



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
PETITION NO 233 OF 2011 "B"

JOB NGANGA THIONGOPETITIONER

VERSUS

KAMITI MEDIUM G.K. PRISON1ST RESPONDENT

COMMISSIONER OF PRISONS.....2ND RESPONDENT

REGISTRAR OF THE HIGH COURT3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. In his amended petition dated 16th September 2011, the petitioner seeks a declaration that the period he was held at Kamiti Medium G.K Prison between 13th October and 22nd November 2007 was a breach of his right to liberty, security of the person and the protection of the law as is provided for in section 70(a) and 72 of the Constitution. He also seek a further declaration that he was held in servitude and subjected to cruel and inhuman treatment which contravenes section 73(1) and 74 of the Constitution, an award of damages or such other order, writs or directions as this court deems proper for the enforcement of his constitutional rights, and the costs of this petition. The petition is supported by an affidavit sworn by the petitioner on 16th September 2011. In opposition to the petition, the respondents have filed a replying affidavit sworn on 22nd August 2011 by Olivia L. A. O'bell, the Officer in Charge of Kamiti Medium Security Prison.

The Petitioner's Case

2. On 2nd May 2007, the petitioner was charged in **Republic –v- Job Nganga Thiongo, Limuru Criminal Case No 886 of 2007** with the offence of escape from lawful custody contrary to section 123 of the Penal Code, Chapter 63 Laws of Kenya and breaching Community Service Orders contrary to Section 5 of the Community Service Orders Act No. 10 of 1998. He pleaded guilty to the two offences and was sentenced to serve 8 months imprisonment in respect of count 1 and three months in respect of count 2. Both sentences were to run concurrently.
3. The petitioner was committed to Kamiti Medium Security G.K Prison to serve his term which

expired on 13th October 2007 but he alleges that the prison authorities refused and or declined to discharge him. He was consequently detained without any lawful reason until 22nd November 2007 for a total period of 38 days despite the fact that the respondents' representatives were aware of the court judgment. He therefore contends that he was subjected to serious violations of his fundamental rights and freedoms and in particular contravention of sections 70(a), (b) and (c), 72, 73 and 74 of the repealed constitution.

4. The petitioner contends further that this court has jurisdiction to hear and determine this petition and relies on the cases of **Rashid Odhiambo Allogoh & 25 Others -v- Haco Industries Ltd, Civil Application No. 110 of 2001** and **Njagi Marete -v- Attorney General (1987) KLR 690** for the proposition that if a violation of the petitioner's constitutional right is disclosed, the court should determine the remedy that the petitioner is entitled to; that the respondents cannot justify the lawfulness of the petitioner's continued incarceration for the 38 days after the date of his release; that the committal warrant produced by the 1st respondent is *ultra vires*, illegal and made without jurisdiction as it failed to comply with the judgment of the court that sentenced the petitioner to 8 months' imprisonment. He urged the court to compensate him with an award of damages for the 38 days' illegal detention after completion of his lawful sentence.
5. In support of his claim for damages, the petitioner relied on, among other decisions, the case of **Mbulu Musyimi Sumbi -v- Officer in Charge Kamiti Maximum Prison and 2 others, Petition No. 1233 of 2007** and **Dominic Arony Amolo -v- The Attorney General Misc Applic No. 494 of 2003**.

The Respondents' Case

6. The respondents' position as set out in the affidavit of Olivia L. A. O'bell is that the Committal Warrant from Nairobi Remand & Allocation Prison confirmed that the petitioner was convicted in the two counts and was sentenced to serve **eighteen (18) months** in respect of count 1 and **three (3) months** in count 2, the sentences to run concurrently. From the 1st respondent's computation, the petitioner was to be released from prison on 2nd May 2008 after deduction of the remission period. A copy of the committal warrant was annexed to the affidavit.
7. According to the 1st respondent, the petitioner raised the issue of his continued detention on 21st November 2007 and alleged that he had been sentenced to eight (8) months and not eighteen(18) months with respect to count 1. Upon receiving this complaint, the 1st respondent sent an officer immediately to the Principal Magistrate's Court, Limuru, to clarify the issue and he was issued with an amended committal warrant that indicated a variation of the sentence on count 1 to eight (8) months. The amended copy of the warrant was also annexed to the 1st respondent's affidavit. The computation of the sentences in accordance with the amended committal warrant indicated that the petitioner should have been released on 13th October 2007 after deduction of the remission period. Consequently, the petitioner was released, without any further delay, on 22nd November 2007, a day after he had complained about his detention and the 1st respondent had discovered the anomaly.
8. The 1st respondent states that immediately upon admission of a prisoner to the prison, his sentence is read over to him and he is issued with a labour card which indicates his prisoner number, name, offence committed, date of release and the type of labour that he will be subject to. Any complaint emanating during a sentence of an inmate is usually recorded in the prisoner's application Book (PB18) and taken to the Officer in Charge for action. The 1st respondent therefore submitted that at no time prior to 21st November 2007 did the petitioner raise any issue regarding his sentence and release, and immediately upon his raising the complaint, the 1st respondent acted on it expeditiously and the petitioner was released from prison without any further delay.
9. The 1st respondent therefore contended that this petition is brought in bad faith and that at no time

were the petitioner's fundamental rights and freedoms contravened. In any event, in the respondents' view, the petitioner was under an obligation to raise any errors in his committal documents and that the law comes to the aid of the vigilant, not the indolent.

Findings

10. It is undisputed that the petitioner, who should have been released on 13th October, 2007, was not released until 22nd November 2007. The petitioner alleges that this was done in violation of his fundamental rights and freedoms, while the respondents attribute the delay in the release to the error made in the committal warrant, and submit that the petitioner was released immediately he raised the issue of his sentence and the error was discovered.
11. The issue that I am called upon to determine is whether the continued detention of the petitioner for a period of 38 days after his sentence ended was in violation of his constitutional rights. The petitioner contends that his rights under section 70, 72 and 74 of the former constitution were infringed because he was held unlawfully after his sentence ended between 13th October and 22nd November 2007. The respondents have produced documents which indicate that the petitioner's committal warrant indicated that the petitioner had been sentenced to 18 months for count 1 instead of 8 months. The respondents have also explained that the petitioner never raised the anomaly stated in the labour card which he was issued upon his admission to prison which indicated *inter alia* his date of release. The respondents also contend, and this has not been controverted by the petitioner, that the 1st respondent would not have known the petitioner's correct sentence since the 1st respondent does not attend court and the petitioner was committed to the 1st respondent by the remand prison after sentencing for purposes of serving the sentence. The respondents have also demonstrated that upon the petitioner raising the issue and the anomaly being discovered, they released the petitioner immediately.
12. The question is whether the continued detention in the circumstances set out above amounted to a violation of the petitioner's fundamental rights as guaranteed under sections 70(a), 72, 73(1) and 74 of the former constitution. The warrant of committal for the petitioner stated that he had been sentenced to 18 months, and not 8 months. This was the document that the 1st respondent was required to act upon. Section 30 of the Prisons Act, Cap 90 Laws of Kenya, provides as follows:

'every officer in charge shall keep and detain all persons duly committed to his custody by any court or other competent authority according to the terms of the warrant or order by which such person has been committed, or until such person is discharged by due course of the law.'
13. It is on the basis of this warrant that the respondent read out the petitioner's sentence and issued the petitioner with his labour card. The petitioner was fully aware of his sentence, but the evidence before me indicates that he did not raise any issue when it was read out to him upon his arrival at the prison when it was recorded in the card issued to him. He did not raise it at the time he knew he ought to have been released-on the 13th of October 2007. The duty of the officer in charge of a prison with regard to the release of a prisoner is set out in section 45 of the Prison Act as follows:

'45(1) The Officer in Charge shall be responsible for the due discharge of all prisoners immediately upon their becoming entitled to release.'
14. The 1st respondent had computed the date for the release of the petitioner on the basis of the warrant of committal under which the petitioner had been placed in its charge. I take the view that, in the circumstances of this case, the delay in the release of the petitioner was inadvertent. There was no deliberate decision by the 1st respondent to keep the petitioner in prison unlawfully, and as soon as the error was discovered, he was released.

15. However, it cannot be disputed that the petitioner stayed in prison for 38 days longer than his sentence required, and as I have stated above, this detention was inadvertent on the part of the 1st respondent. The same, however, cannot be said of the 3rd respondent. The warrant of committal was issued from the Limuru Senior Resident Magistrate's Court which convicted the petitioner in Criminal Case No. 886 of 2007. The court bore the responsibility of ensuring that the right information regarding the petitioner, including the date of his conviction and the sentence on each of the two counts for which he was convicted were set out clearly in the committal warrants. The failure through what appears to have been a careless mistake on the part of the officers of the court led to the continued incarceration of the petitioner for a month and more longer than he was supposed to serve. There was, clearly, a violation of the petitioner's right to liberty, though it was inadvertent. There is, however, no evidence of violation of the rights not to be held in servitude and not to be subjected to cruel and degrading treatment.
16. This case is, in my view, vastly different from the other cases that have come before this court, such as the cases relied on by the petitioner in his submissions, in which the state has been accused, rightly so, of violating the rights of citizens through arbitrary arrests and detention. It is a case in which the petitioner should have brought the error in the committal documents to the attention of the prison authorities, and not kept quiet, as he did, till a month had elapsed. A party has a duty to mitigate damage that may occur to him. It is true that an error was made in the committal documents, but the petitioner has not denied, as averred by the 1st respondent, that the period of his sentence was read out to him upon his arrival at the prison, and that he did not say anything then about the anomaly in order to have it corrected. He has also not denied that he was issued with a labour card that indicated his sentence, and again he did not protest. It took him 38 days to raise the issue of his irregular detention.
17. This case is also distinguishable from the case of **Mbulu Musyimi Sumbi -v- Officer in Charge Kamiti Maximum Prison and 2 Others (supra)** in that as the court found, no warrant for the release of the petitioner had been issued; the Prison Officer was entitled to await the order of the High Court, and even though the petitioner was in court at the time the judgment in his favour was read, he was still confined to prison for a further 22 days. He was released when the order from the Deputy Registrar of the Court was issued. In the case of **Dominic Amolo Arony -v- The Attorney General (supra)** the Prison Officers declined to release the petitioner despite being served with an order for his release.
18. Given the above matters, therefore, I am of the view that even though there was a violation of the petitioner's right, it was inadvertent, and had the petitioner raised the issue of the incorrectness of the information contained in the warrant of committal at an early stage, the violation would have been avoided.
19. In the circumstances, I am of the view that such damages as should be awarded to the petitioner should be nominal. I therefore make an award of **Kenya Shillings One Hundred Thousand (Kshs100,000.00)** for the inadvertent incarceration of the petitioner by the 1st respondent.
20. The petitioner shall also have the costs of this petition.

Signed at Nairobi this 18th day of January, 2013

MUMBI NGUGI

JUDGE

Dated and Delivered at Nairobi on 18th January, 2013

D. S. MAJANJA

JUDGE

Mr. Onindo instructed by the firm of Wachira Mburu Mwangi & Co. Advocates for Petitioner

Mr. Kakoi instructed by the Attorney General for the Respondents