The petitioner further submitted that the 3rd respondent was also liable because the acts complained of are by officers employed in the Public Service, namely; the Prison Service, a government institution.

13. On the issue of damages the petitioners referred to the case of ***Dominic Arony Amolo v Attorney General*** [2003]eKLR on the applicable principles and urged the court to allow the petition and award damages as prayed.

14. Mr Ogosso, learned Counsel for the respondents, submitted that on the date in question a search was being conducted by Prison authorities to confiscate contraband items, but the petitioner resisted because he did not want the search to go on. The search, however, yielded contraband goods in the form of cellphones, and one of the cellphones, belonged to the petitioner that is **Itel 5120 S/N 353599062714056**.

15. Counsel submitted that on 15th July 2016 the Court directed the Officer in Charge of Kamiti Prison to investigate the alleged threats to the petitioner and he filed a report in form of a letter dated 19th September 2016 “AM3 & 4. Mr Ogosso contended that the petitioner did not prove that he was tortured by the 1st respondent or any other Prison officer hence the petition is based on conjecture. In Counsel’s view the petition is aimed at frustrating prison officers from carrying out their duties.

16. I have considered this petition, the response thereto, submissions by parties and the authorities cited. The petitioner has come to this court complaining that he was tortured and treated in an inhuman and degrading manner being a prisoner and, therefore, a person deprived of liberty.

17. He has relied on a number of **Articles** of the **Constitution** and provisions of statutes and International Conventions. He relied on **Article 25(a)** which states that ***despite any other provision in this Constitution, freedom from torture and cruel, in human or degrading treatment or punishment shall not be limited.*** **Article 27(1)** states that ***every person is equal before the law and has the right to equal protection and equal benefit of the law.*** **Article 28** emphasizes the fact that ***every person has inherent dignity and the right to have that dignity respected and protected.*** This means that all persons by virtue of them being human have dignity which must be respected and protected irrespective of where they are whether free or deprived of liberty.

18. **Article 29** of the **Constitution** guarantees freedom of the person and provides as follows:

“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;

b. detained without trial except during a state of emergency, in which case the detention is subject to Article 58;

c. subjected to any form of violence from either public or private sovereign

d. subjected to torture in any manner, whether physical or psychological;

e. subjected to corporal punishment; or

f. Treated or punished in a cruel, in human or degrading manner.” (emphasis)

19. The petitioner has also relied on **Article 51(1)** of the **Constitution** which provides that-

51 (1) “ a person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of rights, except to the extent that any particular

right or freedom is clearly incompatible with the fact that the person detained, held in custody or imprisoned.”

20. The petitioner’s grievance, as I understand it, is that he was mistreated and tortured while prison officers were searching the Block where he is confined looking for contraband items. In the process, the petitioner contended, the 1st respondent “**descended**” on him and other inmates and beat them individually and severally occasioning them injuries for which the petitioner sought treatment at the prison health facility. To this end, the petitioner has attached treatment notes to his further affidavit sworn on 10th April 2017 to show that he was injured.

21. The incident complained of took place on the 19th September 2015. The **annexture “JM1”** (treatment notes) date back to 2013. From the annexture, the petitioner went to the health facility on 20th October 2013, 4th March 2014, 20th September 2015, 26th May, 2016 and 6th July 2016.

22. The record that would be relevant to this petition is that of 20th September 2015 a day after the alleged assault. However, from that day’s record, the Court is unable to tell what the petitioner was suffering from. This is because on that day, the petitioner was treated and given another appointment for 26th May 2016 about eight months away. The treatment record is not helpful and the Court is left without clear evidence of what the petitioner was suffering from and what he was treated for when he went to the health facility.

23. Secondly, the petitioner states both in his petition and affidavit that he was beaten by the 1st respondent but did not disclose in his pleadings what injuries, if any, he suffered and where in the body, to enable the Court ascertain the veracity of the claim.

24. I have also perused the record and in particular the order of the Court (**Onguto J**) made on 15th June 2016, directing the Officer in Charge of Kamiti Prison to investigate some alleged threats made against the petitioner and make a report to Court. This was after the petitioner complained to Court that his life was in danger following threats while in the cells.

25. In a letter dated 19th September 2016, **Henry K Kisingu** the Officer in Charge, Kamiti Prison, informed the Court that after investigations, he established that there had not been any threats to the petitioner, and further that he had assured the petitioner of his security while in prison.

26. Following this report, the petitioner filed a document dated 19th July 2016 and filed in Court on the same day disputing the findings and, in particular, contending that no proper investigations were carried out and that proper procedure was not followed in conducting those investigations. According to the petitioner, the Officer in Charge and the 1st respondent are both employees of the 2nd respondent who had a common interest. He also argued that the officer in charge, did not adhere to provisions of Section 27 of Persons Deprived of Liberty Act, 2014

27. Section 27 of the Act provides how complaints should be dealt with, it states that when a complaint is made it should be investigated and the findings and recommendations made in writing.

