



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

PETITION NO 190 OF 2016

PETER AMINA NDAR.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

AND

FRANCIS AMINA JUMA.....INTERESTED PARTY

JUDGMENT

1. Peter Amina Ndar, the Petitioner, is a brother to Francis Amina Juma, the interested party herein. The petitioner filed a petition dated 5th May 2016 against the Attorney general in his capacity as the Principal Legal Advisor to the Government and the one mandated by Article 156 of the Constitution to represent the government in legal proceedings. The Attorney General is sued in a representative capacity on behalf of the Inspector General of Police.
2. The facts of the petition are that the interested party made a report at Makongeni Police Station on 1st March 2015 and following that report, the petitioner was arrested from his house on the 1st March 2014 (sic) by 8 police officers and locked up at Makongeni Police Station. The petitioner was however not arraigned in Court for any offence despite having been held at the police station until 5th March 2014 when he was released.
3. The petitioner stated that the arrest and confinement from 1st March 2014 to 5th March 2014 without any charge being preferred against him, violated Articles 10, 28, 29, 49, 73 and 75 of the constitution for failure to arraign him in court within 24 hours, for illegal confinement and by arresting him in a dramatic by 8 police officers.
4. It was stated that the arrest and subsequent confinement of the petitioner was instigated by the interested party and therefore violated the petitioner's human rights and fundamental freedoms. The petitioner sought the following orders;

1. A declaration that the petitioner's confinement at Makongeni Police Station from 1st March 2014 to 5th March 2014 was unconstitutional and a violation of the petitioner's constitutional rights of respect of his dignity, right to freedom and right as an arrested person to be brought before a court of law within twenty four hours.

2. An order that the respondent and the interested party do compensate the petitioner by way of damages for the illegal and irregular arrest and confinement at Makongeni Police Station.

3. The court do make issue (sic) and give such other and consequential orders, writs and directions as it may consider appropriate for purposes of enforcing or securing the enforcement of any of the provisions of articles 10, 28, 29, 49, 73, 75 and 132 of the Constitution.

4. That the respondent and interested party do bear costs of this petition.

5. The respondent filed grounds of opposition dated 22nd August 2016 and filed in Court on 2nd November 2016. The respondent contended that the petitioner had not specifically outlined with a high degree of precision how his fundamental rights and freedoms under Articles 28, 29 and 49 of the Constitution were violated, that the evidentiary burden of proof required of the petitioner that he was arrested, detained or ill-treated by police officers had not been met, that petitioner has not demonstrated when he was actually arrested and where he was detained, and that there are glaring inconsistencies in the petitioner's averments regarding the date of his arrest and the police station where he was allegedly detained. It was stated that the petition is vague and an afterthought.

6. The interested party filed a replying affidavit sworn on 1st July 2016. The interested party deposed that there is a misjoinder of parties because he was not supposed to have been sued. It was also deposed that the petitioner had not shown through evidence that he, the interested party was in any way connected with the petitioner's arrest and confinement. The interested party further deposed that he should not be associated with police arrest and confinement of the petitioner since he is only a private citizen. The interested party further deposed that the orders sought against him cannot be granted because the actions complained of were not his actions.

7. This petition proceeded by way of oral evidence, the petitioner who testified as PW1, told the Court that he is a businessman and had brought this petition against the respondent and the interested party over the violations committed against him. He told the court that the interested party is his blood brother who had caused his arrest and subsequent confinement. The petitioner testified that the interested party used to go to his place and humiliate him in front of his family. The petitioner in particular told the Court that on one occasion in 2013 while he was hosting visitors at his home, the interested party verbally abused him in the presence of the visitors.

8. The petitioner further testified that despite this humiliation, he however sent the interested party a text message thanking him for insulting him in the presence of visitors. The petitioner testified that on 1st March 2014, he was arrested by 8 police officers from Makongeni Police station without being informed why he was being arrested and taken to the police station where he was locked up for 5 days. It was at the station where he was told that he had been arrested because of a complaint that had been lodged by the interested party. He told the Court that he was held together with other inmates yet his health was not good. He told the Court that he was suffering from cancer and relied on the documents in his further affidavit to show this fact.

9. The petitioner went on to testify that he was released on 5th March 2017 without a charge being preferred against him and that he later sent a notice of intention to sue the respondent dated 22nd April 2014. He also testified that the interested party had admitted in his defence filed in Civil Suit No. 657 of 2014 which the petitioner had filed before the Chief Magistrates Court, but which he withdrew, that it was him who had made a report at Makongeni Police Station.

10. In cross examination by Mr Ogosso for the respondent, the petitioner told the Court that although the interested party used to humiliate him he did not state this fact in his petition neither did he sue him for that. He testified that he was arrested from his house by police officers one of whom was known as Ouma. Referred to his affidavit in support of the petition where the letters referred to the date of arrest as being on 28th June 2012 at 8p.m and that he was held at Embakasi Police Station, the petitioner confirmed that the letters were written by him.

