



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 355 OF 2012

BETWEEN

JOSHUA THAIRU MUTHIGA.....PETITIONER

AND

THE ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

Introduction

1. In his Petition dated 16th August, 2012, the Petitioner Joshua Thairu Muthiga alleges a violation of his fundamental rights as set out in **Section 77** of the **Repealed Constitution**. It is his case in that regard that his rights were infringed for he was detained by the State through its agents, being Special Branch Police Officers, in various police stations for twenty seven days without being arraigned before any Court in violation of the law.
2. In his Petition he has therefore sought the following orders;

“(a) A declaration that the Petitioner’s fundamental rights and freedoms under the law and the Constitution were contravened and grossly violated by the Respondent’s Police/CID/Special Branch officers, when he was arrested and kept in various Stations and other unidentified places for twenty seven (27) days without being arraigned in Court.

(b) An award of general compensation on a higher scale for the violation of the Petitioner’s civil, human and property rights, and for tortious detention before detention without trial and after his detention.

(c) An award of compensation for loss of employment and benefits accruing from employment with the Nairobi City Council.

(d) An award of punitive damages for the evident complicity by the Respondent in the calculated violation of the Petitioner’s rights during efforts by the Government intimidate Kenyans to silence.

(e) An award of the costs of this Petition, interests and any other relief or reliefs, the Honourable Court might deem appropriate in all the circumstances

of this case.”

The Petitioner’s case

3. The Petitioner claims that he was arrested on 21st April, 1975 by Special Branch Police officers, at his house in Ofafa, Maringo Estate for allegedly being in possession of a seditious paper. He claimed that he had collected the said paper somewhere near Khoja Mosque in Nairobi, as he was on his way from City Council of Nairobi offices where he was working as a carpenter.
4. Upon his arrest, he was taken to Jogoo Road Police Station where he was interrogated. He was later transferred to Pangani Police Station, and Central Police Station before being taken to Milimani Criminal Investigations Department (CID) offices where he was interrogated further. He was thereafter locked up at Milimani Police Station and at 4.00am, he was taken back to Milimani CID Offices. During his ordeal, he was denied food and drinking water.
5. He claimed that during his incarceration, he was kept in a dark cell, he slept on cold floor, was beaten up from time to time and was also kept incommunicado as his family and friends did not know of his whereabouts.
6. He further claimed that he was taken to the High Court on 17th May, 1975, charged with the offence of sedition and when he denied the charges, he was made to sign a detention order at Milimani Police Station before being taken to Kamiti Maximum Prison. After 14 days there, he was taken to Shimo la Tewa Prison where he was detained between 1975 and 1978. He was only thereafter released by President Daniel Arap Moi on 12th December, 1978.
7. He claimed that upon his release he returned to his employer but he was not re-employed and as he was not pensionable, he had nothing to fall back on.
8. In his written submissions, the Petitioner added that his detention did not comply with detention laws at the time and was intended to cover up the initial illegal incarceration, beatings and torture. It was his further contention that the **Preservation of Public Security Act 1966 (Cap 57)** provides for detention without trial in Kenya during periods of declared national emergency and that under **Section 2** of that **Act**, detention of a Kenyan citizen could only be justified in the interests of the defence of the territory and people of Kenya. That **Section 83** of the **Repealed Constitution** also allowed derogation from the Bill of Rights contained in Chapter 5 but such derogation could only be invoked in legal detention and not illegal detention. He thus claimed that his constitutional rights as provided for under **Sections 72, 74** and **77** of the **Repealed Constitution** were violated by the Petitioners.
9. In any case, he submitted that **Section 57** of the **Penal Code** provided for the prosecution of a suspect found in possession of a seditious publication but it was not invoked by the State in prosecuting him and so the law was thereby violated.
10. It was therefore the Petitioner’s case that for the above reasons, he is entitled to compensation for the illegal detention, loss of economic benefits and suffering his family underwent including some of his children falling out of school and which matters have caused them a great loss. He therefore pleaded that his Petition be allowed and he be awarded special, general and exemplary damages amounting to Kshs.8,600,000.00 together with costs.

The Respondent’s case

11. The Respondent, the Attorney General, opposed the Petition through the following Grounds of Opposition filed in Court on 17th December 2012;

“(1) That the Petition is grossly and incurably defective in substance and

should be struck out at the earliest.

(2) That the Petition offends the trite principle that the law ought not to be applied in retrospect.

(3) That the Petitioner was arrested and charged with a capital offence at the time, of sedition, and as such his detention was bound to be longer pending investigations.

(4) That the detention was done pursuant to an existing law then, the Public Security (Detained and Restricted Persons) Regulations 1966.

(5) That from the annexures it is evident that the Petitioner admitted to having possession of seditious material being a stencil cut from which he had many copies made.”

12. In addition, the Respondent filed written submissions and it was his case that the Petitioner was indeed found to be in possession of seditious material which was a crime and therefore in violation of the law. That the Petitioner was in conspiracy with the merchants of the said seditious material and he had collected them with a view of circulation which was prohibited under the law at the time. He submitted therefore that the **Preservation of Public Security Act** had been enacted to curb seditious acts and that Section 2 of that Act provided that preservation of public security included the prevention and suppression of rebellion, mutiny, violence, intimidation and unlawful attempts and conspiracies to overthrow the Government.

13. It was the Respondent's further position that the Petitioner had failed to prove that he was tortured as he did not avail the treatment notes from Kenyatta National Hospital where he alleged to have been treated. He thus claimed that he had failed to discharge the burden of proof required of him under **Section 107 and 109** of the **Evidence Act** and he relied on the case of **Col. Peter Ngari Karume & Others vs Attorney General Petition No.128 of 2006** to the effect that it is incumbent upon the Petitioner to avail tangible evidence of violation of his rights and freedoms.

14. In conclusion, the Respondent submitted that the Petitioner had failed to prove his case and he urged the Court not to be guided by the speculations and imaginations of the Petitioner but by the law as cited above before dismissing the Petition.

Determination

15. It appears to me that the facts leading to this Petition are not contested. The Petitioner was arrested and detained for having been in possession of a seditious material which was prohibited by the law at the time. The issue in my view is whether the facts as presented disclose a violation of the Petitioner's rights under **Sections 72, 74 and 77** of the **Repealed Constitution**.

16. It is true from the evidence before me that the Petitioner was arrested on 21st April 1975. He was then detained on 17th May, 1975 for a period of close to 4 years as he was released on 12th December, 1975. The State claims that he was detained lawfully for he was found in possession of seditious material. In that regard the Detention order read as follows;

“THE PUBLIC SECURITY (DETAINED AND RESTRICTED PERSONS) REGULATIONS 1966

DETENTION ORDER

IN EXERCISE of the powers conferred by regulations 6(1) of the Public Security (Detained and Restricted Persons) Regulations 1966, the Minister for Home Affairs, being satisfied that it is necessary for the preservation of public security to exercise

control, beyond that afforded by a restriction order, over

RUEL THAIRU MUTHIGA

(hereinafter referred to as the detained person), HEREBY ORDERS that the detained person shall be detained.

Dated this 17th day of May, 1975.”

17. The detention was expressed to have been done on the following grounds;

“ ...

That on the 21st April 1975 you were found in possession of seditious documents by a Police Officer. That you subsequently admitted you had a stencil out from which you had many copies made. It being obvious that your intention in having such a number of copies made was to have them publicised with the object of causing public unrest and dissatisfaction with the present legally constituted Government.”

18. What was the law applicable to his detention? **Section 2** of the **Preservation of Public Security Act**, established that preservation of Security included;

“(1) ...

(2) *In this Act, “the preservation of public security” includes-*

- a. *the defence of the territory and people of Kenya;*
- b. *the securing of the fundamental rights and freedoms of the individual;*
- c. *the securing of the safety of persons and property;*
- d. *the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempt and conspiracies to overthrow the Government or the Constitution;*
- e. *the maintenance of the administration of justice;*
- f. *the provision of a sufficiency of the supplies and services essential to the life and well-being of the community, their equitable distribution and availability at fair prices; and*
- (g) *the provision of administrative and remedial measures during periods of actual or apprehensible national danger or calamity, or in consequence of any disaster or destruction arising from natural causes.”*

19. The law above is clear that a preservation of public security order could be issued *inter alia* as a means to suppress a rebellion, mutiny, violence and any attempt to overthrow the Government. **Section 6(1)** of the **Public Security (Detained and Restricted persons) Regulations 1966** also provided that the Minister for Home Affairs could issue a detention order for the purposes of detaining any person for the purposes of preserving public security. For avoidance of doubt this Section provided thus;

“(1) *If the Minister is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by a restriction order, over any person, he may order that that person shall be detained.*

(2) ...

(3) ...”

20. The Petitioner in the above context admitted that he had collected a paper in the streets of Nairobi which was deemed to contain seditious content against the Government of the day. He was later arrested by Special Branch police officers who allegedly found him in possession of more seditious materials which he was allegedly supposed to circulate. It is therefore clear that the Petitioner was in contravention of the law to that extent and by his own admission.

21. In that regard, **Section 6(2) of Public Security (Detained and Restricted persons) Regulations 1966**, provided that when a Detention Order had been issued, it was to be deemed that one was in lawful custody. To that extent therefore, it is difficult to find that the Petitioner was not rightly in custody for the period he was incarcerated.

22. However, if I understood the Petitioner’s case, he also claimed that he was arrested on 21st April 1975 and the detention order was issued on 17th May 1975 and that for the period between those dates, he was unlawfully held.

23. If that be so, the Petitioner testified that he was arrested on 21st April, 1975 but was not taken to Court until 17th May, 1975. This therefore means that he was held in custody for a period of 27 days before being arraigned in Court. The applicable law at the time, **Section 72(1)** of the **Repealed Constitution**, read together with **Section 72(3)** and **72 (5)** of the Repealed Constitution, obligated the arresting authority to present any suspect to a court of law within 24 hours of arrest for a misdemeanor and within 14 days for capital offences. **Section 72** of the **Repealed Constitution** provided as follows;

“(1) No person shall be deprived of his personal liberty save as may be authorized by law....

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) A person who is arrested or detained-

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty- four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offense punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

In this case the Petitioner was accused of being in possession of a seditious material which was a misdemeanor and as such was supposed to have been presented to Court within 24 hours of his arrest but instead, he was presented 14 days later in clear violation of **Section 72** of the **Repealed Constitution**, and I so find.

24. The Petitioner also claimed that he was beaten while held in police custody and he was therefore

submitted to inhuman and degrading treatment. However, while he pleaded the violation of his right not to be subjected to inhuman and degrading treatment, he failed to give any facts in support of that assertion neither did he seek any specific remedy in that regard. I will therefore not belabor that issue further than that.

Remedy

25. Having found a violation of the Petitioner's rights under **Sections 72** of the **Repealed Constitution** this Court must award him an appropriate remedy. Indeed **Section 72(6)** of the **Repealed Constitution** mandated compensation for a person who had been unlawfully detained and the Petitioner has indeed prayed for an award of general and punitive damages. In ***Benedict Munene Kariuki and 14 others vs the Attorney General High Court Petition No.722 of 2009*** the Court stated that a global figure is most appropriate in the cases for enforcement of constitutional rights and freedoms because the acts complained of were as a result of the same transaction. The High Court has also been reluctant in awarding punitive damages for reasons that they are not awardable in changed political circumstances - See also ***Dominic Arony vs Attorney General Misc. Appl. 494 of 2003*** and ***Jennifer Muthoni Njoroge and 10 Others vs Attorney General Petition No.340 to 350 of 2009***.
26. In the event, I award the Petitioner **Kshs.1,350,000.00** for violation of his rights under **Sections 72** of the **Repealed Constitution**. I have done so having taken into account the period of 14 days which he was in unlawful incarceration comparable past awards and the fact that he was unable to prove that he was tortured during his incarceration which was the case in other cases decided by this Court – See ***Jennifer Muthoni Njoroge vs AG (2013) eKLR***.
27. Sadly, this Court cannot grant the Petitioner prayer (c) of his Petition as that claim was not properly canvassed and the Court does not have sufficient material on that aspect of the Petition. In any event, matters of employment and labour relations should be canvassed in the right Court i.e. the Employment and Labour Relations Court.
28. The final orders to be made are that judgment is entered in favour of the Petitioner against the Respondent as follows;
- a. **A declaration is hereby issued that the Petitioner's fundamental rights and freedoms under the law and the Constitution were contravened and grossly violated by the Respondent's Police/CID/Special Branch officers, when he was arrested and kept in various Police Stations and other unidentified places for twenty seven (27) days without being arraigned in Court.**
 - b. **General damages of Kshs.1,350,000.00 as compensation for unlawful detention by the Government agents be paid to the Petitioner.**
 - c. **The Petitioner shall have the costs of this Petition together with interest on damages from the date of judgment until payment in full.**
29. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Wanjiri for Petitioner

Mr. Kuria for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

11/9/2015