



REPUBLIC OF KENYA

High Court of Kisii

Constitutional Petition 57 of 2011

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006 SECTIONS 11-24, 70,71,72,74,77,78,79,80 & 82 OF THE OLD CONSTITUTION OF KENYA

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOM UNDER SECTION 72 (3) (B), 5 AND 6 OF THE CONSTITUTION OF KENYA AND NOW UNDER

IN THE MATTER OF ARTICLE 19, 22 (1) (3) (D) 4, 23 (1) (3) (A) – (E), 24, 25 (A), (C) AND (D), 27, 28, 29 (A) (B) (C) (D) (E) AND (F), 44, 47 (1), (2), 48, 49 (1) (A) (I) (II) (III) (D) (F) (G) (H) (2) 50, (1) (2) (3) (4) (5) (6) 51, (1) AND (2) AS ENSHRINED IN CHAPTER 4 OF THE CONSTITUTION OF KENYA 010 AND SECTION 3, 3A AND 63 (E) OF THE CIVIL PROCEDURE ACT

DAVID MUYOMA LWIMBU PLAINTIFF/PETITIONER

VERSUS

HONOURABLE ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The petitioner herein, David Muyoma Lwimbu, filed the originating summons herein dated 28th July 2011 in which he seeks the following declarations/orders:-

(a) A declaration that the fundamental rights and freedoms under the constitution of Kenya have and were contravened and grossly violated by police officers and other Government Servants in 2005 and 2006 on diverse dates thereafter.

(b) A declaration that the holding of the Plaintiff/Applicant for 3 and 9 days respectively over a period of 24 hours in the police custody without being taken to court to be charged and the subsequent charging of the petitioner vide Migori Criminal Case No.24/2005 and 1160/2006 was illegal and unconstitutional.

(c) A declaration that that the petitioner is entitled to the payment of damages and compensation for violation and contraventions of his fundamental rights and freedoms under the aforementioned provisions of the constitution.

(d) General damages exemplary damages on an aggravated damages under the constitution of Kenya for the unconstitutional conduct by the government servants and agents.(sic)

(e) Any further orders, writs, directions that this Honourable Court may consider appropriate and or fit to grant in the circumstances.

(f) Costs of this suit and interest at court rates

2. The Petitioner's claim is based on the grounds set out on the face of the Petition and on the Supporting Affidavit sworn on 28th July 2011. The Petitioner also relies on the proceedings and judgment in Senior Principal Magistrate's Court at Migori in criminal case No.247 of 2005 and the judgment in Kisii HCCRA No.200 of 2006. The proceedings and judgments are duly marked and annexed to the Petitioner's Supporting Affidavit. The claim is also supported by the Petitioner's statement dated 28th July 2011.

3. The Petitioner claims that in addition to having been charged in Migori criminal case 247 of 2005, he was arrested again on 11th September 2006 and charged vide Migori SPM criminal case NO 1160/2006 after staying in the police cells for a period of 9 days without being charged as required by the constitution. He contends that during the arrest, the petitioner was tortured, intimidated, mishandled and was beaten up until he lost consciousness. No reasons were given to him as to why he was being assaulted and/or mishandled.

4. He further claims that he was not given a fair hearing in respect of criminal case No 247 of 2005 first because the court refused to avail to him, upon request, the exhibits and the witness statements recorded by police. As a result he proceeded with the case without witness statements.

5. He states that he was given no explanation and/or reason for delays in arraigning him in court, and to make matters worse, police officers did not obey court orders requiring them to take him to hospital. That the same police officers who allegedly assaulted him were allowed in court when he was taking plea and this psychologically affected him and because of the presence of those officers in court, he decided to plead guilty, even when he had not committed any offence. That during the plea in respect of criminal case No 1160 of 2006 the charges were not explained to him in the language which he could understand and further that he took the plea while he was sick. He claims that the court did not take into consideration the fact that he had been convicted in respect of criminal case NO 247/2005 hence the 2nd conviction was unconstitutional.

6. The petitioner also claims that his stay in the police cells after conviction was unconstitutional since he had been committed to prison to serve sentence. Lastly he claims that the rules or natural justice were violated and he was wrongfully convicted.

7. The petitioner argued the petition in person and emphasized during his testimony that his constitutional rights were violated and for those isolations he is asking for damages and for costs of the petition.

8. Though the Attorney General was duly served with the petition, the only document on the file is the Notice of Appointment of advocates by one Oscar M. Eredi. No replying affidavit or preliminary objection was filed. The petition therefore proceeded ex-parte.

9. Having carefully analyzed the pleadings and the testimony given by the Petitioner, in the absence of any response from the Respondent, I now proceed to consider whether the Petitioner has proved his claims against the Respondent. First issue for determination is whether it is proved that the petitioner was kept in police custody for longer than 24 hours before being taken to court.

10. Under **section 72 (3)** of the repealed Constitution 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 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.”

11. In the instant case, the Petitioner testified that before he was arraigned before court in criminal case Number 267 of 2005, he was kept in police cells for 3 days; while he was kept in police cells for 9 days before he was arraigned before court in criminal case No.1160 of 2006. Although it is clear from the record that these complaints were not raised by the Petitioner at the earliest possible time during the hearing of his cases before the trial court, it is nonetheless not controverted that the petitioner, who was not facing a capital offence in either case, was detained for longer than was absolutely necessary before being arraigned before court. That was clearly a violation of the Petitioner’s constitutional rights as provided under **section 72 (3) of the repealed Constitution**. Similar provisions are now enshrined under **Article 49 (1) (f) of the Constitution of Kenya, 2010**.

12. The Petitioner has also claimed that the charge was not read out to him in a language that he could understand. **Section 72 (2) of the repealed Constitution** provided as follows:-

“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.”

And **section 77 (2) of the same repealed Constitution** read as follows:-

“(2) Every person who is charged with a criminal offence –

(a) shall be presumed innocent until he is proved or has pleaded guilty;

(b) shall be informed as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;

(c) shall be given adequate time and facilities for the preparation of his defence;

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

(e) -----

13. It is clear from the above provisions that right from the moment of arrest and through trial, an accused person is entitled to first of all be informed of the charge facing him in a language that he understands and secondly, to follow the proceedings in a language which he understands. I have examined the lower court record and it appears that apart from the day of plea on 2nd March 2005, when interpretation was shown as: **LUO/KURIA/KISWAHILI** there is no indication of what language was used during the hearing of the case. Only the name of the clerk is given. It can therefore be reasonably concluded that the proceedings before the lower court were conducted in a language not understood by the petitioner. This court is however baffled as to why the petitioner did not raise the issue of language when he appealed against the conviction and sentence of the trial court. There is no hint from the judgment in HCCRA No.200 of 2006 that the issue of language was a ground of appeal. It would appear to me that the petitioner only remembered these provisions upon promulgation of the new constitution on 27th August 2010.

14. The Petitioner also claims that he did not have a fair trial because one he was forced to proceed with his case without being afforded adequate time to prepare and two that he was not provided with witness statements. He also alleges that after conviction, he was placed in police cells instead of being placed in prison. These allegations have not been controverted by the Respondent. Non-compliance with these basic provisions of the law amounted to violation of the Petitioner's fundamental rights to fair hearing. The relevant provisions of the old constitution were imported into the Constitution of Kenya 2010 vide **Article 50 (2)**.

15. Finally, is the Petitioner entitled to damages? As noted earlier in this judgment, the petitioner completely slept on his rights. The criminal cases before the Senior Principal Magistrate's court at Migori were completed in 2005. His appeal to the High Court was concluded on 28th day of June 2008. From that date of judgment, the petitioner took no action until 12th August 2011 when he filed the instant proceedings. Further the petitioner did not raise the issues earlier during trial or appeal. In the circumstances, I award nominal general damages of Kshs.10,000/= . I decline the prayer for exemplary or aggravated damages since there is no evidence on record that the petitioner relentlessly fought for his rights from the day of his first appearance in court.

16. In the premises and for the reasons above given, I enter judgment in favour of the Petitioner as against the Respondent in terms of prayers (a) and (b) thereof and award general damages of Kshs.10,000/= plus costs of this petition and interest thereon.

DATED and delivered at Kisii this 18th day of April, 2013

RUTH NEKOYE SITATI
JUDGE

In the presence of:

Present in person (David Muyoma Lwimbu) for Petitioner

N/A (A.G.) for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.