



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL PETITION NO.4 OF 2015

ANNE KENDI MUTHEE PETITIONER

Versus

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE HON THE ATTORNEY GENERAL 2ND RESPONDENT

And

CRIMINAL PETITION NO. 5 OF 2015

JACOB GITHINJI MACHARIA PETITIONER

Versus

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE HON THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. **JACOB GITHINJI MACHARIA** (who shall henceforth be referred to as the 1st petitioner) and **ANNE KENDI MUTHEE** (who shall henceforth be referred to as the 2nd petitioner) filed their respective petitions which petitions are identical, seeking the following orders:-

- (a) A declaration that the petitioners were unlawfully detained and that the said detention amounted to breach of his fundamental rights;*
- (b) A declaration that by the said infringement the petitioners are entitled to compensation;*
- (c) An order for compensation to be made payable by the 1st respondent through the 2nd respondent;*
- (d) Any other relief the court may deem just and expedient; and*
- (e) Costs of the petition*

2. Although the petitions were argued separately in my view, because the fact relied upon by all the

parties are entirely the same, for expediency sake I have decided to do one judgment in respect to both petitioners.

BACKGROUND

3. Both petitioners were jointly charged in **Criminal Case No. 1922 of 2010** before the Nanyuki Chief Magistrate's Court with **three counts of robbery with violence contrary to section 296(2) of the Penal Code**. In respect to count two and three there was an alternative count of **handling stolen goods contrary to section 322 (2) of the Penal Code**. They were tried before that court and by that court's Ruling dated 12th August 2011 the 2nd petitioner was acquitted under section 210 of the Criminal Procedure Code because that court found she had no case to answer. The 1st accused was found to have a case to answer and after submitting his defence the said court by its judgment dated 9th September 2011 convicted him on all three counts of robbery with violence. The 1st accused appealed against his said conviction at the High Court at Nyeri in Criminal Appeal No. 190 of 2011. The said High Court upheld his conviction and dismissed his appeal. It is not clear whether he appealed to the Court of Appeal.

4. It is not disputed that both petitioners were arrested on 8th October 2010. The proceedings of the Nanyuki Chief Magistrate's court show that both petitioners were arraigned before that court on 21st October 2010. Both petitioners allege that their rights as embodied in Article 49 of the Constitution of Kenya were violated. That they were violated because they were not presented before a court of law within 24 hours of their arrest. That Article provides:-

49 (1) An arrested person has the right:-

(f) to be brought before a court as soon as reasonably possible, but not later than:-

(i) twenty – four hours after being arrested; or

(ii) If the twenty four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

PETITIONER'S CASE

5. Both petitioners relied on their identical affidavits, written submissions and cited authorities.

6. By their affidavits both petitioners state that they seek by their petitions compensation for the unlawful prolonged detention following their arrest. They deponed that contrary to the constitution they were detained for 13 days before being presented to a court. In this regard they relied on the proceedings of the Nanyuki Chief Magistrate's Courts.

7. The Nanyuki Chief Magistrate's Court proceedings show that indeed the petitioners were arrested on 8th October 2010. This is evident from the evidence of police officers Cpl Mutua Kirimi Paul and P. C. Oswald Gitonga, the arresting officers. The charge sheet also reflects the date of arrest of both petitioners to be 8th October 2010.

8. Learned counsel for the petitioners by his written submissions submitted that the delayed detention of the petitioners was not explained by the respondents. That the burden was not upon the petitioners to complain to the magistrate about the delayed detention. On that proposition learned counsel cited the case PAUL MWANGI MURUNGA –V- REPUBLIC (2010)eKLR, a copy of which he did not supply to this court.

9. On compensation the petitioners seek the sum of Kshs. 300,000 for everyday they were unlawfully detained. In support of this claim the petitioners relied upon authorities that were not supplied to this court and accordingly I shall not refer to them in this judgment.

