



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

PETITION NO. 417 OF 2015

SHEILA AMALEMBA.....1ST
PETITIONER

MARTIN HOHMANN.....2ND
PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST
RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND
RESPONDENT

THE CABINET SECRETARY FOR INTERIOR AND NATIONAL COORDINATION.....3RD
RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....4TH
RESPONDENT

THE DIRECTOR FOR IMMIGRATION SERVICES.....5TH
RESPONDENT

JUDGMENT

Introduction

1. The Petitioners in their Petition dated 28th September 2015 challenge the decision to have the 2nd Petitioner deported on the basis, inter alia, that the 2nd Petitioner, a German citizen is married to a Kenyan citizen and that they have two issues as a result of the marriage. The Petitioners assert that the Constitution recognizes a family as a fundamental unit of society and the Petitioners must be given a chance to be together. The Petitioners who have also brought the Petition on behalf of their two minor children seek orders to have the 2nd Petitioner released from detention and reunited with his family.

2. The Petition is supported by two affidavits sworn by each of the Petitioners. They set out in their respective affidavits the facts of their case. They also set out the alleged violation or threatened violation of their rights in a more general manner.

3. The crux of the Petition is that the 2nd Petitioner continues to be kept in unlawful detention after completing his sentence and if he is deported a family unit will be destroyed contrary to the provisions of and the spirit of the Constitution.

4. The Respondents oppose the Petition. A singular Replying Affidavit was filed on 28th October 2015 on behalf of all the Respondents.

5. The Petitioners abandoned, with leave of the court, the application for conservatory orders which had also been filed simultaneously with the Petition and instead the Petition was heard on the basis of the affidavit evidence on record and counsels oral submissions.

Factual backgrounds

6. The facts are relatively not in dispute. The circumstances under which the Petitioners came before the court could be stated shortly as follows.

7. The 2nd Petitioner arrived in Kenya in April 2010. Some fourteen days later he had met, fell in love with and got engaged to the 1st Petitioner. The 2nd Petitioner got the 1st Petitioner's parents approval when he offered his hand in marriage. He had previously come to Africa and settled in the south. He wanted to go back to Botswana where he had set up his business but the 1st Petitioner's parents would hear none of that. In April 2011 the Petitioners were blessed with the issues of the marriage. It was a pair of girls, twins.

8. The Petitioners' marriage was however never formalized as had been intended by the 2nd Petitioner. According to the 2nd Petitioner, the 1st Petitioner mother scuttled all plans to formalize the marriage.

9. The 2nd Petitioner never went back to Botswana. He also never travelled back to his homeland Germany. He stayed in Kenya

10. It is unclear what happened to the 2nd Petitioner's first marriage. It is also unclear what happened to the 2nd Petitioner's four children who had accompanied him to Botswana. The Petitioners make no mention of the four children or their mother.

11. It is however not in controversy that the 2nd Petitioner was arrested on 29th November 2014 and arraigned in court on 1st December 2014. He was charged with the offence of being unlawfully in Kenya contrary to Sections 53(1) and 53(2) of the Kenya Citizenship and Immigration Act, 2011. The charge was read to him. He pleaded guilty. He was convicted on his own plea. He gave a lengthy mitigation. He was sentenced. He was to serve 6 months in prison or pay a fine of Kenya Shillings 100,000/=. He was unable to raise the fine. He was also to be deported once he served the sentence. He served his sentence. His deportation has however been delayed partly because of this Petition and partly by the 2nd Petitioner's refusal to provide his passport to facilitate his deportation.

The Petitioners' Case

12. The Petitioners case is that by reason of their duly consummated marriage the 2nd Petitioner is entitled to all rights appurtenant to such association or relationship.

13. The Petitioners state that their rights under Article 45 have been or are about to be violated. The Petitioners also state that the 2nd Petitioner was arrested kept incommunicado, tortured and arraigned in court after one week in complete violation of his rights under Articles 49 and 50 of the Constitution.

14. The Petitioners also contend that the 2nd Petitioner was never accorded a fair trial contrary to Article 50 of the Constitution.

