



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.281 OF 2008**

**BETWEEN**

**STEPHEN OUMA AMBOGO.....PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Stephen Ouma Ambogo was an Inspector of Police attached to the Anti-Banking Fraud Unit and who was arrested in a 'sting' operation conducted by the Kenya Anti-Corruption Commission officers on 2/7/2007. His Petition seeks the following orders.

***“(1) A declaration that the arrest, detention and other acts perpetuated by the Officers of the Anti-corruption Commission that falls under the Respondent's docket on 2nd July 2007 are unlawful, illegal and in breach of the provisions of Section 70 of the Constitution of Kenya and a violation of the Petitioner's fundamental rights and freedoms under Section 76(1) and Section 81 of the Constitution of the Republic of Kenya.***

***(2) A declaration that the filming of the Applicant and gathering of evidence through Electronic media which was later aired in the Local Television Screens before the Petitioner was charged in a Court of Law on 4/7/2007 was in breach of the Constitution of Kenya and more specifically under Section 77(1) of the Constitution.***

***(3) A declaration that the holding and detention of the Petitioner in Police custody for more than twenty four hours for a bailable offence was in breach of the Section 72(1) of the Constitution.***

***(4) A declaration that the charges made out against the Petitioner considering the manner with which they were initiated, published in the electronic media before arraignment in Court was highly prejudicial to a fair trial and should therefore not be allowed to continue in Court***

**for being a violation of the Petitioner's constitutional rights enshrined in Section 70, 72, 73, 74, 76 and 81 of the Constitution of Kenya.**

**(5) A declaration that the charges preferred against the Petitioner in light of the degrading manner of arrest and arresting officers' conduct amounted to negation of the Petitioner's fundamental rights and freedoms that he is entitled to.**

**(6) Cost of the Petition.**

**(7) Such other conservatory or preservatives orders that may be necessary and fit to grant as to secure the petitioner's constitutional rights.”**

2. Before going any further, I should state that the original file relating to the Petition was lost (*a rarity in today's Judiciary*) but the same was reconstructed by an order of Hon. Ongeri, Deputy Registrar, made on 23/1/2013 and the matter thereafter proceeded to conclusion more than five years after its institution.

### **Petitioner's Case**

3. On 2/7/2007 at about 4.30 p.m. the Petitioner alleges that he was arrested at Home Park Restaurant along Harambee Avenue, Nairobi after a trap had been set for him in an alleged bid on his part to receive a bribe. He was apparently also frisked in the full glare of television cameras and in public before being locked up at Kileleshwa Police Station.
4. He was taken to Court on 4/7/2007 and charged with offences relating to corruption which charges are not in issue in the present Petition because in the Petition, his main complaints are that;
- (i) *His right to privacy was infringed when he was roughed up, humiliated and taken to police custody against his will.*
- (ii) *He was in any event arrested without a warrant.*
- (iii) *He was further humiliated and embarrassed when his arrest was aired on live evening news on NTV and KBC, (Local television stations) more than once on 3rd and 4th July 2007.*
- (iv) *During his incarceration, he had no access to a lawyer despite his persistent demands for one.*
- (v) *He was also denied a Police Bond in lieu of the fact that he was locked up in police custody for more than twenty-four hours before being taken to Court.*
- (vi) *That throughout his period of incarceration, he was never told why he had been arrested and he was greatly ridiculed in public by the arresting officers.*
5. That therefore his rights under **Articles 23, 25, 27, 28, 47** and **50** of the Constitution of Kenya were infringed and grossly violated.
6. I note that an Amended Petition dated 16th June 2011 is referred to by the Petitioner in his lawyer's Submissions but do not see it on the reconstructed record. I also see that a Notice to Re-Amend the Amended Petition was filed on 17/4/2013 but I see no record that leave to Re-Amend the Petition was ever given. The Re-Amended Petition is undated but makes fundamental changes to the Petition because it deletes any reference to **Sections 70, 72, 73, 74, 76** and **81** of the Repealed Constitution and instead introduces references to **Articles 23, 25, 27, 28, 47** and **50** of the **Constitution, 2010** and adds one more prayer; that “*a declaration that the Petitioner's continued prosecution by the Police at the instance of KACC without a written consent and permission from the Respondent herein is illegal and therefore null and void.*”

7. Sadly, without leave to Re-Amend the Petition being granted, I will only determine the Petition dated 15/5/2008 and will construe the Submissions on record in that context. The implications of this finding will become obvious later in the judgment.

### **Respondent's Case**

8. The Respondent's case is contained in a Replying Affidavit sworn on 25/9/2008 by one Robert Karani, a Police officer seconded to the Kenya Anti-Corruption Commission and the Investigating Officer in Nairobi Anti-Corruption Court Case No.32 of 2007, Republic vs Stephen Ouma Ambogo.
9. According to the said Karani, the Petitioner was indeed arrested in the circumstances set out above and that he was arrested after a complaint had been received at the Anti-Corruption Commission that he had demanded a bribe from two suspects in a criminal case, in order to secure their release. That one of the suspects was then wired with a micro tape and after negotiations with the Petitioner (*all captured by the tape*), a bribe of Kshs.60,000/- was agreed at. The suspect later received the money from Karani but the cash was treated with control powder and when he returned to meet the Petitioner at Home Park Restaurant, Karani discreetly accompanied him and recorded the conversation between the suspect and the Petitioner.
10. That when the Petitioner and the suspect went into a toilet to exchange the bribe money, Karani and his colleagues confronted the two and the Petitioner was then arrested. Karani denied all the allegations made that the Petitioner was mistreated during his arrest or thereafter and that he was taken to court on 4/7/2007 after the recording of statements on 3/7/2007.
11. Regarding the fact that the Petitioner's arrest was also televised by local television stations, Karani stated that the Anti-Corruption Commission had no control over the Stations and what content they chose to air.
12. On the allegation that the Petitioner was denied access to his lawyer, the answer was that a lawyer by the name Biyot was called by the Petitioner immediately he was arrested and the said lawyer was present when the treated money (amounting to Kshs.40,000/-) was examined by the Investigating Officers after the Petitioner's arrest. That before he was locked up at the Police Station, the Petitioner was asked to deposit a police Bond of Kshs.30,000/- before his release but he was unable to do so and that on the advise of his lawyer, he declined to record a statement and so he was incarcerated at the Kileleshwa Police Station before being taken to Court.

The Respondent through the said Karani also denied that any constitutional right in respect of the Petitioner was breached and prayed that the Petition should be dismissed with costs and the criminal case against the Petitioner should proceed to its logical conclusion.

### **Determination**

13. In his written Submissions, the advocate for the Petitioner submitted that the following issues should be determined by this Court;

***“(a) Whether failing to produce the Petitioner in Court within 24 hours violated the Constitution.***

***(b) Whether the manner in which the Respondents obtained evidence to sustain the charge against the Petitioner violated the Petitioner's rights enshrined in the Constitution.***

***(c) Whether the Respondent's failing to allow the Petitioner the right to communicate to an advocate violated his constitutional rights.***

***(d) Whether compelling the Petitioner to give self incriminating evidence violated the rights of the Petitioner.”***

### **Failure to produce the Petitioner in Court within 24 hours**

14. It was admitted in Karani's Affidavit that the Petitioner was taken to Court on 4/7/2007 which was a day more than the expectation of **Section 72(3)** of the **Repealed Constitution** which provided as follows;

“(1) ...

(2) ...

(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 offence 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.”*

15. The Respondent explained that the Petitioner's arraignment in Court was delayed because on 3/7/2007, the Investigating officer was busy recording statements. It is unclear how many statements were recorded and for how long and in the end, the explanation cannot meet the constitutional threshold and must be dismissed.

16. The High Court has ruled on many occasions that where no reasonable explanation was given why a suspect was not taken to Court within the time stipulated by the Constitution, then his rights were violated. I am therefore in agreement with the submission by Counsel for the Petitioner that following the decision of Wachira Weheire vs AG [2010]eKLR amongst others, I find that failure to produce the Petitioner in Court within 24 hours was a violation of **Section 72(3)** of the **Repealed Constitution**.

### **Manner in which evidence was obtained**

17. The manner in which evidence was collected during the Petitioner's arrest was faulted by the Petitioner. In Submissions, counsel for the Petitioner relied on the decision of Warsame J. in Mohamed Kuriow Nur vs AG [2011] eKLR where the learned judge held as follows;-

*“In all disputes, the role of the Court is to stand between the State and its citizens and make sure that one does not cross the dotted lines without reasonable and proper explanation. The law is that it is not acceptable that the State through its agents should instruct its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That could be a misuse of State of power and an abuse of the process of the Court. The unattractive consequences, frightening and sinister in extreme cases which the State conduct of this nature to have are obvious. No doubt, the Kenya Anti Corruption and Economic Crimes Commission whose agent tape recorded the conversation of 14th March 2007, is a creature of the statute, their activities must be confined to the four corners of the Act. It is an act for prevention and not conceptualizing for purposes of entrapping people [under] Section 7 of the Kenya Anti-corruption and Economic Crimes Act, the function and the purpose of the commission is to investigate. The question is whether conceptualizing or creation of an offence for purposes of entrapping citizens is one of the components of its functions.*

*[Under] Section 7(1) (d) the Commission is to advice and assist on the ways ... to ... eliminate corrupt practices. It is also clear under Section 7(1)(g) that the Commission has a responsibility to educate the public on the dangers of corruptions to enlist and foster public support in combating corruption and economic crimes”*

Further that;

*“It cannot be strongly emphasized that it is wholly wrong for a police officer to induce a person to commit an offence in order that an offence may be detected by the said officer. It is not also right that the Kenya Anti-Corruption Commission should instruct, allow or permit and direct its officers to commit an offence so that they can prove that another person committed an offence. The respective part of the conversation earlier quoted is a clear testimony that the agent played a significant or a leading role in the commission of the crime that was preferred against the Petitioner herein. There is no ground for saying that the Petitioner had originally intended to commit the crime which he was charged with”*

18. Similarly, reliance was placed on the decision of Makau, J. in **Anthony Muriithi vs O.C.S. Meru Police Station & 2 Others [2012]eKLR** where he stated partly as follows;

*“The samples were obtained through illegal means and as such, illegally obtained samples and incomplete disregard of fundamental rights and freedoms is tainted with illegality and cannot be used in any proceedings against the persons whose fundamental rights and freedoms as enshrined in the Constitution has been breached. Any evidence obtained through any assault of whatever nature, or through torture or inhuman or degrading treatment or punishment is a violation, denial and infringement of a person's right of fundamental freedoms of the bill of rights. It is unconstitutional and as such null and void for all purposes and intentions it cannot be used in evidence against such a person.”*

19. Both learned Judges above, were firmly applying **Article 50(4)** of the **Constitution, 2010** which provides as follows;

*“(1) ...*

*(2) ...*

*(3)*

*(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would the trial unfair, or would otherwise be detrimental to the administration of justice. ”*

20. Were there similar provisions in the **Repealed Constitution** and if not, can **Article 50(4)** be applied to cover circumstances before 27/8/2010 when the Constitution, 2010 came into effect? I ask these questions because as I stated earlier, it is clear to me that the Re-Amended Petition which imported the application of the Constitution, 2010 was never properly admitted on the record. None of the parties addressed me on this issue and their submissions were erroneously limited to **Article 50(4)** aforesaid.

21. My perusal of the **Repealed Constitution** would show that there was no similar provision to **Article 50(4)** aforesaid. **Sections 72 (protection of right to personal liberty)**, and **76 (protection against arbitrary search or entry)** all limited these rights in circumstances where there was “reasonable suspicion” that an offence had been or was about to be committed or in the interests of “public safety” and “public order”.

22. Article **50(4)** of the **Constitution** was heavily relied on by the Petitioner and no submission has been made that the said Article can be applied retrospectively. Attractive therefore as the argument made regarding the alleged entrapment may be, I see no basis for finding in favour of the Petitioner.
23. From the issues framed above, the Petitioner has faulted the police for using self incriminating evidence against him, swabbing his hands without the purpose of so doing being explained to him and generally obtaining evidence in an unconstitutional manner.
24. My view is as follows;

Looking at the Repealed Constitution, again it is unclear to me what rights were violated by the above actions and why for example self-incrimination is pleaded. Because the Submissions were limited to **Article 50** of the **Constitution, 2010** I cannot make presumptions in a vacuum and sadly, the Petitioner's arguments on this point must also fail.

#### **Failure to allow the Petitioner the right to communicate with his advocate**

25. I will spend little time on this issue because I believe the answer given by Karani and which has not been controverted at all. His answer was that the Petitioner's lawyer, one Biyot was called by the Petitioner soon after his arrest and that the said lawyer even advised the Petitioner not to record any statement soon after his arrest.
26. Had there been no credible answer to the Petitioner's allegation on this issue I would have certainly made a more detailed analysis of it. However, since it is a non-issue I will say no more.

#### **Whether filming the Petitioner's arrest and supplying the film to the media was a violation of the Petitioner's constitutional rights**

27. Important as this issue may seem, there is absolutely no evidence before this Court that the arresting officers actually worked in cahoots with NTV or any other media house to publicise his arrest. Submissions have been made touching on **Article 28 (right to dignity)** and **Article 29 (Freedom from torture)** but in the absence of real evidence, the issue is moot, even if those Articles of the Constitution would apply (*and I have said that they cannot apply*).
28. I will therefore refuse to accede to the Petitioner's plea in this regard.

#### **Conclusion**

29. I am aware that the Petitioner has criminal charges before the Chief Magistrate's Court where his guilt or otherwise will be determined. This Court, whatever its findings on the process leading to those charges cannot, in the circumstances of this case, take over that role and his prayer that the charges should be terminated are prayers in the amended Petition which is of no consequence.
30. In view of my findings elsewhere above, I can only state that it is now trite that where a person has been unlawfully held beyond the period envisaged by the Constitution, that person is entitled to a remedy.
31. In this case, the Petitioner was only held for a day outside the period envisaged by the Constitution. I will exercise discretion and grant him Kshs.50,000/- as damages.
32. The final orders to be made are therefore that the Petition is determined in the following terms;

(i) *It is hereby declared that the incarceration of the Petitioner for one day outside the period envisaged by **Section 72(3)** of the **Repealed Constitution** was a violation of his fundamental rights and freedoms.*

- (ii) *He shall be paid Kshs.50,000/- as compensation for the said violations.*
- (iii) *All other prayers in the Petition are dismissed.*
- (iv) *Since the Petitioner has not wholly succeeded, he will have ¼ of the Costs of the Petition.*

33.Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

**Irene – Court clerk**

**Mr. Wamoba for Respondent**

**Miss Kithiki holding brief for Mr. Ng'etich for Petitioner**

**Order**

**Judgment duly read.**

**Copies of the Judgment to be supplied.**

**ISAAC LENAOLA**

**JUDGE**