



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CONSTITUTIONAL PETITION NO. 10 OF 2014

FRANCIS CHEGE KARERI.....PETITIONER

VERSUS

OFFICER IN CHARGE, EMBU G.K PRISON.....1ST RESPONDENT

COMMISSIONER OF PRISONS.....2ND RESPONDENT

CHIEF REGISTRAR OF HIGH COURT.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. **FRANCIS CHEGE KARERI** has lodged a constitutional petition in this court against the 4 named respondents in this petition alleging that the 1st Respondent – Officer in Charge of Embu G.K. Prison and 2nd respondent Commissioner of Prisons contravened his fundamental right to freedom by holding him illegally for a period of 4 months and 18 days.

Background

2. The petitioner with others faced two separate charges of Robbery with Violence cases contrary to **Section 296(2)** of the **Penal Code**. The two cases were both registered at Kerugoya Law Courts as follows:
 1. Kerugoya S.R.M.’s Court Criminal Case No. 1010 of 2005.
 2. Kerugoya P.M.’s Court Cr. Case No. 1451 of 1998.

In the 1st case, the petitioner and others charged alongside were found guilty and convicted of the offence. They appealed vide **Embu H.C. CR.A. No. 56/07** and succeeded partly when the appellate court ordered for a retrial. The petitioner and his co-accused were retried at Muranga Senior **Principal Magistrate’s Court Criminal Case No. 259 of 2009** and once again found guilty and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The petitioner appealed vide **Nyeri H.C. CR.A. No. 181/09** against both conviction and sentence arguing in their appeal that they had been held in custody longer than the constitution stipulated before being charged in court. The High Court in Nyeri allowed the appeal on the said ground and set aside both conviction and sentence vide a judgment delivered on 9th March, 2012 and ordered that the appellants including the petitioner herein be released forthwith unless lawfully held.

3. In the 2nd case which was earlier registered in the **Kerugoya P.M.'s Court CR. Case No. 1451/98** the petitioner had been charged with another offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. He was apparently convicted of the offence on 10th December, 1998 and had launched an application to appeal out of time which application was pending for hearing when a mysterious fire gutted the criminal registry at Kerugoya Law Courts destroying all criminal files among them **Kerugoya P.M.'s Court Cr. Case No. 1451 of 1998**. The petitioner applied to be released vide **Embu H.C. Misc. CR App. No. 37 of 2005** and the court ordered for his release on 26th July, 2012 as it was not possible to either proceed with the appeal or the application to appeal out of time in the absence of the original file. Upon release, the petitioner on 2nd January, 2013 issued a statutory notice to the hon Attorney General claiming that he was unlawfully kept in custody in Embu G. K. Prison when his real name was **FRANCIS CHEGE KARERI** and the **Misc. Cr. App. No. 37 of 2005** referred to a person by name **FRANCIS CHEGE KARORI**. The petitioner alleged that his constitutional rights were infringed as a result.

Petitioner's case

4. The petitioner has insisted that he is known as **FRANCIS CHEGE KARERI** and he had nothing to do with **Kerugoya Criminal Case No. 1451 of 1998** at the Principal Magistrate's Court where the accused person was described as FRANCIS CHEGE KARORI. He has submitted that having succeeded in his criminal appeal at **Nyeri High Court "Criminal Appeal No. 181/09**, he ought to have been set free on 9th March, 2012 after his conviction and sentence was quashed. He has faulted the respondents for transferring him from Nyeri G. K. Prison to Embu G.K. Prison where he claims he was kept in custody unlawfully until 27th July, 2012.
5. The petitioner has submitted through his learned counsel that the prolonged and wrongful detention of the petitioner for the said period constituted a deprivation and violation of his right to liberty which is guaranteed under **Article 29(a)** of the **Constitution**. He further submitted that his right to liberty guaranteed under international instruments and domesticated under **Article 2(5)** of the **Constitution** was infringed and owing to the infringements he was entitled to enforce his right as he was a victim of arbitrary detention.
6. It has also been submitted that the petitioner's right to freedom guaranteed under **Article 29 (a)** of the **Constitution** was infringed and that he should be compensated by the respondent as provided under **Article 23 (e)** of the **Constitution**.
7. The petitioner has contended that production orders issued in criminal cases No. 1451/98 at Kerugoya and Embu H.C. Misc. cr. Appeal No. 37 of 2005 was wrongly effected on the wrong person and that the first respondent ought to have established the true identity of the accused person who was required to be detained and produced in H.C. Embu vide Misc. CR. APP. No. 37 of 2005.
8. The petitioner faulted the respondents for not responding or verifying the complaints of his letter dated 8th June, 2012 and this in his view led to unconscionable and prolonged detention of the petitioner. He relied on the following authorities in asking this Court to make declaratory orders and order for compensation:
- i. ***Mbulu Musyimi Sumbi –Vs- Officer in Charge Kamiti G.K. Maximum Prison and 2 others (Misc. Petition No. 1233 of 2007 at Nairobi H.C.) unreported.***
 - ii. ***Ramadhan Kipkemoi Chepkwony –Vs- Officer in Charge Industrial Area Remand and Allocation G. K. Prison and 3 others (Misc. Pet. No. 222 of 2010 at Nairobi – unreported.***
 - iii. ***Dominic Arony Amolo –Vs- Hon. Attorney General (Misc. Applica. No. 494 of 2003.***
 - iv. ***Sonia Kwamboka Rasugu –Vs- Sandal Wooll Hotel & Resort T/A Paradise Beach Resort (Petition No. 156/11 AT Nairobi).***

Respondent's Case

9. The 1st, 2nd and 4th respondents have opposed the petition now before court. The first respondent filed a replying affidavit through Aggrey Onyango sworn on 19th July, 2013. The 1st respondent has deposed that the petitioner was detained due to several criminal cases which are given as

- Kerugoya SRM's Court Criminal case No. 1451/98, Kerugoya P.M.'s Court Cr. Case No. 1010/05 which later became Muranga SRM CR. Case No. 259 of 2008 and Nyeri H.C. Cr. Appeal No. 179/09.
10. The 1st respondent has contended that the case where the petitioner claims to have been illegally detained is in respect to Kerugoya SRM Court Cr. Case No. 1451/98 where he was convicted of robbery with violence contrary to **Section 296(2)** and sentenced to death. The 1st respondent has faulted the petitioner for concealing the fact that he himself made an application to appeal out of time which application was made in the name the petitioner was using which was FRANCIS CHEGE KARORI. The copy of the application and affidavit which is thumb printed has been exhibited in the replying affidavit as exhibit NO. AO1.
 11. The 1st Respondent has further deposed that the petitioner was always in remand as convict No. NYERI/1011/05/CON and was known as FRANCIS CHEGE KARORI and never raised any issue concerning the names when he was being produced in Embu H.C. Misc. App. No. 37 of 2005. The petitioner is accused of trying to make capital out of a fire accident at Kerugoya Law Courts that consumed a large number of criminal files including Kerugoya SRM C CR. Case No. 1451/98 thus destroying the original records of the files making it hard for the criminal appeals in Embu High Court to proceed. The respondents have denied violating any of the petitioner's constitutional rights.
 12. The 4th respondent has submitted that the petition is speculative, anticipatory and lacks legal basis. It has been contended that the petitioner was kept in custody owing to numerous criminal cases which he had. The respondent cited the case of Prof. Julius Meme – Vs-Republic (2004) 1KLR where the court dismissed a constitutional petition on grounds that the petitioner had failed to set out clearly what rights had been violated.
 13. The respondents have argued that the petitioner was released vide Embu CR. Misc. App. No. 32/05 just because the original filed from Kerugoya SRM C CR. Case No. 1451 of 1998 could not be found due to a fire which could not be attributed to the respondents. They maintained that the petitioner was under lawful custody and he was just trying to take advantage of the circumstances that were beyond the control of them.
 14. It is further argued that the alleged rights under Article 29 and 30 are not absolute but limited under **Article 24** of the **Constitution**. The respondents have pointed out that Section 30 of the Prisons Act presumes that every prisoner confined in any prison is deemed to be in lawful custody of the officer in charge of that prison.
 15. The first respondent has also pointed out that they were bound by production orders issued by court in Embu Misc. App. No. 37 of 2005 and that is why the petitioner was produced in court on 8th March, 2012 and 18th April, 2012. They have argued that when he was produced in court on 18th April, 2012 he did not tell the court that he was not Francis Chege Karori and cannot later on turn around and say he was not the said Francis Chege Karori.
 16. The respondents have distinguished some of the authorities cited by the petitioner with this case. It is indicated that the case of **Mbulu Musyimi Sumbi –Vs- Officer in Charge Kamiti Maximum Prison & 2 others** (Pet. No. 1233 of 2007) does not apply as the respondents herein have what they consider reasonable explanation on why the petitioner herein was kept in custody for the period complained about. They have further argued that the High Court in Nyeri had upon allowing the appeal ordered for the release of the petitioner but added that unless he was lawfully held. It is submitted that the 1st and 2nd respondents had to comply with valid orders in Embu High Court vide the cited case to produce the petitioner in Embu High Court and that as soon as the High Court in Embu allowed the petitioner's application and ordered for his release on 26th July, 2012 they immediately complied and released the petitioner.
 17. On the cited case of Ramadhan Kipkemoi, the respondents have submitted that the settlement of Kshs.9 million as compensation for wrongful confinement was a settlement made out of court and was distinguishable with the present petition.

Issues and Determination

18. The main issues in this petition are:

- i. Whether the detention of the petitioner by 1st and 2nd respondents from the period he was ordered released by Nyeri H.C. (CR. A. NO. 179/09) on 9th March, 2012 to the period he was ordered to be released vide Embu CR. A No. 37/05 was unlawful and an infringement of his constitutional and fundamental rights.
- ii. If the detention was unlawful and an infringement of his rights what is the quantum of compensation.

19. It is important to note that as stated by the petitioner one of the pillars of Kenya's Constitution is the elaborate fundamental rights and freedoms one of which is right to freedom and security. Under Article 29 (a) the Constitution clearly provides as follows:

“Every person has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause.”

This Court is empowered under the Constitution under **Article 23(1)** to uphold and enforce the bill of rights under the Constitution and it is true that all international human rights laws that has been ratified by Kenya are domesticated and becomes rights enforceable under **Article 2(6)** of the **Constitution**. The submissions by the petitioner's counsel that the international covenant on civil and political rights and Universal Declaration of Human Rights are enforceable here in Kenya are valid.

20. On the other hand it is also true that there are limitations to those rights and fundamental freedoms as submitted by the respondents in this petition. The provisions of **Article 24(1)** of the **Constitution** provides as follows:

“A right or fundamental freedom in the bill of rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom taking into account all relevant factors.”

21. I am also persuaded by the legal arguments advanced by the 1st and 2nd respondent that the law allows them to keep prisoners and remandees in custody. The provisions of Section 30 of the Prisons Act Cap. 90 provides as follows;

“Every prisoner confined in any prison shall be deemed to be in the lawful custody of the officer in charge of that prison.”

Section 31 of the same act clearly shows that every prisoner or remandee shall be kept in custody on the basis of commitment warrant issued in court. They therefore act as agents.

22. The respondent has maintained that the detention of the petitioner was justified and lawful contrary to what the petitioner alleges in his petition. The position of the law where there are competing arguments is espoused by the principle of law reflected under **Section 107** of the Evidence Act Cap. 80. Whoever alleges must prove and the standard of proof applicable in civil cases is of course a balance of probabilities.

23. It is clear from the pleadings herein that the petitioner's main complaint is based on the committal warrants issued vide Kerugoya PMC CR. Case No. 1451 of 1998 which made the 1st and 2nd respondent to continue holding him in custody after the judgment in Nyeri HC CR. A No. 179 of 2009 in respect to another criminal case that faced the appellant, quashed the conviction and ordered that he be released unless lawfully held. The respondents have contended that they were acting lawfully by holding the petitioner in custody courtesy of another case – Embu H.C. Misc. CR. No. 37 of 2005 which was an appeal in respect to Kerugoya PMCC CR. No. 1451/98.

24. This Court has carefully and keenly examined the court records pieced together by both the petitioner and the respondents herein. This Court has noted that the petitioner while in Kerugoya PMC CR. Case No. 1451 of 1998 and Embu H.C. Misc. App. No. 37 of 2005 was known as FRANCIS CHEGE KARORI. He has denied in this petition that he is not known by that name

- but a look at exhibit AO1 exhibited by the 1st respondent reveals that he made an application to be allowed to appeal against the death sentence handed to him in Kerugoya P.M.'s Court Cr. Case No. 1451/98. The application and the affidavit in support are duly signed by him by thumb print. I have gone through the further affidavit of the petitioner sworn on 1st August, 2013 and I find that he has gone in circles saying he was not Francis Chege Karori but he did not deny that the thumb print appearing on the application was his. Had he done so perhaps this court would have ordered for a thumb print expert to study the same and uncover the truth regarding his true identity. He has however, carefully avoided the fact in that affidavit and that is telling. I also find that he appeared in Embu H.C. Misc. No. 37 of 2005 a number of times and played along using the name FRANCIS CHEGE KARORI. There was nothing stopping him from raising an objection in the High Court in Embu that he was not Karori. He proceeded with the application and it was only upon release from prison that he apparently discovered that he was not FRANCIS CHEGE KARORI. I have looked at the letter he wrote exhibited as AO2(a) but the date of the letter is suspect since the same shows that it was received in Embu High Court on 22nd May, 2013.
25. I further find that the petitioner is not candid with this court in so far as the names used by him are concerned. My attention has been drawn by a letter dated 29th August, 2012 written by petitioner's counsel and annexed as Exhibit "FCK5". The letter indicates on the heading that criminal case No. 1451/98 at Kerugoya involved Francis Chege Karori and others. It is therefore possible that the last name of the petitioner was misspelled when he was either charged or when he was received in Embu. And that is not uncommon. If you look at the criminal appeal No. 179 of 2009 at Nyeri High Court the petitioner is described as FRANCIS CHEGE KARELI. The error may be typographical but the name referred to the same person. The petitioner has not pointed out that anomaly but one can argue that the name is different from the real name.
26. It is also hard for this Court to establish the true facts concerning the name owing to what the respondents have indicated in their affidavit. There was an incident of a fire that consumed majority of criminal files within Kerugoya Law Courts and although the respondents have gone to great lengths to demonstrate the same vide exhibit 'AO5', this Court takes judicial notice of that fact and the fact that the files gutted by fire were mostly files in respect to capital offences and one such file was **Kerugoya P.MCC CR. Case No. 1451/98**. The respondents cannot be blamed on that and none so far none has been found culpable for igniting the fire. What is however, important to note is that the appeal against conviction of the petitioner in criminal case No. Kerugoya P.M.'s Court Cr. No. 1451/98 could not proceed owing to the destruction of the original file. His application for release was allowed by Embu High Court on 26th July, 2012 and he was released promptly the following day. The 1st and 2nd respondent has not been faulted in that regard. They followed the law to the letter.
27. I have considered the circumstances in this petition and I have come to the conclusion that the petitioner either aided the confusion in names appearing in Embu High Court and prison custody by keeping quiet or there was a typographical error which the original file in **Kerugoya PMC CR. Case No. 1451/98** could have revealed. In my view the differences between KARERI and KARORI may just be typographical just like the other appeal case in Nyeri High Court. The error did not substantially cause any prejudice to the petitioner as the same is insignificant. That is why the petitioner never saw the need to correct it when he appeared in court. In the case of **PETER NGURE MWANGI -VS- R [2014] eKLR** an appellant complained that the name appearing on the charge sheet was "Mongare" when his name was "Mungai". The Court of Appeal dismissed the argument that the charge sheet was defective and observed as follows:

"The defect in the Charge Sheet did not prejudice the appellant in any way by describing him as "Mongare" instead of "Mungai".

Similarly in the case of **SIMON MULI KATIWA -VS- R [2006] eKLR** the Court found that the appellant's name in the charge sheet was written as BHANGWAN while the appellant's name was "Bugwan". The Court found nevertheless that the issue of names was not brought up during trial which could have been rectified or cured under Section 382 of the Criminal Procedure Code. The court found that the error was insignificant in so far as identifying the accused and the appellant was concern. The error was found to be trivial and found not to have caused any prejudice to the

appellant.

28. This Court of course notes that the circumstances under which the decision of the above cases were different and distinct from this one. The two appeals raised the issue of defective charge sheets owing to misdescription of accused persons at the trial. But the principles in my view is the same and applicable in this petition. This is because as indicated above, the petitioner was tried and convicted as FRANCIS CHEGE KARORI in **Kerugoya PM CR. Case No. 1451/98**. He made an application to be allowed to appeal out of time using the same name. he later applied to be released in **Embu H.C. Misc. No. 37/05** using the same name and was released because the original file convicting him could not be traced. I am satisfied that he suffered no prejudice at all with the use of the name FRANCIS CHEGE KARORI. His first name and middle name remained the same – FRANCIS CHEGE.
29. I have also noted that the petitioner herein has not produced a copy of his national identity card or passport to really prove his identification. I have seen from exhibit FCK1A in his further affidavit that he has attempted to demonstrate that his real name is Francis Chege Kareri but I have noted that the same is a waiting card showing that he applied for a new identity card on 6th December, 2012 which would appear to be after he was released from prison. He has not explained why he had to apply for a new identity card or whether the same is a replacement. These are explanations that would have perhaps put to rest some question marks about petitioner's true identity. This court finds that the petitioner had the onus to prove that the respondents made a mistake by detaining the wrong man and not a person who was known by different alias names or synonyms. This as I have said is not uncommon in our courts but at the end of the day it is common to find that the names or aliases refer to one and the same person even if they are not described as such. This Court therefore finds that there were many possibilities or variables that could have come into play. I have pointed out a few; misspelling, typographical errors, loss of original file, lack of identification documents or use of aliases. There could be other but on the whole this court finds that the petitioner has failed to prove his claims to the required standard.
30. I have considered the authorities cited by the petitioner but I find that the same are not applicable in this petition. In the cited cases the petitioners were able to prove that they were kept in custody without any justifiable or lawful reason. In this petition I do find that the petitioner has not proved his case to the required standard in law. His contention has been negated by the explanation given by the respondents. I have also looked at the proceedings and considered all the circumstances surrounding this petition and I have come to the conclusion that the petitioner was being held lawfully between the period of 9th March, 2012 and 27th July, 2012 at Embu G.K. Prison. When the High Court in Embu vide Embu Misc. Cr. App. No. 37/05 ordered for his release on 26th July, 2012 the 1st and 2nd respondent promptly released him the following day on 27th July, 2012. The petitioner has not proved that any of his constitutional rights were infringed.
31. This Court having decided the first issue in this judgment in the negative, the issue of compensation and the quantum is purely academic and I do not consider it necessary to delve into it.

The upshot of this is that I find no merit in this petition for the reasons aforesaid. The same is dismissed with costs to 1st, 2nd and 4th respondents.

Dated and delivered at Kerugoya this 17th day of March, 2016.

R. K. LIMO

JUDGE

17.3.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Kariuki for applicant/petitioner

Sitati holding brief for Irari for Attorney General.

COURT: Judgment signed, dated and delivered in open court in the presence of Kariuki for the petitioner/applicant and Sitati holding brief for Irari for Attorney General.

R. K. LIMO

JUDGE

17.3.2016