



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

PETITION NO. 5 OF 2015

BETWEEN

DAVID OGOLLA OKOTH.....PETITIONER

AND

THE CHIEF MAGISTRATE COURT, KIBERA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner seeks orders to quash his trial in a criminal case. He also seeks a declaration that the evidence generated by the prosecution in the criminal trial is illegal and unconstitutional. The basis of the Petitioner's claim is that his rights under Article 50(2)(c) of the Constitution have been violated.

Background facts

2. The Petitioner describes himself as an informal artisan who earns his living repairing electrical defects in motor vehicles. He conducts his business on the outskirts of Nairobi. In December 2012, he received instructions from one John Nyaga owner of motor vehicle registration no. KAL 979L. He undertook the repairs as instructed. Mr John Nyaga ("the owner") then paid him Kshs. 6000/= but the motor vehicle still apparently had defects. There was a disagreement as the owner was not satisfied with the repairs. The owner moved to report the disagreement to the local police station and the Petitioner agreed thereafter to occasion additional repairs. He again undertook the repairs.
3. The owner was then later to accuse the Petitioner of vandalizing the subject motor vehicle and following a complaint the Petitioner was arrested. The subject motor vehicle was also removed from the Petitioner's garage and towed to the local police station. The Petitioner was then arraigned in court and charged with the offence of theft of motor vehicle parts in Criminal Case No. 1583 of 2013.

Petitioner's case

4. The Petitioner's case is rather straightforward. It may be pieced together from the Petition filed on as well as the submission made by Counsel on behalf of the Petitioner.
5. The Petitioner does not contest having been charged. The Petitioner does not question the 3rd Respondent's powers and mandate. The Petitioner does not contest the fact that the trial process commenced and was being conducted under the watch of the 3rd Respondent. The Petitioner however impugned the manner the evidence being used against him was gathered. The Petitioner also contested the fact that the Petitioner was denied access to the evidence and this negatively impacted on the Petitioner's pursuit of a fair trial as the Petitioner was unable to prepare for his trial. Thirdly, the Petitioner contended that his rights to property have been contravened and additionally that his right to privacy was violated by the wanton action of seizure by the Respondents of the subject motor vehicle.
6. The Petitioner contended that the exhibit which was to be used in his trial was seized without any warrant. The Petitioner re-enacted how officers from the Police Service, upon the prompting of the owner of the subject motor vehicle seized the same without any warrants, and later surrendered the motor vehicle to the owner without the Petitioner accessing the same. The Petitioner contends that this action of seizure and surrender violated his constitutionally guaranteed rights and also exhibited elements of abuse of office on the part of the 3rd Respondent.
7. On the issue of denial of access to evidence the Petitioner contended that the Petitioner's rights under Article 50(2) (c) and (5) had been infringed. The Petitioner stated that the Respondents action in these respects had been extremely arbitrary.
8. The Petitioner also contended that Article 40 had been violated as the Petitioner who had a genuine repairer's lien over the subject motor vehicle had been denied the same by the rather arbitrary seizure of the subject motor vehicle.

Respondents' case

9. The Respondents' case may be retrieved from the Replying Affidavit of Sergeant Silas Kubai. It was sworn on 11th August 2015 and filed in court the next day.
10. The Respondents contend that the Petitioner has not shown that his rights as guaranteed by the Constitution were infringed. The Respondents contend that a genuine complaint had been lodged against the Petitioner and following investigations the 2nd and 3rd Respondents saw it appropriate to have the Petitioner charged with the offence of stealing. The Respondents allege that due process has been followed and witnesses also testified. According to the Respondents, the Petitioner only claimed that his rights had been violated after he had been placed on his defence by the 1st Respondent.

Arguments

11. Mr. G.K. Mwaura represented the Petitioner whilst Mr. Sekwe appeared for the 1st and 2nd Respondents. Ms. Kahoro urged the 3rd Respondents case.

Petitioner's submissions

12. The Petitioner's counsel submitted that the Petitioner has been denied the equal treatment and benefit of the law. This followed the illegal search and seizure of the Petitioner's property when the Respondents, simply took away the subject motor vehicle against which the Petitioner had a repairer's lien. Counsel added that the evidence had not been properly obtained and this meant an abuse of the process. The infringements and abuse continued when the Petitioner was further denied access to the subject motor vehicle even after a court order. Counsel concluded by stating that the entire criminal process had been compromised beyond repair by what happened both before and after the Petitioner's indictment.
13. Mr. Mwaura relied on the cases of **Marshalls E.A Ltd -vs- Osoro [1993]eKLR** to illustrate the point that a repairer's lien is itself a property. Additionally, counsel referred to the cases of **Abubaker Sharrif Abubakar-v- Attorney General & Another [2014]eKLR** for the proposition that the police service should never retain items secured even during criminal

investigations, but rather the same should be surrendered to court.