28. In this regard, the petitioner complained in Court and the court directed the Officer in Charge to investigate and report back to Court. This was done and a report was filed in Court. If the petitioner was not satisfied with the investigations, he could have taken up the issue with the Court when the report was filed in Court. Furthermore the officer in charge stated that he had assured the petitioner of his security.

29. The contention by the petition that both the office in charge and the 1st respondent are employee of the 2nd respondent and are therefore of common intention is, in my view, without basis. Section 27 requires the officer in charge to investigate the complaint and make a report. That is the officer the court directed to investigate and indeed he carried out investigations and made a report in writing as was ordered by the Court.

30. The petitioner did not object to the officer in charge investigating the matter, and cannot now object to the findings without showing that investigations were not carried out as ordered by the Court or at all.

31. Persons deprived of liberty, like the petitioner, are human beings and have their human rights intact except deprivation of liberty. The **constitution** and the Bill of Rights apply to them equally, the only exception being that they are held in lawful custody which deprives them liberty. They cannot be subjected to inhuman or degrading treatment, torture or any other form of human rights violations.

32. Parliament enacted Persons Deprived of Liberty Act, to give effect to **Articles 29(f) and 51** of the **Constitution** on these people's rights. Section 5(1) of the Act provides that ***a Person Deprived of Liberty shall at all times be treated in a humane manner and with respect for their inherent human dignity.*** Section 5(2) states that ***any person who subjects a person deprived of liberty to cruel, inhuman or degrading treatment commits an offence and shall be liable upon conviction to a fine or imprisonment or both.***

33. In that regard, any person who treats a person deprived of liberty in a manner that is inconsistent with the **Constitution** and provisions of the Act, commits a criminal offence. However, a person deprived of liberty who claims to have been treated in a manner that contravenes the Constitution and the law, should put forward sufficient and credible evidence to that indeed his rights were violated. He should also report to prison authorities for investigations so that action can be taken against the culprits in accordance with the law.

34. The Court is acutely aware that persons deprived of liberty may have some difficulty in obtaining evidence, but there must be reasonable grounds to believe that what is alleged did indeed happen to enable the Court act on the complaints. In the present case, the petitioner stated that he was beaten but did not state where and what injuries he suffered. The treatment notes attached to his pleadings are short in that regard

35. The respondents on their part stated that all that was done was a search to recover contraband items and in that exercise, cellphones were recovered from Block F where the petitioner is held and that in fact the petitioner was found with a smart phone.

36. This court has not been called upon to determine whether or not the petitioner was found with a cellphone. The complaint before it is that his human rights were violated. That violation need not be on one single occasion. Subjecting one to physical or psychological torture is a violation of human rights. This Court would be prepared to hold that there was such violation if there was tangible evidence which I don't find in this case.

37. The petitioner referred to the case of ***Jenifer Muthoni & Others V Attorney General*** (supra) to support the fact that it is difficult for persons deprived of liberty to produce evidence in support of their claim of torture and mistreatment. The Court referred to the case of ***Azzapo V President of South Africa***, (CCT 17/96) where **Mahomed. DP** stated;

“Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loves ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating

themselves in objective and corroborative evidence which could survive the rigors of the law.”

The court in **Jenifer’s case** then stated;

“The above holding is attractive to me because of the difficulties that suspects have in bringing forth the usual evidential material expected of them in trials. When one is arrested and tortured mercilessly, where is the opportunity to take photographs of the tortures, get medical reports to show the injuries inflicted and where is the opportunity to call eye witnesses?”

38. I agree entirely with the observations in the two decisions above. However, the facts alluded to in the above decisions is different from the present case. **Jenifer’s case** in particular, was with regard to torture committed in the infamous **“Nyayo House torture chamber”** where people were held incommunicado and had no opportunity to see the outside world. The present case relates to someone serving a lawful sentence and not held incommunicado. In fact the petitioner attached medical documents to his pleadings, only that they do not show injuries suffered, and as the Court pointed out earlier, the petitioner has not stated where he was beaten except saying that he was beaten and tortured.

39. The respondent denied the petitioner’s claim and maintained that the petition is meant to frustrate the respondents’ duties. The respondents have also pointed out that they were carrying out routine searches and actually found items that the petitioner and his colleague inmates had which are not allowed in prison cells. The petitioner has not denied that a search was being conducted. He has also not denied that cellphones were found in the cells. He only says that he was not found with a cell phone although the respondents state that he was found with one.

40. From the record, there is no evidence that the petitioner was targeted as a person. This was an exercise targeting the whole Block which was suspected to have contraband goods. In that regard, therefore, I am not satisfied that the petitioner has made a case for grant of the orders sought. had there been satisfactory evidence before Court that he was treated in a manner contrary to law, the Court’s finding would have been different.

41. The upshot is that the petition dated 25th October 2015 is declined and dismissed with no order as to costs.

Dated Signed and Delivered at Nairobi this 22nd Day of September 2017

E C MWITA

JUDGE