11. Cross examined by Mr Wambola, counsel for the interested party, the petitioner told the court that even through the interested party used to humiliate him, he never reported the matter to the police. The petitioner admitted that he had sent several text messages to the interested. The petitioner also admitted that he had filed a suit before the Chief Magistrate's Court but it was withdrawn. The petitioner told the court that his complaint against the interested party was because they had reported the matter to the police for a suspected crime. He admitted that the letters and documents he attached to his petition in Court show that he had an ailment before his arrest and confinement

12. AT the close of the petitioner's case the respondent and the interested party did not call witnesses and therefore closed their cases.

13. Parties filed written submissions which they highlighted. Mr Saende, learned counsel for the petitioner, submitted that the petitioner was arrested on 1st March 2014 and confined for 5 days but released without charge. Counsel submitted that this violated Article 49 of the Constitutions since he was not produced in court within 24 hours. Counsel submitted that Article 29 was also breached because he was deprived of freedom without just course and that the petitioner's dignity was also violated in contravention with Article 28 of the constitution.

14. Counsel submitted that based on the evidence and documents on record, the petitioner had proved his case on a balance of probability. He relied on the decisions in the list of authorities. He specifically relied on the case of **Milka Wanjiku Kinuthia & 2 Others V Attorney General {2013}eKLR, Registered Trustee of Kenya Railways Staff Retirement Benefits Scheme & 5 others {2013}eKLR.**

15. Mr Ogosso Learned Counsel for the respondent submitted that the petitioner had not proved his petition to the required standard. He submitted that the evidence adduced did not support the petition. Counsel referred to paragraphs 3 and 5 of the affidavit in support of the petition and the fact that the medical documents date back to prior the period complained of. Counsel further pointed out that the demand letters attached to the pleadings refer to events that occurred on 28th June 2012 and also show that the petitioner was held at Embakasi Police Station. According to Counsel, there was no proof of arrest and therefore, no violation of the petitioner's rights was also proved.

16. Mr Wambola also submitted that the petitioner had not proved his case to the required standard. Learned Counsel submitted that the petitioner's case against the interested party was only based on an alleged report. According to counsel, there was no evidence that the petitioner was arrested and confined. Counsel went on to submit that there was no witness to corroborate the petitioner's evidence that he was arrested and confined. Counsel contended that the interested party never participated in the arrest if at all there was an arrest and was therefore blameless.

17. Counsel relied on the decision in the case of **Catherine Wanjiku Kariuki v Attorney General & Another [2011]eKLR for the proposition that it is the duty of citizens to report suspected crimes and Socfinaf Kenya Ltd v Peter Guchu Kuria & Another [2002] eKLR** for the proposition that once a report is made, it is up to the police to undertake further investigations and that the onus of proving that there was no reasonable and probable cause for arrest and prosecution lies on the person who queries such arrest or prosecution.

Determination

18. I have considered this petition, responses thereto, submissions by Counsel and the authorities relied on. The petition is founded on alleged unlawful arrest and false imprisonment. The petitioner who is a blood brother to the interested party, says that he was arrested at the behest of the interested party by 8 police officers from Makongeni Police station on 1st march 2014 and held at the police station without any charge until 5th March 2014 when he was released.

19. The petitioner told the Court that the arrest was instigated by his brother who for some time had been humiliating him in front of his family and even guests. The petitioner cited an incident when the interested party is said to have humiliated him in the presence of his visitors.

20. The petitioner's case is that he was unlawfully arrested, illegally confined but released without being arraigned in court in violation of his rights. He cited Articles 19, 23, 28, 29, 47(1), 49(1) (f) and 73 of the Constitution as having been violated.

21. Article 10 is generally on national values and principles of governance Article 10(2) of the constitution provides that the national values and principles of governance include—(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. On the other hand, Article 23 of the Constitution gives this Court the authority to uphold and enforce constitutional rights under the Bill of Rights.

22. The petitioner has alleged that his rights to dignity under Article 28 of the Constitution were violated. Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected. The petitioner further contended that his right to freedoms and security was violated. This, it was contended, was because the petitioner was arrested on 1st March 2014 and held in confinement to 5th March 2014 thus limiting his right to freedom.

23. He also contended that his right to fair administrative action under Article 47(1) was violated. The submission to support this was that he was not given a fair administrative action when he was arrested and detained. Article 49(1)(f) of the constitution also provides that an arrested person has a right to be produced in court within a reasonable time but not later than 24 hours. These constitutional provisions are critical in protecting peoples' rights and fundamental freedoms. The petitioner stated that he was arrested on 1st March 2014 and detained up to 5th March 2014 without being taken to court which violated Article 49(1)(f).