15. The Petitioners then contend that Article 27 and 35 (as to right to information) has been violated in so far as the 2nd Petitioner is concerned. Also stated to have been breached is Article 48 (as to access to justice) of the Constitution. Finally, it is also contended by the Petitioners that Article 53 is likely to be violated as the Petitioner's children will not have access to parental care, love and protection. The Petitioners assert that this would be in breach of the children's best interest and wishes.

16. From all that, the Petitioners seek the following reliefs:

a. Declaratory Order that the procedure of arrest, investigation, prosecution, trial and detention of the 2nd petitioner by the 1st, 2nd 3rd 4th and 5th Respondents is unconstitutional as he was denied his constitutional rights to have a fair trial in total contravention of Articles 27, 28, 29(a) (d)(f), 35(1)(2), 25(a)(c), 47,48,49,(1)(a)(b)(c)(d)(h) (2) and 50(2) of the Constitution of Kenya, 2010.

b. A Declaration that the 1st and 2nd Petitioner's Children's constitutional rights to have parental care love and protection from both parents under Article 53 of the Constitution have been violated and /or threatened to be contravened unless the 1st, 2nd, 3rd, 4th and 5th Respondents are prevented from deporting the 2nd Petitioner herein to Germany whereas he has a Kenyan family to care for and he also enjoys residence in Botswana where he has built a home and always called home.

c. A Declaration that the 1st and 2nd Petitioners' constitutional rights to form the sacred institution of marriage is threatened if the 2nd Petitioner is deported whereas it is the states duty to protect the family institution

d. A Declaration that the continued detention of the 2nd Petitioner violates his constitutional right to be protected from inhuman and degrading manner in total contravention of Article 28 of the Constitution

e. A Declaration that the 1st and 2nd Petitioners have the constitutional right to have protection of equal benefits of the law and not to be discriminated against as provided for under Article 27 of the Constitution

f. A conservatory injunction to be issued against the 3rd, 4th and 5th Respondents herein preventing them from deporting the 2nd Petitioner herein whose children and his wife stand to suffer greatly as he is the sole bread winner who has been raising for their upkeep even while in police custody

g. Judicial review orders of certiorari and mandamus be issued against the 3rd 4th and 5th Respondents herein compelling them to release the 2nd Petitioner herein who continues to be unlawfully detained at Industrial area Police Station even after he successfully served his jail term sentence that ended on 5.06 2015.

h. An order of compensation to issue against the 1st Respondent who has continued to wrongfully and unconstitutionally hold the 2nd Petitioner in detention for now over 3 months.

The Respondents' case

17. The Respondents case may be gathered from the Replying Affidavit sworn by Alfred Abuya Omangi, the Chief Immigration Officer (Investigation and Prosecution) Ministry of Interior and Coordination of National Government.

18. Denying that any of the Petitioners' rights have been violated or about to be violated, the Respondents

state that the 2nd Petitioner was lawfully and properly convicted and sentenced by a competent and impartial tribunal. The Respondents state that the mere fact of marriage if at all does not entitle a person to enter and or remain in Kenya without proper immigration controls. The Respondents also contend that to grant the orders sought would be to simply prejudice and compromise the Respondents' functions, operations and independence.

Arguments before the court

19. The Petition was heard by way of the affidavit evidence and oral submissions made by counsel on 29th October 2015.

Petitioners' submissions

20. Mr. Owaga urged the Petitioners' case while Ms. Kihara argued the case on behalf of the 2nd Respondent and Ms. Mwangi for the other Respondents.

21. Mr. Owaga relied on the Supporting Affidavits sworn by the Petitioners and basically reiterated the averments in the Petition and the affidavits. Counsel submitted that if the 2nd Petitioner is deported, the rights of the 1st Petitioner and those of the children of the two Petitioners would be interfered with. Counsel asserted that it is the duty of the State to ensure that the family unit is kept together and protected under Article 45 (1) of the Constitution.

22. Counsel then submitted that the 2nd Petitioner was also being discriminated against. It was contended that being a first offender, he should not be deported. According to counsel this was harsh and contrary to Article 27 (2), (3) and (4) of the Constitution.

23. Counsel wound up his submissions by stating that the unique circumstances of the case and the fact that the 2nd Petitioner was the sole bread winner dictated that the Petition is allowed.