THE RESPONDENTS' CASE

10. In a very short affidavit Paul Gisemba, an advocate in the office of the Attorney General deponed that the petitioners were arrested on 8th October 2010 on suspicion of having committed a capital offence of robbery with violence. That they were both arraigned before court on 21st October 2010 when they were charged with the offence of robbery with violence. The said counsel then deponed:-

“That the offence in question was a capital offence that required thorough investigation before arraigning the suspect in court. That the delay was not inordinate given the circumstances and the nature of the offence. That in the present case, the petitioner(s) was arraigned in court on 21/10/2010 having been arrested on the 8/10/2010 within the envisaged period of 14 days.”

The learned counsel therefore sought the dismissal of the petitioner's petition.

ANALYSIS AND DETERMINATION

11. The issues that present themselves for determination are two. They are:-

(a) Were the petitioners unlawfully detained.

(b) If (a) is in the affirmative what is the remedy available.

12. Article 49 (f) of the constitution provides that an arrested person must be taken to court within twenty – four hours of their arrest. This is the period prescribed under the constitution which permits the police to detain an arrested person. The learned counsel for the respondent therefore erred to depone that the period an arrested person should be detained was 14 days. In the case **Lucas Omoto Wamari v Attorney General & Another (2014) eKLR** the court referring to that prescribed period stated:-

“To support this argument counsel relied on the decision or Raditshego Godfrey Mashilo and Minister of Police –v- Jacobus Michael Prinsloo (2012) ZACSA 146 where the Supreme Court of Appeal in South Africa held that the where the law prescribed the out limit for detention, the duty was on the police to bring him to court as soon as possible without waiting for the time to lapse.”

The purpose for which that restricted period was set out in the constitution was discussed in the case:-

Hussein Abdillahi Ndei Nyambu – v- Inspector General of Police & Another (2014)eKLR where the court stated:-

“Thus there is a violation of the constitution when a person is held beyond the 24 hours irrespective of the reason. In Salim Kofia chivui v Republic Nairobi Petition No. 256 of 2011 (2012) eKLR the court stated that, “The tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty – four hours or for the period necessary to secure his production in court of the next available date. In any case any detention beyond 24 hours must be authorized by court as provided by Article 49(1)(f). Once the person's attendance has been secured within the 24 hours, the court may order the person released or may release the person pending charge or trial on bail or bond unless there are compelling.”

13. On the issues identified above I shall consider them and their relevance to each petitioner separated.

14. The 1st petitioner, as stated before was convicted on all three counts or robbery with violence by the Chief Magistrate's court. He appealed to the High court against that conviction. Amongst the grounds he raised in his said appeal before the High court was that his rights were violated because of prolonged detention before being arraigned in court. This is what 1st petitioner submitted on that ground:-

“In the instant case, I was detained for 13 days before I was arraigned in court and I contend that my rights as stipulated under Article 49(1)(f) (of) constitution were grossly violated.”

15. It becomes obvious that the 1st petitioner by the aforesaid ground invited the High court to pronounce itself on whether his rights under Article 49(1)(f) of the constitution were violated. The High Court by its judgment dated 18th October 2012 in Criminal Appeal No. 190 of 2011 made a finding that 1st petitioner’s rights under Article 49(i)(f) had not been violated. This is what the High Court state in that judgment on that ground:-

“The other constitutional issue raised by the appellant is that he was held for 13 days before being arraigned in court. We note that under the law the maximum period of time allowed then was 14 days since the appellant was charged with a capital offence and therefore hold that there was no violation of the appellant’s constitutional rights.”

16. What is not clear, since no document have been attached to the petition, is whether the 1st petitioner appealed against that determination of the High Court. I will assume that no such appeal was filed to the Court of Appeal. Having made that assumption it follows that I cannot make a finding that is contrary to one made by a court of concurrent jurisdiction:

Joseph Ndirangu Waweru t/a Mooreland Mercantile Co. & Another v City Council of Nairobi (2015) eKLR the Court of Appeal had occasion to consider whether a court of concurrent jurisdiction can sit in appeal of another court. The Court of Appeal referred to the following case:

Civil case No. 90 of 2005, Stephen Mwaura Njuguna vs Douglas Kamau Ngotho consolidated with **Civil appeal No. 247 of 2007**, where the court held:-

“The learned judge had no jurisdiction to determine a matter that was decided by a fellow judge of concurrent jurisdiction. He could not for instance set aside a judge of Muga Apondi J. A Judge who has the same jurisdiction as himself. Such setting aside could only be by an appellate court but not by a judge of the High court as the appellant sought.”