24. I have carefully considered the supporting affidavit, further affidavit and the documents in this petition. I have also considered his oral testimony. The petitioners' evidence is contradictory in material respects in both the petition and affidavit in support. At paragraph 17 of the petition it is stated that the interested party made a report to the police on 1st March 2014 which caused the police to arrest the petitioner on 1st March 2015. This is also repeated in the affidavit in support of the petition. These are obvious and clear contradictions in the petitioner's pleadings but no attempt was made to explain them away.

25. In his evidence in chief, the petitioner stated that he was arrested on 1st March 2014. He did not in anyway try to clarify whether the date 1st March 2015 was an inadvertent error or not. The letter dated 6th February 2015 from Dr Opiyoo Arisemy says the petitioner had been referred to him by Dr. Wanjigi of Masaba Hospital on 10th July 2007 and that he had been attended to between 13th August 2007 and 21st September 2007. There is also a medical report from Dr (Mrs) Farzaha S Rana which says the petitioner was seen on 23rd June 2007 over some ailment.

26. The petitioner had also on 15th April 2015 written a demand letter to the Attorney General's office signifying the intention to sue for arrest on 28th June 2012 at 8p.m by officers from Makongeni Police Station on arrest order from Embakasi Police Station. He had also written a demand letter on 24th April 2015 to Cyphrinus Ouma Juma informing him of intention to sue him for arrest on 28th June 2012 and that he was illegally confined at Embakasi police station for five days from 28th June 2012 to 2nd July 2012. He similarly issued a demand letter dated 25th April 2014 to the respondent for arrest on 1st March 2014 and unlawful confinement at Makongeni for 5 days. These contradictions were not explained either.

27. First and foremost, the petitioner has a duty to prove that he was arrested on 1st March 2014 and subsequently detained at Makongeni police station for 5 days without being produced in Court as the constitution and the law require. The petitioner did not call any other witness to corroborate his evidence although he stated in cross examination that he was with his son when he was arrested but the son was never called to testify as a witness.

28. He also testified that he was confined at Makongeni but other than what he stated, there is no other independent evidence to prove this. There is also no evidence that the interested party had made a complaint to the police as a result of which he was arrested. The petitioner relied on a defence which was allegedly filed in a case before the Chief Magistrate's Court but which case was withdrawn. The evidential value of that defence was not established since the suit did not proceed for hearing and determination and therefore those pleadings were not legally tested.

29. The petitioner has the legal burden to prove his case against the respondent and the interested party. That duty does not shift. Section 107(1) of the evidence Act Cap 80 is clear on this. It 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”.

30. Section 109 of the same Act is also material to this case, that section provides:-

“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”

31. What the above provisions of the law show is that the burden of proof of any fact is on the person who alleges existence of such facts and for that matter, the petitioner was under duty to prove his case.

32. The above provisions have been the subject of discussion by courts. In the case of *Jenifer Nyambura Kamau v Humprey Mbaka Nandi* [2012] eKLR the Court of Appeal stated with regard to the burden of proof 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 Court of Appeal again reiterated that the burden of proof was always on the balance of probabilities.

33. As it is, the essential threshold of proof was not met in this matter as the petitioner did not put before Court sufficient material of evidential value to enable the Court make a determination on the breach of his fundamental rights.

34. Moreover, Courts have also been clear on the issue of arrest, confinement and prosecution as a basis for seeking damages and what is required to be proved. A party who alleges that he was unlawfully arrested falsely imprisoned and maliciously prosecuted, has the burden to prove that the arrest had no basis in law. It is not enough for one to just allege that he was unlawfully arrested. The interested party's responsibility if any ended with a report to the police. It then became the duty of the police to investigate and take action if necessary.

35. In the case of *Jediel Nyaga v Silas Muckeke* 1987 (CA NO 59 of 1987) the Court of Appeal stated;

“The appellant having reported to the police about the respondents 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.”

36. The court went on to state that false arrest may be constituted where the false report was actuated by malice. The Court however found in that case that there was no evidence of malice in making the report by the appellant. That is the position I find in the instant case.

37. In the case of *Robert Okeri 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.”

38. The above decisions are clear that there must be unreasonable basis for reporting a complaint to the police and that the report must be actuated with malice. In the present petition the petitioner did not even say what complaint was made to the police against him which made the police to arrest him. He did not show that the complaint was false and that it was full of spite or malice. He admitted of sending text messages to the interested party but did not say whether they were the basis of the report that he said the interested party made to the police.

39. Having considered this petition the evidence on record and the law, I am not satisfied that the petitioner has proved his case on the balance of probabilities. Consequently, the petition dated 25th May 2016 is declined and dismissed with costs.

Dated Signed and Delivered at Nairobi this 19th Day of October, 2017

E C MWITA

JUDGE