Respondents' submissions

24. Ms. Mwangi for the 1st, 3rd, 4th and 5th Respondents was categorical that the due process had been observed from the time of the 2nd Petitioner arrest though the time his deportation was due and scheduled but the Petitioner had curtailed the same. To Ms. Mwangi all the Respondents were acting within the law and merely enforcing the law within Constitutional confines. Counsel observed that the Petitioner was in Kenya illegally and was simply now seeking to perpetrate that illegality through the court system. Ms. Mwangi urged the court to consider the provisions of Section 34 of the Kenya Citizenship and Immigration Act (Cap 172). Section 34 is to the effect that any person who is not a citizen of Kenya or an asylum seeker was not to enter or remain in Kenya unless he or she had a valid permit or pass.

25. Counsel wound up her submissions with the statement that marriage to a Kenyan is not equivalent to a citizenship status.

2nd Respondent's submissions

26. For the 2nd Respondent, Ms. Kihara submitted that the proceedings availed were clear that there was no breach of the 2nd Petitioner's rights either as an arrested or as an accused person. Ms. Kihara was of the view that the 2nd Petitioner could have appealed if he was dissatisfied with either the conviction or the sentence rather than file a constitutional cause.

27. The Respondents asked for a dismissal of the Petition with costs.

Analysis and determination

28. Times without number and dating back to 1979, this court as well as other courts of superior hierarchy have consistently held that where fundamental rights or freedoms guaranteed under the Constitution are alleged to have been infringed or threatened with infringement, it is important for the Petitioner to, with reasonable precision, identify the relevant provisions of the Constitution allegedly violated or threatened with violation. It is also important for the Petitioner to also with reasonable precision, set out how the same have been infringed or threatened with infringement: see for example **Anarita Karimi Njeru –v- Republic [1979] 1 KLR 154, Matiba –v- Attorney General [1990] KLR 666, Mumo Matemu –v- Trusted Society of Human Rights Alliance & 5 Others C.A.C.A No. 290 of 2012 [2013] eKLR, Attorney General –v- W.K. Buttambala [1993] 2 KLR**. See also **Lawrence Tribe** in his treatise *American Constitutional Law* (2nd Edition) at page 67.

29. The Petition herein has not taken the form of meticulous pleading. I have had to read the Petition more closely than ordinarily a person should to identify the issues raised as Constitutional questions or matters. The Petitioners have cited an array of Articles and proceeded to state that the same have been violated or threatened with violation but with minimal particulars.

30. Article 10 is pleaded but no particulars have been given to demonstrate a violation or threatened violation. During oral submissions no reference too was made to this article. Likewise, in the reliefs sought mention is made of Articles 25, 28 and 29 yet no mention of these Articles, on how they were violated or threatened with violation, was made in the Petition. In my view reference to these Articles were unnecessary and simply helped to cloud the issues further. In these respects, the Petition would not be too dissimilar to the case of **Mumo Matemu –v- Trusted Society of Human Rights Alliance & 5 Others (Supra)**. I am constrained to ignore references to these Articles in so far as they do not raise any justiciable issues in the Petition.

31. Having read the Petition together with the Supporting Affidavits and having also read the Replying Affidavit as well as having listened to counsel making their respective oral submissions, I am satisfied that the Petition takes a three- pronged constitutional trajectory.

32. The three resultant issues could be stated as follows:

- a. Whether the 2nd Petitioner's right to a fair trial was infringed.
- b. Whether the 2nd Petitioner's right of access to information was violated.
- c. Whether the Petitioners family has been denied the necessary recognition and protection envisaged under Article 45 (1) of the Constitution.

33. The facts as earlier stated are largely not in dispute. It is not in dispute that the Petitioner was arrested and arraigned in court. He was charged with the offence of being unlawfully present in Kenya. It is also not in dispute that the 2nd Petitioner is a German citizen. The 2nd Petitioner entered Kenya in April 2010 and met the 1st Petitioner just days later. Under one year later the two were blessed with twin-daughters. They continued to stay together, albeit on and off. Their marriage was never solemnized. There was intention to do so but it never was carried through.

34. In November 2014, the 2nd Petitioner was arrested following a tip off. The police authorities suspected he was involved in terrorist activities. They interrogated him. He was absolved of any terrorism related activities. He would not however show his legal basis for being in Kenya. He had apparently overstayed. He had no resident permit. He did not have a visitor's pass. He had no reason to be in Kenya, save for the 1st Petitioner and their two children it would appear. He was not engaged in any gainful employment.