The court of appeal proceeded further to express itself as follows:-

“We reiterate this court’s finding in the Stephen Mwaura Njuguna case (supra) that a judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing the same.”

17. I am bound by the determination of the High Court sitting in Nyeri, that, the 1st petitioner’s constitutional right on prolonged detention were not violated. I am so bound even though in my view the said court erred in making that determination. It follows therefore that in respect to the first issue identified above it is in the negative in respect to the 1st petitioner and correspondingly therefore the 1st petitioner is not entitled to any remedy as sought.

18. My finding in respect to the 2nd petitioner is that the 1st respondent did indeed violate her right embodied in Article 49(i)(f). The 2nd petitioner was arrested on 8th October 2010. 8th October 2010 was a Friday. It follows that bearing in mind Article 49(i)(f)(ii) the day 2nd petitioner could only have been presented to court, since courts do not ordinarily sit on Saturday and Sunday, was on Monday 11th October 2010. The 2nd petitioner however was presented to the Chief Magistrate’s Court at Nanyuki on 21st October 2010. The 2nd petitioner was therefore held beyond the constitutional period by 10 days. I do make a finding that the 2nd petitioner was unlawfully held by the 1st respondent for 10 days.

19. What remedy should the 2nd petition obtain following that violation? The answer is found in Article

23 of the constitution. That Article 23(3) provides that the High Court may grant relief in proceedings brought to enforce the Bill of rights by making declaration of rights; make conservatory order; declare invalidity of any law; order for compensation; and make an order for judicial review. The most appropriate remedy for the 2nd petitioner is to order the 2nd petitioner to be compensated for the violation of her right.

20. Learned counsel for the petitioners, without giving justification, sought for compensation of Kshs. 300,00 per every day that the 2nd petitioner was unlawfully detained. Justice M. J. Anyara Emukule in the case Nakuru High Court Petition No. 7 of 2010 LECHORNAI LORKURAN –V- A.G. while considering a case on violation of the petitioner’s rights stated:-

“In my view damages for contravention of fundamental rights of freedoms is at the discretion of the court, and where the petitioner claims particular sum or figure, that sum or figure ought to be related to some basis for instance loss of business, income or other quantifiable basis. In the absence of such basis, it falls into the court’s discretion. There was no information as to the petitioner’s occupation or trade and it is thus difficult to approximate what loss in monetary terms he suffered during the period of unlawful incarceration.”

21. I agree with that view but add that whether or not a person has a trade, business or occupation is not a basis to deny him compensation for the violation of his constitution right. Such compensation which Justice Emukule stated was at the discretion of the court is the bear minimum when there is a finding of a violation. In addition to that is the compensation for loss in business, trade and occupation.

22. In the case HUSSEIN ABDILLAHI NDEI NYAMBU (supra) the court awarded the petitioner Kshs.10,000 where he was unlawfully detained for 4 hours in excess of the twenty – four hours. In the case High Court of Nakuru Petition No. 2 of 2014 where the petitioner was held in detention for 119 days the court awarded him Kshs.1 million in compensation. In the case Captain (Rtd) FRANK MBUGUA – V- KENYA DEFENCE FORCES & ANOTHER (2013) eKLR where the petitioner was subjected to physical and mental trauma for the 8 months that he was in detention and where he was not presented to a court of law was awarded Ksh.5 million in compensation.

23. Bearing in mind the above decided cases I find that the 2nd petitioner is entitled to be compensated by the respondents to the tune of Kshs.300,000.

24. In the end the court finds:-

(a) Jacob Githinji Macharia’s constitutional rights under Article 49(i)(f) were not violated.

(b) Anne Kendi Muthee’s constitutional rights under Article 49(i)(f) were violated because the said petitioner was detained for 10 days beyond the period provided under the constitution.

(c) Anne Kendi Muthee is awarded Kshs.300,00 as against the 1st respondent and costs of this petition.

DATED and DELIVERED at NANYUKI this 21st day of SEPTEMBER 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Petitioners: Anne Kendi Muthee

Jacob Githinji Macharia

For Petitioners

For the Respondents:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE