



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.470 OF 2013**

**JARED BICHANGA.....PETITIONER**

**AND**

**THE INSPECTOR GENERAL OF POLICE.....1<sup>st</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

**Petitioner's case**

[1] On 26<sup>th</sup> September 2013, the Petitioner filed a Petition dated 18<sup>th</sup> September 2013 against the Respondents in which he alleged that his constitutional rights enshrined in **Articles 25(a) and (c), 29(b) and (d), 45, 47(1), 48, 49(1)(c),(f)(i) and (h) of the Constitution** read together with **Section 123(1) of the Criminal Procedure Code** and **Articles 50(2)(e) and 51(1) of the Constitution** been violated. The events leading to the alleged violations are detailed out in his Witness Statement dated 16<sup>th</sup> January 2015.

[2] The Petitioner alleged in the said Statement that he was arrested on 11<sup>th</sup> July 2011 at around 5:20 pm when he was leaving the Chief Magistrate's Court at Makadara Law Courts by two uniformed Police Officers and that the officers never informed him of the reason for the said arrest. Further, that the Police Officers merely informed him that they were instructed to arrest him but did not say who had issued those instructions.

(3) He further alleged that he was taken to Jogoo Road Police Station where he was locked up at around 6.00 pm and where he spent the whole night. He stated that at that station he enquired for the reason of his arrest but was again informed that the person who had requested for his arrest would attend him in due course but no such person appeared. Instead on 12<sup>th</sup> July 2011, he was taken to the Central Police Station where he spent the whole night and that even at that Station he was never informed of the reason for his arrest despite his attempts to get such information.

(4) He also alleged that on the 13<sup>th</sup> July 2011, he asked to see the Officer Commanding Station (OCS) at Central Police Station in order to be given the reason why he was arrested but the request was declined. Further, that when he eventually spoke to the OCS, he was informed that an inquiry will be made about his arrest and detention and that pending that inquiry, the Petitioner would not be released on bail since the reasons for his arrest were unknown.

(5) It is the Petitioner's case further that for all the days spent in custody, he was not allowed to

communicate with his lawyer or family members and that he was only able to do so on 15<sup>th</sup> July 2011. On that date he used a police officer's cell phone to call his lawyer who came and had him released on a cash bail of Kshs.2,000.00 on the same day. The Petitioner alleged that he was only informed at the time of his release that he was accused of obtaining Kshs.4,000.00 from an unknown person and that he was further informed to appear at the Milimani Chief Magistrate's Court on 20<sup>th</sup> July 2011 for further directions in relation to his case.

(6) He stated that when he appeared in Court on that date, his case file was not brought and a Prosecutor told him that he was not aware of the case and informed him to make an enquiry on that case at the Central Police Station. When he went to the Central Police Station and presented the bail receipt to a certain Police Officer, the said Officer wrote on the receipt that the complaint against him had been disposed of and that is when his lawyer advised him to lay a complaint with the relevant authorities.

(7) In this Court, the Petitioner filed a list of items that were allegedly lost when he was in custody and he also filed letters which he wrote to the Commissioner of Police, the Attorney General and other letters written by the Permanent Secretary in the Office of the Prime Minister on his ordeal. In all the letters, the Petitioner complained of the manner in which he was arrested and detained as detailed above.

(8) During the hearing in this Court, the Petitioner adopted his Statement of 16<sup>th</sup> January 2015 as his evidence and further stated that he did not have an Occurrence Book (OR) entry number of his alleged arrest and incarceration and that he had no evidence of his transfer from Jogoo Road Station to Central Police Station.

(9) Based on the above narration of events, the Petitioner submitted that his rights have been violated and sought the following orders:

**“a) A declaration by this Honourable Court that the Petitioner's Rights and fundamental freedoms have been denied, infringed and/ or violated by the Respondents.**

**b) The Petitioner, his constitutional rights and freedoms having been violated and infringed upon, and being held in custody illegally prays for compensation for unlawful detention and cruel and degrading treatment.**

**c) Damages in compensation of the contraventions as herein above.**

**d) Punitive damages for blatant breach of the petitioners' right. (sic)**

**e) Any other or further order or relief that this Honourable Court may deem fit to grant.**

**f) Costs occasioned by this Petition.”**

### **Respondents' case**

(10) During the hearing it was indicated by learned State Counsel that the Respondent's case is based on the Grounds of Opposition dated 17<sup>th</sup> March 2013 and Written Submissions dated 6<sup>th</sup> October 2015.

(11) It is their case in that context that the Petitioner's evidence, as tested during cross-examination, is not a credible. In that regard, they argued that while the Petitioner stated that he was denied access to a lawyer it became clear during cross-examination that he was allowed to make a call and communicate with his Advocate.

(12) The Respondents also submitted that the Petitioner failed to place evidence, in any form, to prove the allegations that he was tortured and subjected to degrading treatment when he was in custody and so

the said claim ought to fail.

(13) It is their other position that the Petitioner failed to explain why he was only able to lodge his Petition in 2013 for events that occurred in 2011. In that context, they urged this Court to dismiss the Petition on the basis of delay alone. In support of that proposition, they relied on **High Court Petition No.306 of 2012 Ochieng Kenneth K'Ogutu vs Kenyatta University and 2 Others**.

(14) Further, relying on **Constitutional Petition No.128 of 2006, Lt Col. Peter Ngari Kagume and Others vs Attorney General**, the Respondents submitted that the Petitioner had failed to prove, on a balance of probabilities, the allegations of torture and degrading treatment that he suffered at the hands of the police and that no evidence or witnesses corroborated those allegations.

(15) Alternatively, the Respondents submitted that even if it were to be accepted that the Petitioner was treated in an inhumane manner as alleged, mere incarceration cannot amount to a constitutional violation and that in any event the Petitioner was arrested by the Police in the course of their lawful duties. Further, that he failed to lodge a complaint at any Police Station concerning the alleged violation and so the same is purely speculative.

(16) As to the appropriate relief, in the event that the Petition should succeed, the Respondents submitted that damages in constitutional matters are not meant to restore a person to the state they were in before the violation but to give just satisfaction. Further, that the Court should apply the principles enunciated in **Peter Ngari Kagume Others vs Attorney General (supra)** that:

**“(a) If there is any other remedy in addition to damages, that other remedy should usually be granted initially and damages should only be granted in addition if necessary to afford just satisfaction.**

**(b) The court should not award exemplary or aggravated damages.**

**(c) An award should be “of no greater sum than that necessary to achieve just satisfaction”.**

**(d) The quantum of award should be moderate and normally on the lower side by comparison to tortuous awards . . .”**

(16) In conclusion, the Respondents submitted that the Prayers sought should not be granted because the Petitioner had failed to prove his case to the required standard and the Petition ought to be dismissed with costs.

### **Determination**

(17) It seems to me that the only issue to determine is whether based on the facts as outlined above, the Petitioner's rights under the Constitution were violated and as a consequence, what remedies, if any, are available to him. For convenience, I will deal with each right separately and in no order of importance to determine whether the same was violated as alleged.

(18) Before I do so however, there is the preliminary point whether the Petition ought to be dismissed solely because the Petitioner approached the Court two years after the incident forming the subject matter of the Petition.

(19) In that regard, it is now a well-established position of this Court that there is no limitation of time for bringing petitions alleging violations of rights under the Bill of Rights. However, in a bid to avoid blatant abuse of the court process and to enable a respondent to properly respond to violations that may have occurred decades ago, the High Court in **Juan Akinyi Kabaselleh and 2 Others vs AG Petition No. 41 of 2014** stated that a party coming to court after a long period of inaction ought to explain the delay and the Court will then consider whether in the specific circumstances of each case, it ought to

accept the explanation and deal with the claim of violations on its merits.

(20) Although the Respondents relied on **Peter Kagume Kariuki (supra)** as the authority that there may be limitation of time in constitutional matters and specifically under the Bill of Rights, neither that authority nor any law known to this Court creates such a limitation of time.

(21) It is also the practise and policy of this Court that noting our history as a country and the space of freedom opened up after 2002, claims filed up to the year 2012 with sufficient explanations may be accepted. It would be difficult however to accept such claims after 2012 unless sufficient and plausible explanations are given. This position is meant to stem abuse of court process and the unfairness occasioned to the State, the invariable Respondent in such matters.

(22) Having so said, between 2011 and 2013 when he filed his Petition, the Petitioner was engaged in fruitless correspondence with the Respondent in a bid to resolve the issues now in context. His correspondence with the Office of the Prime Minister also shows a diligent litigant intent on vindicating his rights before approaching this Court.

(23) In the circumstances, the two years' delay is neither inordinate nor unreasonable and I so find. I shall now turn back to the specific allegation of constitutional rights and freedoms.

### **Article 25 of the Constitution**

(24) The Petitioner alleged that his right to freedom from torture and inhuman or degrading treatment enshrined in **Article 25(a)** and the right to a fair trial in terms of **Article 25(c)** of the **Constitution** have been violated. The Petitioner alleged that he was arrested for no apparent reason and detained for five days without being charged. For avoidance of doubt, **Article 25** provides for certain rights that cannot be limited in the following terms:

**“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited?**

- a. **Freedom from torture and cruel, inhuman or degrading treatment or punishment;**
- b. **Freedom from slavery or servitude;**
- c. **The right to a fair trial; and**
- d. **The right to an order of habeas corpus.”**

The substantive rights above are themselves provided for in **Articles 28, 29, 30, 50(1)** and **51(2)** and I will address the relevant ones only.

### **Right not to be subjected to torture or to be treated or punished in a cruel, inhuman or degrading manner**

(25) **Article 29(a)** and **(f)** provide as follows:

**“Everyone person has the right to freedom and security of the person, which includes the right not to be?**

- a. . . .
- b. . . .
- c. . . .
- d. **Subjected to torture in any manner, whether physical or psychological;**
- e. . . .
- f. **Treated or punished in a cruel, inhuman or degrading manner.”**

(26) In the above regard, the Respondents have argued that the Petitioner has failed to lead any medical evidence or otherwise to substantiate the claim of torture and degrading treatment. In that regard, I

cannot fault the Respondents' argument because, apart from the Petitioner's word, there is absolutely no evidence led in support of this allegation. In my view, it is not enough to merely state he suffered such serious violations without any evidence at all. Further, the Petitioner, did not bother to proffer reasons why he could not provide any form of evidence to back his claim including medical evidence. In fact, the whole Petition is largely grounded on the arrest and incarceration of the Petitioner allegedly without any reasons for such an action. Without any evidence on the alleged torture and inhuman and degrading treatment, I am unable to say more on the subject.

**The right not to be detained without trial and to be taken to Court within 24 hours**

(27) The Petitioner alleged that his right not to be detained without trial enshrined in **Article 29(b)** of the **Constitution** was violated when he spent five days in detention without being charged or tried. In that regard, it is trite that a detention following an unlawful arrest is also unlawful. In that context, it is indisputable that the detention in this case was unlawful because the arrest was also unlawful. It is my view that before the issue of detention without a trial arises, an antecedent question of whether he was supposed to have been detained in the first place arises. If not, that alone would, in my view, constitute an infringement of **Article 29(b)** of the **Constitution**.

(28) From the evidence tendered before me, I believe the Petitioner when he stated that he was detained at Jogoo Road Police Station and Central Police Station between 12<sup>th</sup> July 2011 and 15<sup>th</sup> July 2011, that is for three days. Although he had the legal duty to prove that allegation on a balance of probabilities, the Respondents had a duty of rebutting that allegation and no attempt to do so was made save a bare denial.

(29) But does his incarceration at a Police Station for three days amount to a detention without trial or is it a violation of the right of an arrested to be taken to Court within the period envisaged by **Article 49(1)(f)**? Was there in fact any reason to arrest the Petitioner in the first place?

(30) From the evidence, there is no person who can be called a complainant who triggered the Petitioner's arrest and there is no evidence that his incarceration therefore had any lawful basis. His detention was clearly unlawful and the fact that he was taken round in circles including being told to report to the Chief Magistrate's Court at Milimani confirms that fact.

(31) However, it seems to me that the right not to be detained without trial is different from the right to be taken to Court within 24 hours under **Article 49(1)(f)** and the right that has been violated in the circumstances. In saying so, and for avoidance of doubt, **Article 29(b)** provides as follows:

**“Every person has the right to freedom and security of the person, which includes the right not to be –**

...

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

(32) **Article 49(1)(f)** on the other hand provides as follows:

**“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.”**

(33) I reiterate that the holding of the Petitioner for three days without being taken to Court is a violation of the latter provision and I so find – See also **Minister of Law and Order and Others v Hurley and Another 1986(3) SA 685 (A) at 589E-F** and **Duarte v Minister of Police [2013] ZAGPJHC 51 at para 3**.

**The right to family life**

(34) It is the Petitioner’s case that his right to family life in terms of **Article 45** of the **Constitution** was violated. I must state however that I do not see how this right finds application in this case and without a credible demonstration by credible evidence of violations by the Petitioner, and on how the conduct of the Police Officers violated this right, I am inclined to find that there was no violation. That is all to say on this matter.

**The right to communicate with a lawyer**

(35) The Petitioner alleged that he was not allowed to consult with his lawyer during his detention and that as a result, his right in terms **Article 49(1)(c)** of the **Constitution** which entitles him to communicate with a lawyer, and other persons whose assistance is necessary, has been violated. The Respondents on the other hand argued that the fact that the Petitioner was given a cell phone by a Police Officer to communicate with his Advocate is indicative of the untruthfulness of the Petitioner’s submission.

(36) I must state in the above regard that although the Petitioner was allowed to call his advocate, this was only done on his fourth and final day in custody. In my view, the Respondents’ argument that the right to access an advocate was not infringed because he was eventually allowed to call his advocate on that day is misguided. The mere fact that the Petitioner was allowed to communicate with his Advocate on the day he was finally released from custody cannot be the basis to wish away the fact that he was denied the same right for a period of three days when he needed it most. I say this mindful of the fact that the aforesaid Article does not prescribe when this right should be exercised. However, to my mind a purposive interpretation which accords with the spirit, purpose and objects of the Constitution would dictate that soon after arrest, the arrested person must be allowed to communicate with his lawyer. In that context, I therefore find that the Petitioner’s right as aforesaid was violated.

**The right to be released on bond or bail**

(37) **Article 49(1)(h)** provides as follows:

**“An arrested person has the right?**

...

**g. to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**

(38) The Petitioner alleged that his right to be released on bond or bail enshrined in the above **Article 49(1)(h)** of the **Constitution** was violated when he was detained for four days without being released on bail or bond. In my view, the essence of this right rests on the right to apply for bail or bond including police bond and to be given reasons when same has been denied.

(39) In this case, the Respondents did not place anything on record to indicate that the Petitioner was allowed the right to apply for bail or bond until the fourth day of his arrest and this in my view points to the fact that the Petitioner was refused the said right. In that regard and without more, I find that to the extent that the Petitioner was not allowed to apply for bail, not granted bond until the last day of his arrest, his right in terms of the aforesaid Article was violated.

### Alleged violation of Article 50(2)(e) of the Constitution

(40) **Article 50(2)(e)** provides as follows:

**“Every accused person has the right to a fair trial, which includes the right –**

...

**e. to have the trial begin and conclude without unreasonable delay.”**

(41) It was submitted by the Petitioner that his right to have a trial begin and conclude without unreasonable delay as provided in **Article 50(2)(e)** of the **Constitution** was violated. In my view, this right can only be effectively invoked by a person who has been charged and is awaiting trial. In this case, the Petitioner was not even charged and as such could not have been tried without being charged. For that reason, I am unable to find that this right is effectively applicable to the Petitioner in these circumstances and I find no violation thereof.

### Alleged violation of Article 51(1)

(42) **Article 51(1)** provides as follows:

**“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 a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.”**

(43) It was the Petitioner’s allegation that his right in terms of **Article 51(1)** of the **Constitution** has been violated. The said Article broadly provides that a person who is held in custody or imprisoned retains all rights and fundamental freedoms in the Bill of Rights except to the extent that the rights and freedoms are incompatible with his detention and arrest. In my view, the findings above in respect of certain rights to which the Petitioner was denied reflect an acknowledgment by this Court of the fact that even though the Petitioner was detained, he was still entitled to his rights and fundamental freedoms as spelt out in the aforesaid Article. In that context, I find that this Article has been effectively vindicated by the findings above and I need not say more in this regard.

### Other Rights

(44) The above having been said, I do not see the need to make a determination on the alleged violations or otherwise of **Articles 47** and **48** of the **Constitution** because their scope is broadly covered by some of the provisions as determined above and they have been effectively vindicated. In any event the right to administrative action and access to justice as provided by these Articles do not squarely fall for application in the present Petition in view of my findings on the specific circumstances of the Petition before me.

### Relief

(45) At the most basic, the appropriate remedy for constitutional violations is a declaration by the Court that certain rights have been violated. However, there are circumstances in which a declaration alone would not satisfactorily vindicate the constitutional violations in issue. In that regard, the *dictum* in the Trinidad and Tobago case of **Attorney General of Trinidad and Tobago vs Ramanoop (Trinidad and Tobago) [2005] UKPC 15** is apposite. In that case the Court said:

**“A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.”**

(46) The Court further said:

**“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances.”**

(47) I have taken the same view in this regard and I am convinced that this is one case in which more than a declaration is needed. In that context, the Petitioner prayed for the following, in addition to the declarations made elsewhere above:

“ . . .

- c) **Damages in compensation of the contraventions as herein above.**
- d) **Punitive damages for blatant breach of the petitioners’ right. (sic)**
- e) **Any other or further order or relief that this Honourable Court may deem fit to grant.**
- f) **Cost occasioned by this petition.”**

(48) As may be seen from the Prayers above, the Petitioner prayed for general and punitive damages. In that regard, the question is whether he is entitled to claim under these two heads of damages in the circumstances of this case. In that context, it is settled law that the question of quantum of damages falls within the discretion of the Court – See **Dick Joel Omondi vs Hon. Attorney General [2013]eKLR**. It is therefore to the Court to make an assessment of what is an appropriate quantum of damages in the circumstances of a particular case and such a finding cannot be made with mathematical precision.

(49) As regards punitive damages, the Court in the English case of **Rookes vs Barnard [1964] UKHL 1** instructively pointed out that punitive damages should be awarded where:

- (i) **There is oppressive, arbitrary or unconstitutional actions by the servants of government.**
- (ii) **The defendant's conduct was ‘calculated’ to make a profit for himself.**
- (ii) **A statute expressly authorises the same.**

(50) Expressing itself on the same subject of punitive or exemplary damages, the Court in **Attorney General of Trinidad and Tobago v. Ramanoop (Trinidad and Tobago) (supra)** stated thus:

**“An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”**

(51) I associate myself with the above exposition of the law and on this aspect I fail to see anything from this case that can justify the awarding of punitive damages as described above. Although the arrest and the subsequent detention could not be justified, this is not a case of recurred unlawful arrests and detentions by the police for which this Court would feel the need to express its disquiet. In that regard, I find no basis to grant punitive damages as prayed by the Petitioner.

(52) Regarding compensatory damages, I find that the Petitioner deserves to be compensated for the constitutional violations described above and as I have stated above, the quantum of an award of damages of this nature depends on the circumstances of a particular case. In that regard, having considered the rights at stake, the manner in which the arrest and detention occurred and the number of days the Petitioner was detained, I am of the view that the Petitioner must be awarded a global amount of Kshs.150,000.00 as compensatory damages for the constitutional violations found above.

**Disposition**

(53) Having found as above, the appropriate reliefs to grant are the following;

- a) **A declaration is hereby made that the Petitioner's Rights and fundamental freedoms have been denied, infringed and/ or violated by the Respondents.**
- b) **The Petitioner, his constitutional rights and freedoms having been violated and infringed upon, and having been held in custody illegally, is entitled to compensation in the sum of Kshs.150,000.00.**
- c) **Costs occasioned by this Petition are to be paid to the Petitioner plus interest on (b) until payment in full.**

(54) Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF APRIL, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Obura for Respondent

No appearance for Petitioner

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**