35. These facts are not contested.

36. Controversy emerges when the 2nd Petitioner states that his Constitutional right to a fair trial was not

observed. He states that he was never assigned an advocate. He also states that he was not informed of his reason for detention. He also states that his attempts to contact the German consulate were disregarded. The 2nd Petitioner also states that his rights as an arrested person were also violated as he was not brought to court before the expiry of the Constitutional time limit of 24 hours. Paragraph 21 of the Petition states as follows:

“[21] On the 5th of December 2014, nearly a week after his arrest, the 2nd Petitioner was taken to court and charged with being an illegal immigrant. This is in contravention of Article 49 of the Constitution that provides for prompt information on the reason for arrest and the right of arrested persons to be charged or informed of the reason for detention continuing at the first court appearance.”

37. It was for the Petitioners to prove the allegations.

38. The Respondents denied any breach or violation as alleged. The Respondents contended that the 2nd Petitioner was accorded all the benefits, rights and freedoms extended to both arrested and accused persons.

39. The Petitioners rely on the affidavits sworn in support of the Petition to prove their claims of contravention of the Constitution. I have read the affidavits closely. I have also read the annexure to the affidavits.

40. For starters, it is clear that Articles 49 and 50 of the Constitution does not distinguish between citizens and non-citizens. The rights guaranteed under both Articles apply to any person. Upon arrest or arraignment before a court of competent jurisdiction the arrested person or the accused person is entitled to the rights outlined. The rights are not limited to Kenyans. The 2nd Petitioner would be perfectly entitled to insist on his rights under the two Articles. In the eyes of and before the law arrested and accused persons are all equal.

41. Article 49 of the Constitution provides, inter alia, that

49.(1) An arrested person has the right

a. to be informed promptly, in language that the person understands of-

i. the reason for the arrest

ii.

iii.

b.

c. to communicate with an advocate and other persons where assistance is necessary;

d.

e.

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.

g. At the first court appearance, to be charged or informed of the reason for the detention continuing or to be released; and

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

2)

42. The Petitioners contend that the 2nd Petitioner's rights under Article 49 were violated as he was not informed of the reasons of his arrest. Further it is contended he was denied the right to communicate with an advocate or other persons and finally, that he was not arraigned before a court within the prescribed time.

43. The affidavit evidence before this court would however appear to point to the contrary. The 2nd Petitioner was arrested on 29th November 2014 at 3.00 pm. The calendar reveals the day to have been a Friday. Court hours end at 5.00 pm. Court days also do not flip over to Saturdays or Sundays or public holidays: see **Rule 5 of the High Court (Practice and Procedure Rules), Section 10 of the Judicature Act (Cap 8) Laws of Kenya**. The latest the 2nd Petitioner could have been taken to court without violating Article 49 (1) (f) of the Constitution was Monday 1st December 2014 at 3.00 pm.

44. Even though the Petition at paragraph 21 states that the 2nd Petitioner was arraigned before a court on 5th December 2014, the evidence indicates otherwise. The 2nd Petitioner's own affidavit at paragraph 19 states that he was taken to Kibera Law Courts on 1st December 2014. The record of proceedings availed by the Petitioners as well as the Respondents also show that the 2nd Petitioner first appeared in court on 1st December 2014. He was charged and pleaded guilty. He was in court again on 2nd December 2014 as well as 4th December 2014. On the latter date, the prosecution stated the full facts of the case. Then on 5th December 2014 the sentence was pronounced.

45. As an arrested person the 2nd Petitioner was also entitled to be informed of the reasons for his arrest at the time of arrest. He says he was not informed. However the 1st Petitioner's affidavit states otherwise and contradicts the 2nd Petitioner's stand. The 1st Petitioner deposes that the 2nd Petitioner was arrested taken into "custody and verbally informed that he would be charged with the offence of overstaying and have and hence an illegal". That would satisfy, in my judgment, the requirements of Article 49 (1)(a)(i) of the Constitution.

46. The 2nd Petitioner's also contends that the arresting officers communicated in a language (Kiswahili) the 2nd Petitioner did not understand.

