



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.4 OF 2012

SOSPETER MWANGI KARANJA.....PETITIONER

VERSUS

HUSSEINBHAI HEBATULLAH.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner, Sospeter Mwangi Karanja filed an Amended Petition on 15th May 2012 and in it he seeks the following Orders;

“(a) The Honourable Court does declare the discharge of the Petitioner in Nairobi C.M.C. CR. Case No.2252 of 2002 under Section 87(a) by the prosecution a nullity and [that] the Petitioner's constitutional rights were grossly violated.

(b) The charge and or proceedings in Nairobi C.M.C. CR. Case No.2252 of 2002 be declared oppressive, void, illegal and unconstitutional and the Petitioner be discharged forthwith unconditionally.

(c) The Petitioner be awarded damages to be quantified by the Honourable Court payable by the Respondents herein jointly and severally.”

2. It is his case that on 23rd July 2002, he was arrested on suspicion of having committed the offence of stealing by agent and as on 28th August 2002, he was arraigned in Court (*para 2 of the Amended Petition*). The complaint were the 1st Respondent, Husseinbhai Hebatulla and his company M/s Hebatulla Investments and Properties and the Complainant was that the Petitioner had stolen Kshs.1.5 Million which had been entrusted to him as an agent of the Complainants through his company, M/s. Mumenyeneri Muramati (K) Ltd. Apparently the latter had a contract with the complainants to manage certain properties belonging to the Complainants but a dispute arose between them and the Petitioner filed CMCC No.866/2002 (Milimani Commercial Court) seeking Kshs.395,331/- as outstanding commission for work done and services rendered on behalf of the Complainants.

3. According to the Petitioner, once he served the summons in that suit, the Complainants engineered his

arrest and arraignment in Court. That before arraignment in Court, he was allegedly kept in police custody for five (5) days and that the complaint to the Police was made to forestall the civil suit he had filed.

4. The Petitioner also stated that because of his arrest and arraignment in Court, he lost his job as the Chairman of Mumenyereri Muramati (K) Ltd and lost his monthly salary of Kshs.80,000/- a year, aside from the fact that his name and good reputation were badly affected.

5. Regarding the criminal charges that he was facing, the Petitioner stated that after many adjournments whenever the case was listed for hearing, the charges were terminated and he was discharged under **Section 87A** of the **Criminal Procedure Code**. He appealed to the High Court against the discharge but the Court dismissed his Appeal and the Court of Appeal dismissed his Appeal against the decision of the High Court. The Court of Appeal entered its decision sometime in 2007 and he explained that he delayed in filing the present Petition because “*he was waiting for the Constitution to be enacted and ... was still being followed by the 1st Respondent*”.

6. With regard to the question of damages for alleged violations of his constitutional rights, unlawful arrest, false imprisonment, loss of business and exemplary damages, the Petitioner now seeks the total sum of Kshs.115 Million plus costs.

7. On his part, the 1st Respondent never participated in the proceedings and a perusal of the Affidavit of Service sworn on 6th February 2012 by one Victor Mulanga, a Process Server would show that one Mr. Osman, General Manager of Hebatullah Properties Ltd was purportedly served on behalf of Mr. Hebatullah Husseinbhai which service is not in conformity with **Order V Rule 9** – of the **Repealed Civil Procedure Rules**.

8. The 2nd Respondent also filed no formal response to the Petition but Mr. Kakoi, learned Litigation Counsel, appeared, cross-examined the Petitioner during the taking of oral evidence and later filed Submissions in opposition to the Petition. His Submissions were generally thus;

a) That the *Petitioner failed to produce sufficient evidence to show that he was arrested and arraigned in Court as alleged because he produced no proceedings of his alleged Court appearance.*

b) *Secondly, that the matters complained of happened before the Promulgation of the present Constitution and so no remedy is available to him.*

c) *Thirdly, that even if the Petitioner had been taken to Court outside the period permitted by Law, his trial and subsequent discharge were not by that fact alone rendered a nullity.*

d) *Fourthly, that the proceedings were time-barred because they were filed five (5) years after the Court of Appeal dismissed his Appeal arising from the discharge under **Section 87A** aforesaid.*

e) *Lastly, that the Petitioner is not deserving of any order in damages as prayed and his Petition ought instead to be dismissed with costs to the Respondents.*

9. I have taken into account the fact that the 1st Respondent has never been party to the present proceedings and having considered the Petition it is my opinion that;

10. Firstly, the Petitioner in his testimony tendered evidence that was not controverted at all showing that;

- *He was indeed a Director and Chairman of Mumenyereri Muramati (K) Ltd, a company contracted by His Holiness Dr. Syedna Mohammed Burnahuddin Saeb, Head of the Dawoodi Bohra Community represented in Kenya by Sheikh Husseinbhai Ahmedally Hebatullah, the 2nd Respondent.*

- *That a dispute arose between the parties to the contract and Mumenyereri Muramati (K) Ltd represented*

by the Petitioner filed CMCCC No.866/2002 seeking certain Orders including a declaration that the termination of the contract was unlawful, null and void. The suit was filed on 11th July 2002 and His Holiness Dr. Syedna Mohammed and the 2nd Respondent were both named as Defendants.

- On 23rd August 2002, he was arrested and on 28th August 2002 was charged in CM's Court Criminal Case No.2252/2002 with the offence of stealing by agent and the allegations were that on diverse dates between January 2000 and July 2002, he stole Kshs.1,595,000/- received by him on account of M/s Hebatullah Investment Ltd.

- He was released on a personal bond of Kshs.500,000/- with a surety of a like amount.

- The charges were later terminated on 5th May 2004 under **Section 87A** of the **Penal Code** and his appeal against the termination was dismissed by High Court and on further appeal, by the Court of Appeal.

16. Secondly, and as a follow up to the above, the Petitioner made the point that although he was arrested on 23rd August 2002, he was only released from custody on 10th September 2002 and that therefore he had been held unlawfully for that period contrary to **Section 72(3)** of the **Repealed Constitution**. On this point, I must go to the evidence tendered and I note that in the Charge Sheet in CM's Court Criminal Case No.2252/2002, the date of arrest is indicated as 23rd August 2002 (P. Exhibit 3) but the bond document exhibited by the Petitioner shown that he was granted bail on the same day he was arraigned in Court which was 28th August 2002, and it is not in contest that for the five (5) days before he was taken in Court, he was held in unlawful confinement for four (4) days. **Section 72(3)** of the **Repealed Constitution** 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.”.

17. The offence for which the Petitioner was charged was not a capital offence and therefore it was expected that he would be arraigned in Court within twenty four (24) hours of his arrest i.e. by end of 24th August 2002. The onus of establishing that he was arraigned in Court as soon as was reasonably practicable thereafter lay with the Respondent who, as I have indicated above, tendered no evidence in response and I say it is not difficult for me to find that the confinement of the Petitioner in police custody for four (4) days was unlawful – and a contravention of the Constitution. While on this point, Mr. Kakoi's Submission that there is no remedy for Constitution was not pursued and I see no reason to advert to it.

18. Having so held, the Petitioner stated in evidence that he was actually released only on 10/9/2002 but that allegation is unbacked by the documentary evidence that he tendered. He was granted bail on 28th August 2002 and on the same day, his release order was issued. There is absolutely no evidence that either of the Respondents influenced his non-release. In any event, I do not believe that evidence which I consider improbable in normal criminal trials; bond cannot be issued and a surety given the bond and the suspect is still held for another two weeks. Even if I am wrong in my thinking, I am unable to find any

evidence to convince me otherwise. He who alleges must prove and the Petitioner on this point has failed to prove his assertions.

19. The other issue raised by the Petitioner is that the charges, proceedings and eventual discharge of the Petitioner in CM's Criminal Case No.2252/2012 were all unlawful, void and wholly unconstitutional. I have already determined one part of that issue. The remaining part relates to the discharge under **Section 87A** of the **Criminal Procedure Code**. I am deliberately focusing on that matter because it is now trite that the High Court cannot interfere where a suspect is investigated and is later arraigned in Court to face criminal charges except where it can be shown that those actions were patently unlawful and in the instant case, I see no such evidence. It is not enough for the Petitioner to allege that differences with the 2nd Respondent led to his arrest and detention. It must be shown that the Respondent was deliberately malicious and worked in cahoots with the 1st Respondent to bring up brought up trumped charges against him.

The fact that the 2nd Respondent has not been properly served would in any event stop me from making any negative inferences against him.

20. Turning back to the Petitioner's main complaint, sadly, it is improper for this Court to attempt to re-open that matter. The Petitioner, upon being discharged, appealed to this Court and Lesit J. upon hearing the appeal, dismissed it. He was dissatisfied and appealed to the Court of Appeal (Cr. Appeal No.81/2007) and in that Court, the Petitioner's Counsel withdrew the appeal on 3th June 2008 after submitting that the Court had no jurisdiction to entertain the same. The Petitioner re-opened the matter by filing Criminal Application No. 3 of 2008 but the same was again dismissed by the Court of Appeal.

21. This Court cannot now re-open those proceedings and make any orders as that would be tantamount to re-opening matters already determined.

22. Having so said, there is the prayer of damages. Under **Section 72(6)** of the **Repealed Constitution**, the remedy for violation of rights is damages. In the instant case, and on that issue my view is that the Petitioner was unlawfully confined in police custody for four (4) days. It has not been shown that during that period he was tortured as was the case in say, Herman Nderi vs Republic Petition No.115 of 2011 where evidence of torture before arraignment in Court was tendered and accepted by the Court.

23. That being the case and in the circumstances, I shall grant Kshs.200,000/- as damages under **Section 72(6)** of the **Repealed Constitution** and the Petition is allowed in those terms.

24. The Petitioner shall have the costs of the Petition.

25. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Petitioner present in person

No appearance for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

22/2/2013