Respondents' submission

14. Ms. Kahoro urged the 3rd Respondent's case and submitted that the Petitioner had not established even on a balance of probabilities that his rights had been infringed either before or during the trial of criminal case. Counsel stated that the Petitioner had been properly indicted of theft. Counsel also added that the Petitioner will be at liberty to appeal if the trial court's decision will not favour him, while with regard to denial of access to evidence the Petitioner should have raised issue before the trial court.
15. Mr. Sekwe advocating the 1st and 2nd Respondent's case added that Article 157 was clear on how prosecutorial powers are to be organized. Counsel submitted that the issue of presentation of evidence should have been raised before the trial court. Whilst stating that the Petition lacked merit, counsel concluded that the same was only an after-thought intended to help the Petitioner to avoid the trial process to its finality.

Discussion and Determination

Issues

16. The core issues for determination may be isolated as

- a. Whether the Petitioner constitutional rights have been infringed and;
- b. If so, which particular rights.

17. It is for the Petitioner to show through relevant and admissible evidence that his rights have been violated. See **Meme –v- Republic [2004] e KLR** and also **Anarita Karimi Njeru –v- Republic [1976- 80] KLR**.
18. The Petitioner does not contest his prosecution by the 3rd Respondent but contends that his rights under Articles 50(2) and 50 (4) have been infringed.
19. Firstly, the evidence is stated was obtained without following the proper legal procedure. The evidence in question which led to the Petitioner being arraigned in court was the subject motor vehicle.
20. Article 50 (4) of the Constitution is to the effect that evidence obtained in a manner inconsistent with the provision of the Bill of Rights is to be excluded from any trial if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.
21. The Petitioner's argument was that the evidence which was used to indict him and during the trial was irregularly obtained. The evidence, the subject motor vehicle, was seized without a warrant and taken to a police station instead of being placed in the safe custody of the court. It is not denied that the evidence was seized without a court warrant. It is also not denied that the evidence was not placed in the safe custody of the court. Instead the evidence was stored at a police station and later released to the complainant who had claimed ownership.
22. There is no controversy that the subject motor vehicle was not the property of the Petitioner. It belonged to the Petitioner's customer and the Petitioner only had a claim if any, for repairs effected on the subject motor vehicle. It is further not in controversy that the subject motor vehicle formed the substratum of the criminal complaint and ultimate prosecution of the Petitioner, with the owner claiming that it had been vandalized.
23. The Criminal Procedure Code (Cap 75) has an elaborate and detailed procedure for obtaining and securing evidence which is necessary for the purposes of any investigation or prosecution. The code also has a detailed procedure for the detention of such evidence. Section 118 and 121 of the Criminal Procedure Code, respectively provide for search or seizure warrants to be obtained from court and the seized items detained by court until the conclusion of the case. These particular sections of the law were not enacted without reason. The purpose must have been to ensure that arbitrary searches and seizures, arbitrary invasion of privacy or security of person and arbitrary interference with property rights were curbed and stopped. As part of the law and pursuant to

- Article 27 of the Constitution, the Criminal Procedure Code applies to all persons equally.
24. In the instant case, the Petitioner alleges that the failure to comply with these provisions of the law was discriminatory. For being contrary to the law, it is urged that the criminal proceedings to which the unlawfully obtained evidence relate should be terminated. According to the Petitioner the evidence was obtained unconstitutionally.
25. It is true evidence ought to be obtained in accordance with the provisions of both the Constitution and of the law. Obtaining evidence and indeed, as in this particular case, seizing the same without first obtaining appropriate warrants violates Constitutional norms. The right to property as well as the right to privacy will be violated. Likewise, the right to have a person's dignity respected will also be violated not forgetting security of person and of a person's property. In such instances, Article 50(4) provides “ [e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”.
26. There is inherently an exclusionary rule under Article 50 (4).
27. I do not however agree with the position adopted by the Petitioner which is seemingly an unqualified one that all evidence not properly obtained lead to some form of prejudice and therefore the automatic termination of a criminal trial. Such an approach negates and dilutes, invariably, the words of the Constitution emphasized above. There has to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must then be shown that the admission of such evidence would render the trial unfair or be detrimental to the administration of justice.
28. In my view and on the facts of this case, the Petitioner has not shown that any of his rights under the Bill of Rights were violated. It is evident from the Petitioner's own affidavits that in the run down to the criminal charges being preferred, the Petitioner as well as the owner of the subject motor vehicle were engaged in negotiations. The subject motor vehicle was also in a garage, a rather public place. There was also not only the Petitioner's claim to the motor vehicle by way of lien but also the owners claim to the same. Then there are the allegations of continued vandalism. The circumstances of the case dictated that the true owner's rights be also secured besides those of a lien holder..
29. Having established that there was no violation of any right notwithstanding the fact that the evidence was seized without a warrant, it would not be necessary to establish whether it would render the Petitioner's trial unfair. Likewise, it is unnecessary to establish whether it would be detrimental to the administration of justice. I must however hasten to add that there would have been nothing wrong for the Petitioner to also urge the trial court to exclude such evidence through the use of the court's discretion on the basis that it would render the trial unfair.
30. The Petitioner also claimed that he was denied access to the evidence and this meant he never had the benefit of a fair trial contrary to the provisions of Article 50 (2)(5) of the Constitution. In these respects, the Petitioner contended that the Respondents blatantly refused to obey a court order which was to the effect that the Petitioner be granted access to the subject motor vehicle.
31. Article 50(2) (j) reads as follows:

“[Every accused person has the right to a fair trial which includes the right]:

(j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence”.

32. The essence of Article 50(2)(j) of the Constitution, in my view, is to assist the accused person to exercise his or her fair trial rights. Access to evidence assists the accused in the preparation of his defence and to identify if at all any exculpatory facts. Where the accused person needs to access evidence the trial court has the discretion to make orders for such access depending on the stage of the trial. The earlier the better though.
33. In the instant case, the Petitioner applied before the trial court for an access to enable the Petitioner to access the evidence and in particular the subject motor vehicle. That was so shortly after the Petitioner had recorded a plea of not guilty. The subject motor vehicle was then in the custody of the police service. The trial court issued an order which read as follows:

“The defence is allowed to access the subject motor vehicle which is being held at Riruta Police Station”.

34. Despite service of the court order upon the police service, the police service did not comply and allow the Petitioner or the Petitioner’s counsel to access the subject motor vehicle. Instead, the subject motor vehicle was released to the owner. Evidently, there was disobedience of a court order. The order did not originate from this court. Public policy dictates that for law and order to be maintained court orders are to be observed. However, disobedience of court orders whilst sounding a lot of disrespect to the court does not necessarily translate to violation of the Constitution. While it is true that the Petitioner had correctly and appropriately moved a court to enforce that right and the court obliged, it is unclear why the police service did not comply with the court order. It is also unclear why the Petitioner did not pursue the issue of disobedience before the trial court. Instead, the trial more-the-less proceeded until the Petitioner was placed on his defence. There is no indication that the fair trial rights were hampered and a presumption to that effect ought not be made.
35. I come to the conclusion that even though the Petitioner has shown that he was denied access to evidence through a flagrant disobedience of a court order, I am not convinced that the accused was hampered in the preparation for his trial and defence. Likewise the Petitioner ought to have raised the matter of disobedience before the trial court which he did not. I would consequently not prohibit the on-going trial of the accused.
36. The Petitioner finally argued that in the seizure of the subject motor vehicle, the Petitioner’s right to property was violated. The property claimed by the Petitioner is a repairer’s lien. On this, I take the view that the Petitioner seems to stand in good stead.
37. The subject motor vehicle was in the Petitioner’s possession before it was carted away without any permission by the court. There was basis for the seizure of the motor vehicle but it could only be effected through the court process and not otherwise. The 2nd Respondents servants not only divested the Petitioner of possession but also handed over the motor vehicle to the owner. This effectively killed off the claim of a repairer’s lien which is dependent on possession. With it the Petitioner’s claim also went. In common law, a repairer’s lien is a lawful entitlement that any repairer has a right to enforce. It is the ability of the repairer to retain possession of the chattel until he has received payment for services he was asked to carry out.
38. There is evidence before me that the owner asked the Petitioner to carry out some repairs on the subject motor vehicle. There is also additional evidence that subsequent to the initial repairs the owner sought further repairs to be undertaken. The Petitioner undertook the initial repairs, there is no controversy over that. He held on to the subject motor vehicle until the police service came calling and seized the subject motor vehicle as evidence only to release the same to the owner. The missing link is however the quantum of the repairs undertaken. That can only be in the nature of specific sums and the Petitioner did not avail evidence shelling the loss.
39. While I am confident that the Petitioner has shown that his right to property was violated, I am unable to offer any reprieve. To award an indeterminate amount would not be appropriate in the circumstances. I take solace in the fact that the Petitioner may still pursue a claim in contract against the owner for work done and services rendered as the loss of a repairer’s lien does not extinguish the right to claim for the money the subject of the lost lien.

Conclusion

40. I conclude that the Petitioner has not proven such violation of the Constitution as to warrant this court’s intervention with the Petitioner’s trial in Criminal Case No 1583 of 2013 before the Magistrate’s Court at Kibera.

Disposition

41. In final disposal, the Petition must be dismissed. It is so dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 29th day of June 2016

J.L.ONGUTO

JUDGE