47. The chronology of events however shows otherwise. The 2nd Petitioner was quite able to communicate with the arresting officers and even led them to where he was residing and retrieved his passport. The passport was exhibited in court and ultimately returned to the 2nd Petitioner on 5th December 2014. It is clear to me that the 2nd Petitioner understood what the arresting officers said to him at the time of arrest and in particular the reason for his arrest.

48. It is also to be noted that the 2nd Petitioner swore the affidavit in support of the Petition. The affidavit was drawn in the English language. There is no deposition therein that the same was translated to the 2nd Petitioner and the naturally presumption is that the 2nd Petitioner understood and understands the English language well.

49. That leads me to the third limb of Article 49 alleged to have been violated.

50. According to the 2nd Petitioner he was not allowed to communicate with an advocate or any other

person whose assistance was necessary like the staff at the German Embassy.

51. There is unfortunately no evidence to support this contention that the 2nd Petitioner was held incommunicado. The 2nd Petitioner upon his arrest led the arresting officer(s) to his abode. The 1st Petitioner was present, so too was the 2nd Petitioner's mother-in-law. Certainly, there were people whose assistance could be obtained. Certainly too nothing would have been easier than for them to swear an affidavit to the effect that the 2nd Petitioner had been held incommunicado and that all attempts to access the 2nd Petitioner had been foiled by any of the Respondents or the Respondents' organs.

52. In my judgment too, both the 1st Petitioner as well as the 2nd Petitioner's mother-in-law had the opportunity to not only contact the German Embassy but also an advocate of the 2nd Petitioner's choice on behalf of the 2nd Petitioner.

53. The totality of the evidence would reveal that none of the Petitioners' rights under Article 49 of the Constitution were violated as alleged by the Petitioners.

54. I now come to the question of the right to a fair trial of the 2nd Petitioner as an accused person.

55. The Petitioners also contended that the 2nd Petitioner's right to fair trial was violated as the Petitioner was not assigned an advocate by the State and thus ended up not being aware of any of his rights as provided for under the Constitution. The Petition identifies Article 50 as having been violated. The Respondents resist this allegation.

56. There is need to foremost point out that the right to a fair trial is one of the non-derogable rights under the Constitution: see **Article 25**. Under no circumstances can the state or any person curtail or limit the right to a fair trial. The right is absolute: see **Coalition For Reform and Democracy (CORD) & 2 Others –v- Republic of Kenya & Others HCCP Petition No. 628 of 2014 [2015] eKLR** and also **Samuel Githua Ngari v Republic High Court Crim Appeal No 34 of 2012**. For that reason, all State organs have a responsibility to ensure that the ingredients of the right to a fair trial outlined under Article 50 are observed and adhered to just the same way a judge must always ensure that proceedings are conducted in an orderly and proper manner.

57. The Petitioners have pinpointed the failure by the State to assign an advocate to the 2nd Petitioner as the violation of the right to fair trial. Article 50 (2)(h) of the Constitution guarantees an accused person the right to legal counsel and states as follows:

50(2)(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and be informed of this right promptly

58. It is to be noted that the right to have a legal counsel is basically a universal right enshrined in international conventions.

59. Article 14(3)(d) of the International Convention on Civil and Political Rights (“**ICCPR**”) does dictate all member states to assign legal counsel to accused persons in any case where the interest of justice so require and without payment, if accused person does not have means to pay for it. The African Charter on Human and Peoples Rights (“**ACHPR**”) also provides at Article 7(1)(c) that the right to have a person's case heard comprises not only the right to defence but also the right to be defended by counsel. Kenya has ratified the ACHPR. On 23rd January 1992 and the Charter was deposited at the end of February 1992. The accession to the **ICCPR** by Kenya was on 1st May 1972. Article 50(2)(h) of the Constitution is certainly in line with the State's implementation policies in relation to international duties.

60. The requirements and intricacies of the right to legal representation have also been the subject of judicial discourse. In the case of **David Njoroge Macharia –v- Republic Criminal Appeal No. 497 of 2007** the Court of Appeal ruled that “substantial injustice” under Article 50(2)(h) would include

instances where the sentence is a mandatory death penalty and further that there was need for a quick implementation by the state of Article 50(2)(h). The Court of Appeal however did not conclude that the right to legal representation is automatic. It has to be decided on merit and on a case to case basis.

61. So observed the Court of Appeal in **David Njoroge Macharia-v- Republic (supra)**

'Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence.' (emphasis mine)

62. The judgment of the Court then proceeded as follows:

“Under the new Constitution, state funded legal representation is a right in certain instances. Article 50(1) provides that an accused shall have an advocate assigned to him by the State and at state expense if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore provisions of the ICCPR and the commentaries by the Human Right Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.

63. It is clear, from Judicial precedent as well as International Conventions and Commentaries by various human rights bodies including the United Nations: see for example the **United National Body of Principles for the Protection of all persons under any form of detention or imprisonment (General Assembly Resolution 43/173 of 9th December 1988)**, that the right to legal counsel is an integral part of the right to fair trial. Counsel’s knowledge and expertise helps the accused person to prepare his defence and also conduct his defence. Nobody could have put it better than Lord Denning in the case of **Pettit –v- Greyhound Racing Association [1968] 2 All ER 545, 549**, which case was cited with approval by the Court of Appeal in **Daniel Njoroge Macharia –v- Republic (Supra)**. Lord Denning stated as follows:

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”

64. My reading of both Article 50(2)(h) as well as the decision in **Daniel Njoroge Macharia (Supra)** would however appear to reveal that the right to legal representation is only automatic where substantial injustice would result. It is otherwise not mandatory. It however does not matter whether the accused person is indigent. The accused person also need not request for the legal counsel but he must be informed promptly of this right. If the interest of justice requires that he be accorded counsel then he is to be accorded one.

65. I will draw inspiration from the decision of the Court in the case of **Daniel Njoroge Macharia (supra)**.

66. It is in the interest of justice that no party suffers substantial injustice due to lack of legal counsel. Additionally, in my view, the following factors may be taken into account jointly or separately to determine whether substantial injustice may occur in the absence of legal counsel. The factors are: (i) the gravity of the offence, (ii) the severity of the prescribed sentence and (iii) the socio-economic status of the

accused person.

67. In the instant case, the 2nd Petitioner faced a basic offence of being in Kenya unlawfully. The prescribed sentence upon conviction is a maximum sentence of three years or a fine of Kshs 500,000/= or both: see **Section 53(2)** of the **Kenya Citizenship and Immigration Act**. The offence also carried with it the potential ultimate order of deportation. Any period of incarceration is bad. One stretching more than three months is severe enough to invite the presence of legal counsel. The 2nd Petitioner was also an indigent. He could not pay the fine. He was incarcerated even as he awaited to be taken to court. He was not a local, even though he had stayed in Kenya for more than three years albeit illegally.

68. I find in the circumstances of this case that the 2nd Petitioner was entitled to be provided, at no expense, with an Advocate by the State notwithstanding his non-citizenship status. There was consequently no compliance by the State of its obligations both with the ICCPR and Article 50 of the Constitution to provide the 2nd Petitioner with legal representation.

69. However even where there was no legal counsel provided by the state and an accused person is convicted, as was in this case, every case must be reviewed on its merit to determine if there was “serious prejudice occasioned by reason of such omission”; per the court in **Daniel Njoroge Macharia –v- Republic (Supra)**. The court may then make appropriate orders.

70. I have reviewed the proceedings in the court below as availed by the Petitioners. I have not seen any prejudice that could have been occasioned to the 2nd Petitioner. The charge against the 2nd Respondent was one of being in Kenya illegally. He admitted the charge and was convicted on his own plea of guilty. He admitted the facts as well. He gave a detailed mitigation repeating the facts as well. The fact remains that the 2nd petitioner still has no permit or pass to be in Kenya.

71. As to his claim that he was unable to appeal due to lack of counsel and the knowledge of such right. I hold the considered view that criminal appeals can be admitted out of the prescribed time if reasons are well pegged. Nothing could have stopped the 2nd Petitioner from seeking to appeal out of time and stating the reasons for such delay to include lack of counsel.

72. In my judgment, there was violation of Article 50(2)(h) in the circumstances of this case but the 2nd Petitioner was not, despite his conviction, unduly prejudiced. This is so when consideration is also taken of the fact that the State is progressively realizing the right to legal counsel being provided for all accused persons.

73. With regard to the Petitioners contention that the trial was conducted in a language that the 2nd Petitioner never understood and hence there was a violation of his rights under Article 50(2)(m), my answer is relatively brief.

74. The 2nd Petitioner was entitled to an interpreter, if the language of the trial court was one the 2nd Petitioner could not understand. Article 50(2)(m) states as much. I have already found as a fact that the Petitioner could and still understands English. I need not belabor that finding. The language of the trial court was English. The 2nd Petitioner fully participated in the proceedings. He gave a lengthy and elaborate statement in mitigation. The mitigation was in English. He was at peace with the language as well as the court. The 2nd Petitioner’s attempt to fault the language of the court in my view, is at best an afterthought.

75. I do not find that any of the 2nd Petitioner’s rights to fair trial, except the right as to legal counsel provided by the State, was in anyway violated by the State or any of the state organs.

76. The Petitioners also complained that the 2nd Petitioner was denied information concerning his case to enable him defend himself or even appeal the decision to sentence him and ultimately order his deportation. There is no indication as to the nature or form of information that the 2nd Petitioner was

denied save that copies of the judgment as well as the proceedings were not supplied. For all these the Petitioners stated that the 2nd Petitioners rights under Article 35 of the Constitution had been violated and infringed.

77. The 2nd Petitioner, not being a citizen would have his right to information protected under Article 19 of the International Convention on Civil and Political Rights (ICCPR). Article 19 of the International Convention on Civil and Political Rights (ICCPR) provides that everyone has a right to freedom of expression which includes freedom to seek, receive and impart information and ideas of all kinds. This right to information is especially obligatory. It is information held by the State or another person and is sought for the exercise or protection of any other right or fundamental freedom. It is a right which should neither be derogated from or abridged unless expressly provided by the law: see **Nairobi Law Monthly – v- Kenya Electricity Generating Co & Others HCCP 278 of 2011 [2012] eKLR** and also **People’s Union for Civil Liberties & Another –v- Union of India, Supreme Court of India, Petition No. 161 of 2004** as well as **Brummer –v- Minister for Social Development & Others SA/CCT 25 of 2009**. Information held by State organs ought to be availed to citizens as well as non-citizens by virtue of Article 2 of the Constitution which makes the International Convention on Civil and Political Rights (ICCPR) part of our laws.

78. In the instant case there is no dispute that the information identified was in the possession of a State organ, the judiciary. However to enforce the right to information, a court must not only be satisfied that the information sought is in possession of the State organ but also that the same had been requested and denied. As was stated by Mumbi J in **Nairobi Law Monthly –v- Kenya Electricity Generating Company & Others (Supra)**:

“...in order to enforce this right, a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed; the citizen must go further and show that the information sought is required for the exercise or protection of another right.”

79. I have no hesitation adopting the learned judge’s views. A party seeking a court’s assistance must demonstrate that a request, nay demand, was made by the party to the other party. It matters little that the party seeking the information is a non-citizen.

80. In the instant case, while I am satisfied that the information now sought was in the hands of a State organ, I am not convinced that the Petitioners had ever requested the same from the relevant state organ. The Petitioners needed to establish this aspect of request but did not. Besides, I have seen annexed to the 2nd Petitioners affidavit certified copies of the proceedings as well as the charge sheet. It is unclear when the Petitioners obtained the copies. What is however clear is that the Petitioners had not requested and neither had they been denied copies of the proceedings before the trial court.

81. It is my view, that the Petitioners have not established that their right to information was infringed or violated in view of the lack of evidence of any request for the information now sought through the court.

82. Finally, the Petitioners took issue with the orders for the deportation of the 2nd Petitioner. The Petitioner state that the order was contrary to Article 45 as it would break a family unit. It was also contended that the Petitioners children would suffer neglect as their (Children’s) constitutional right to parental care, love and protection would be violated contrary to Article 53 of the Constitution.

83. The 2nd Petitioner, it is not disputed was charged with the general offence of being present in Kenya unlawfully contrary to the provisions of the Kenya Citizenship and Immigration Act (Cap 172). He was convicted. On his own plea of guilty. He was sentenced to pay a fine of Kshs. 100,000/= or, in default, to serve six months in the pan. The court also ordered his deportation on completion of the jail term.

84. The 2nd Petitioner, it is also not disputed, is not a stateless person. He is a citizen of Germany. He holds a valid German passport no. C5HT10VH2. For more than three years he stayed in Kenya. He last

held an entry visa valid for three months from 21st July 2011. He never renewed the same. He never had a permanent residence permit. Neither did he have a pass. In short, as was confirmed by the trial court, he did not have a legal reason to be in Kenya. He was unlawfully in Kenya as of 29th November 2014 when he was apprehended.

85. The Petitioners' reasoning is that the 2nd Petitioner is married to the 1st Petitioner hence the reason why his intended deportation should be negated. For completeness, the Petitioners have towed in the minors.

86. I would reject the Petitioners' arguments.

87. For starters, there is no evidence that the Petitioners are married. The affidavit sworn jointly by the Petitioners on 15th May 2011 states that the two are husband and wife who started living together in May 2010. That is as far as the affidavit goes. Both Petitioners however separately state that they intend to marry. They have produced a letter of intention to marry issued by a parish priest and dated 11th July 2013. That was a pointer that that even as they cohabited they remained unmarried. Under the law, until the cohabitation was long enough to resemble a marriage, a marriage cannot be presumed. More so where the parties themselves express a desire to formally get married, as in the instant case.

88. In the absence of a marriage for three years, the 2nd Petitioner could not even apply for a permanent residence permit: see Section 37(d) of the **Kenya Citizen & Immigration Act (Cap 172)**. Likewise, the 2nd Petitioner needed to have been married to the 1st Petitioner, a Kenyan citizen for a period of at least seven years for the Petitioner to be entitled to apply under the law to be registered as a citizen: see **Article 15(1)** of the Constitution respectively.

89. It is not for this court to intervene and decide on the 2nd Petitioners right to permanent residence or citizenship. There is already an elaborate procedure complete with necessary forms and the red-carpet to be followed under the Kenya Citizenship and Immigration Act (Cap 172). The Petitioner ought to follow up on the said procedure. Apparently, both under the Constitution as well as under the Kenya Citizenship and Immigration Act (Cap 172), one need not be resident at the time of making the application.

90. With regard to Article 53, I have been unable to discern how the children will not be provided for if the 2nd Petitioner is deported. General statements to the effect that rights have been violated are not enough. Besides, there was need for a more cogent substantiation. Many are instances when families are lawfully separated. This must be one such instance.

Conclusion

91. The totality of the evidence and based on the above analysis, I am constrained to conclude that the Petitioners have not established how any of their rights under the Constitution have been violated, save the right of the 2nd Petitioner to be provided with legal counsel.

92. It is indeed my hope that the State will expedite the process of ensuring that the right provided under Article 50(2)(h) of the Constitution is an absolute reality.

Disposal

93. I have concluded that there was insubstantial substantiation on the part of the Petitioners to enable them succeed in this Petition. The issues in summary can be disposed of as follows.

94. As to whether the 2nd Petitioner's right to a fair trial was infringed, the answer is yes in so far as the State failed to provide the 2nd petitioner with legal counsel. A declaration is consequently hereby issued that the 2nd petitioner's right to an advocate under Article 50(2)(h) of the Constitution was contravened.

95. As to whether the 2nd Petitioner's right of access to information was violated, the answer is no.

96. As to whether the Petitioners' family has been denied the necessary recognition and protection envisaged under Article 45 (1) of the Constitution, the answer is also no.

97. As to whether the Petitioners are entitled to any compensatory orders for the 2nd Petitioner's continued detention, I hold the view that the detention is pursuant to a court order as his deportation is awaited.

98. There will therefore be no order as to compensation or the 2nd Petitioner's release.

99. The Petitioners have otherwise not made a case to entitle them to the reliefs sought in the Petition dated 28 September 2015. I am inclined to dismiss the Petition. I dismiss the Petition but without any order as to costs.

100. I hasten to add though that the deportation of the 2nd Petitioner should and must be conducted pursuant to the provisions of Section 43 of the Kenya Citizenship and Immigration Act (Cap 172) and not otherwise.

Dated, signed and delivered at Nairobi this 25th day November, 2015

J.L.ONGUTO

JUDGE

Delivered in the presence of:

..... **for the Petitioners**

..... **for the 1st, 3rd, 4th, and 5th Respondents**

..... **for the 2nd Respondent**

C/Clerk: