



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 156 OF 2011

BETWEEN

SONIA KWAMBOKA RASUGUPETITIONER

AND

SANDALWOOD HOTEL & RESORT LIMITED

T/A PARADISE BEACH RESORT1ST RESPONDENT

LEON MURIITHI NDUBAI2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner presented this petition on 13th September 2011, accusing the respondents of unlawfully detaining her at their Hotel for three days for alleged failure to clear dues owed by her employer to the Hotel.
2. This is the second judgment I am writing in this matter. I delivered an *ex parte* judgment on 26th October 2012 after the respondent failed to enter appearance. The respondents successfully applied to set aside the judgment and this is the determination after hearing all the parties.
3. The petitioner (“Sonia”) was at the material time a programme coordinator with the Kenya Community Development Foundation (“KCDF”), a local Non-Governmental Organisation. The 1st Respondent is a private limited liability company incorporated under the *Companies Act (Chapter 486 of the Laws of Kenya)* and engaged in the business of offering hotel, accommodation and conference facilities within Kenya. The 2nd Respondent, Leon Muriithi Ndubai (“Leon”), is one of its directors.

The Petitioner’s Case

4. On 6th January 2010, KCDF and Sandalwood Hotel & Resort Limited trading in the name of Paradise Beach Resort, Kikambala (“the Hotel”), the 1st respondent, entered into an agreement to

offer accommodation and conference facilities to about 150 participants on a youth training workshop at the hotel from the 25th January 2011 to the 28th January 2011. KCDF and the Hotel had agreed on terms of payment and the workshop proceeded as planned.

5. The participants were scheduled to leave on Friday, 28th January 2011 when events took a different turn. At about 10.00 am when Sonia was about to leave she was presented with an invoice by Dorothy, the Hotel accountant, who requested her to settle the invoice by issuing two separate cheques. Sonia informed Dorothy that she was not authorized to make payments and that she did not have any cheques to settle the bill. She explained that payment could only be made once the invoice was received at KCDF office and processed within a week. Dorothy then requested her to wait as she sought instructions from her superiors. She told the petitioner not to leave the hotel. At this time Sonia testified that the Dorothy declined to allow her to speak to her superior.
6. At about 1.00 p.m., after all the workshop participants had departed, Dorothy allowed her to speak on phone with her superior who declined to disclose his name. The person on the phone stated that he needed confirmation that payment would be effected. She gave him the KCDF Finance Manager's telephone number. Sonia later learnt that the person she spoke to on phone was Leon, the 2nd respondent.
7. At about 3.00 pm, Sonia received a call from the KCDF Finance Manager who informed her that KCDF would settle the bill and that an email had been sent to confirm this commitment. An email to that effect dated 28th January 2011 was sent to the Hotel. The email was sent to Leon and was received at 4.13pm. It referred to telephone conversation between Leon and the Finance Manager and it stated, in part, "*We are committed to make payments at the earliest opportunity. We have proceeded and prepared the TT, awaiting our Directors to sign, which will be Monday morning. I hope this is enough commitment.*" Sonia testified that even after receiving this email, Leon was non-committal about her release when she last spoke to him at about 5.00 pm on that day. She had to stay overnight as the guards were still under instructions not to let her depart from the Hotel.
8. On Saturday, 29th January 2011 at about 3.39 pm, another email was sent to Leon stating, "*Attached please find the commitment letter, cheque and the TT partially signed. We hope this meets your requirements.*" The email was accompanied by a letter which stated in part, as follows;

Dear Leon,

RE: Commitment to pay Amount due to you

Our Youth Forum from 25th to 28th January 2011, hosted by you refers.

We are in receipt of the final invoice, currently being processed. We are also aware that you have held hostage our staff, Ms Sonia Rasugu for non payment of the final balance.

We hereby reiterate our commitment to pay the balance due, thus proceed and accept this letter as a form of commitment.

The cheque and transfer letter of the amount is already done, awaiting final signature by Monday 31st January 2011.

Your prompt action is highly appreciated.

Francis Kamau

Finance & Investment Manager

9. Despite this email, the attached letter and copies of the cheque and TT instructions being

forwarded to Leon, the Sonia was still not permitted to leave the Hotel on Saturday. Sonia testified that she had spoken to Leon in the morning and he said he would get back to her later in the day. All efforts to locate him later that day were fruitless as even the hotel staff could not reach him. She was once again forced to spend another night at the hotel. On Sunday, 30th January 2011 there was no communication from Leon. All she was told by the hotel management was that they were waiting for Leon's instructions and the guards could not permit her to leave despite persuasion. Sonia was finally allowed to leave the premises at about 3.20 pm on Monday, 31st January.

10. Sonia testified that during the detention, she sought assistance from the police so as to be released. She states that she made a telephone call to the Mombasa District Criminal Investigation Officer, a Mr. Manyara, who indicated that the matter was civil in nature and could not assist.
11. The petitioner avers that due to the delayed departure, she had to reschedule her flight to Nairobi, the car she had hired wasn't returned on time and she had to organize her daughter's accommodation in Nairobi as she had left earlier in the company of the workshop participants. During this period the Sonia felt angry, humiliated and was embarrassed. She stated that her work was to train the youth on integrity yet she was placed in a situation where her own integrity was in question. The humiliation was aggravated by the fact that she remained in the hotel where she had organized the workshop and everyone looked at her as a crook and fraud. She was also worried about her daughter who had left by road earlier in the day and she would not be there to meet her as expected. Sonia seeks declarations that her rights were violated and damages.
12. The petitioner's case is that her detention by the respondents was unlawful and in breach of her freedom of movement and right to liberty and security of the person which are fundamental rights under the Constitution. Further, that even if debt is in fact owed by the petitioner, the Hotel was a mere creditor whose cause of action is limited to the ordinary remedies available to all creditors. She relied on the case of *Lynch v Metropolitan Elavated Ry Co N.Y. 77, 83 (1882)*.
13. In the petition presented to court on 13th September 2011, supported by the petitioner's affidavit, the petitioner seeks the following reliefs:
 - a. *A declaration that the Respondents unlawfully detained the petitioner, deprived her of her freedom to liberty and held her against her will without any lawful cause by forcefully confining the petitioner within the precincts of the 1st Respondent premises for four days.*
 - b. *An order for Compensation in favour of the petitioner for such damages arising from mental anguish, embarrassment, inconvenience, ridicule suffered by the petitioner as a consequent of breach of her constitutional rights.*
 - c. *Special damages*
 - d. *An Order for costs of this suit.*
 - e. *Any other/further order or relief that this Honourable Court may deem fit to grant.*
14. Ms Oduor, learned counsel for the petitioner, emphasized the dignity of the individual and the centrality of the right to liberty and security of the person protected under **Article 29** of the Constitution. According to counsel, there was a dispute between KCDF and the 1st respondent which related to a contract and over which the parties agreed on the terms of payment but the respondents nevertheless opted to detain the petitioner in a bid to enforce the debt against a third party.

Respondents' Case

15. The petitioner's case is opposed on the basis of the replying affidavit sworn on 27th March, 2013 by Leon. Leon confirmed that KCDF had paid a deposit of 50% before the said participants checked in and the balance was to be paid on or before the KCDF's participants checked out of the hotel. Leon stated that it is was a general policy that all clients are only allowed to leave the

premises with their personal belongings after outstanding bills had been settled and that KCDF had not paid the outstanding balance at the time of checking out as had been agreed.

16. Leon stated that since it was unreasonable to hold back on the entire group of 150 KCDF participants, an agreement was arrived at between Sonia and Dorothy, that Sonia remains behind while the other participants leave. The respondent's position is that Sonia did not remain behind against her will but chose to remain behind until KCDF settled the outstanding bill.
17. Leon denied that there was any communication between him, Dorothy and Sonia before or after the period that Sonia remained at the Hotel after the workshop. He stated that since KCDF was a first time client credit could not be advanced to it and as such Sonia agreed to stay behind until the bill was settled. Leon testified that Sonia remained behind so that she could receive her commission once the bill was settled.
18. Leon pointed out that Paradise Beach Hotel and Sandalwood Hotel & Resort Ltd are two distinct entities with separate ownership and that Sandalwood Hotel & Resort Ltd ought to be struck out of the petition. Further that Paradise Beach Hotel is located in Kikambala and the petition ought to be heard in Mombasa and not the High Court at Nairobi.
19. Dr Khaminwa, learned counsel for the respondents, submitted that it was clear that there was a contract between KCDF and the 1st respondent and it was breached as the bill was not settled at the time the workshop participants were leaving. Counsel noted that there was an understanding that Sonia would remain behind until payment was made. Dr Khaminwa stated that hotels run on a limited budget and demand payment by cash and that the Hotel was entitled to use self-help means if the bill was not settled.
20. Counsel further submitted that the petition should have come by way of a normal suit as opposed to a petition in order to enable canvassing of the facts that were seriously in dispute. Counsel also took issue with the time it took before the petitioner filed a suit which was about 5 months after the alleged cause of action arose.
21. In the written submissions dated 31st May 2013, the respondents reiterated their stance that the detention was voluntary as the petitioner expected to be paid a commission out of the payment. They relied on the common law doctrine of *volenti non fit injuria* in that the petitioner ought to have known the consequences of non-payment of debt. They further argued that even the petitioner was detained, it was justifiable and for a good cause as a 'self-help' mechanism aimed at enforcing the hotel's own rights devoid of any criminal intent. The respondents submitted that in the event the court found that the petitioner's rights were violated, she would only be entitled to nominal damages for the reasons that the contract on how the bills were to be settled had already been breached and the Hotel was entitled to prompt payment by way of cash upon the guests checking out, that the alleged false imprisonment was not without a just cause and was not malicious.

Determination

22. The only key issue necessary for disposition of the present matter is whether the respondent held the petitioner in their premises against her will and in the event this court finds there was unlawful detention, the relief to be granted.
23. The petitioner and the respondents' side largely agree on the general framework of the facts leading up to the petition. The only divergence comes in as to whether the detention was voluntary or not and whether the same was justified in the circumstances.
24. The issue here is whether the respondents breached the petitioner's rights. The rights include the following; **Article 29(a)** which protects freedom and security of the person provides that, "***Every person has the right to freedom and security of the person, which includes the right not to be—***

(a) deprived of freedom arbitrarily or without just cause.” The right to freedom of movement under **Article 39(1)** of the Constitution which reads as follows, ***“Every person has the right to freedom of movement”*** and **Article 28** provides that ***“every person has inherent dignity and the right to have that right respected and protected.”***

Whether there was involuntary detention

25. The petitioner and respondents agree that Sonia was confined to the Hotel from Friday to Monday. Sonia claims that she could not leave on instructions of Leon until the debt was paid and on the other hand Leon states that she voluntarily stayed at the Hotel until the bill was settled.
26. When the court, is faced with such contradictory assertions and evidence, the court will seek to establish where the truth lies and this is by placing the evidence of the contesting parties and determine the likelihood of one version over the other. It does not matter whether the matter is an ordinary civil suit or a petition filed under **Article 22** to enforce fundamental rights and freedoms. In each case, the duty of the court is to weigh the facts and evidence on either side, whether it is presented orally or by affidavit and make a finding. The respondents’ submission that the contested evidence can only be solved in a civil court is mistaken and lacks merit. The argument that the matter ought to have been heard in Mombasa lacks merit as the objection was not raised at the beginning of these proceedings and no party was prejudiced by the matter being heard in Nairobi.
27. The petitioner’s case for her detention against her will is to be found in the depositions filed in court and oral evidence. This evidence is corroborated by the letter dated the 29th January 2011 addressed to Leon from the Finance and Investment Manager at KCDF whose content I set out earlier. Part of the letter read, *“We are in receipt of the final invoice, currently being processed. We are also aware that you have held hostage our staff. Ms Sonia Rasugu for non payment of the final balance.”* Leon did not deny that the email and letter was sent to his address and if indeed such an accusation was made, it is one that would have called for a response or rebuttal. This coupled with the evidence adduced that Sonia sought police assistance corroborates the petitioner’s version of events.
28. Leon asserted that Dorothy and Sonia agreed that she would remain at the hotel pending payment. Unfortunately, the court did not have the benefit of Dorothy’s evidence and Leon himself was not party to such an agreement. Furthermore, the fact that the petitioner was provided with food and drinks during this time does not negate the fact that she was held against her will. I also discount the assertion that Sonia remained behind so that she could secure her commission. Leon did not depone to this issue in the affidavit and no evidence of payment was provided to support the fact that the commission was paid when she left the hotel on Monday. The fact that the suit was filed in September, 2011, 9 months after the incident does not negate the fact that Sonia was held against her will. Taking all the evidence on record, I am satisfied that on a balance of probabilities that the petitioner was detained against her will at Paradise Hotel against her will on instructions of the 2nd respondent.
29. The other issue I must now turn to address is the effect of the involuntary detention. The respondents argue that detention of the petitioner was justified in the circumstances in order to enforcement of the hotel’s debt.
30. The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual’s physical freedom. **Article 9** of the **Universal Declaration of Human Rights** provides that; *‘no one shall be subjected to arbitrary arrest, detention or exile’*. Similarly, **Article 9(1)** of the **International Covenant on Civil and Political Rights (ICCPR)** secures the right to liberty and security of the person in the following terms; *“9. (1). Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”* **Article 11** of the **ICCPR** further states that, *“No one shall be*

imprisoned merely on the ground of inability to fulfil a contractual obligation.” The provisions of the **Article 2(5)** and **2(6)** of the Constitution incorporate into Kenyan Law the Convention (see **Re Zipporah Wambui Mathara Milimani BC Cause No. 19 of 2010 (Unreported)**).

27. Or courts have dealt with the issue of detention arising out of failure to fulfil a contractual debt and though these dealt with the issue of the constitutionality or otherwise of committal to civil jail in enforcement of a civil debt, the principles enunciated therein are relevant to the circumstances of the present case in as far as they deal with the justification for false imprisonment in enforcement of a contractual debt by the hotel. In the case of **Ndegwa v Republic (1985) KLR 534**, the court observed that, “*No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.*” Justice M. Ibrahim in **Elijah Momanyi p/a Anassi Momanyi and Company Advocates v Bartera Maiyo HC Eldoret Misc. 149 of 2005 (Unreported)**, stated as follows when considering the rules on committal to civil jail; “*In my view, execution by way of arrest and committal to civil jail must be done the last resort after all other options have been exhausted. The deprivation of an individual’s liberty is not a matter to be treated lightly or in haste. The protection of the right to liberty in my view is the most sacred of the fundamental rights and freedoms of the individual. It should not be taken away easily and particularly in matter relating to commercial transaction and civil litigation...*” [Emphasis mine]
28. What emerges from the decisions I have cited above is the centrality of the liberty of the person and the protection from illegal and false imprisonment as one of the fundamental rights and freedoms enshrined in our Bill of rights. Any form of detention not sanctioned by the law that seeks to procure performance of contractual debt is a violation of the right to liberty. It is also an affront to human dignity to detain someone on account of a debt that cannot be enforced against them. In this case, Sonia had no contractual obligation in law or in fact to settle the debt that was clearly owed by KCDF, a commitment letter had been issued to guarantee payment but the hotel continued to hold her hostage in order to secure settlement of the balance of the bill. I also reject the assertion proffered by Dr Khaminwa on the respondents behalf that they were entitled to use self-help means to enforce settlement of the bill. The law does not condone the use of self-help when the means adopted is in fact contrary to the law and a violation of one’s fundamental rights and freedoms.
29. The common law always protected the security of the individual from unauthorised and wilful detention. In the case of **Sunbolf v Alford (1838) 3 M & W 248, 150 ER 1135**, the court stated that, “*If an Innkeeper has a right to detain the person of his guest for non-payment of his bill he has a right to detain him until the bill is paid, which may be life.... The proposition is monstrous. Again, if he have any right to detain the person, surely he is the judge in his own cause...*”
30. **Article 24(1)** of the Constitution is clear that a right or fundamental freedom in the Bill of rights is not to be limited except by law and only to the extent that such limitation is reasonable and justifiable in an open and democratic society. Leon testified that it was in line with the hotel’s policy that persons be held until clearance of dues owed to the hotel. The rights guaranteed under the bill of rights as I have cited, cannot be limited in a way other than by law and even then, the limitation ought to be justifiable in ‘an open and democratic society’ as contemplated under **Article 24**. **Article 2** is clear that the Constitution is the supreme law of the land and “*binds all persons and all State organs at both levels of government.*” All persons must include even corporate entities such as the 1st respondent by dint of **Article 260** of the Constitution which defines the term ‘person’ to include “*a company, association or other body of persons whether incorporated or unincorporated.*” **Article 3(1)** is categorical that, “*Every person has an obligation to respect, uphold and defend this Constitution.*”
31. I have set out the above provisions to drive the point home that no one is immune from the constitutional duty to respect and uphold the rights enshrined in the Constitution. A policy such as

the one relied on by the respondent to justify its actions and any resultant action from such policy is invalid in as far as it fails to meet the constitutional muster.

Reliefs

32. Having concluded that there is a violation of the petitioner's right, the proper relief as submitted by counsel for the petitioner is an award of damages. There is no fixed formula for the determination of the quantum of damages. Such determination lies in the discretion of the court, which must determine the quantum by taking into account all relevant factors and circumstances according to what is just and fair. Such an award should express the importance of the constitutional right to individual freedom, it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth.
33. The detention caused the petitioner distress and embarrassment. The indignity and humiliation occasioned to her in the presence of the hotel staff is not in doubt. Counsel has prayed for a sum of Kshs.7,488,000/00 based on *Oscar v Chief Constable of the Royal Ulster Constabulary (1992)NI 290* where the court awarded UK Pounds 600 per hour.
34. Damages for false imprisonment are very much at large and I think the decision cited by the petitioner bears no relation to the local circumstances. I am aware that in cases of detention and torture the court has awarded the sums between Kshs. 1 million and Kshs. 5,000,000.00. In the case of *Rumba Kinuthia & others v The AG Nairobi HCCC No. 1408 of 2004 (Unreported)*, seven claimants who were detained for long period of time and were subjected to torture, cruel and inhuman treatment were awarded Kshs.1.5 million each. In the cases of *Nelson Akhahukwa Muyela v AG Nairobi Petition No. 783 of 2008 (Unreported)* and *Israel Okemo Agina v AG Nairobi Petition No. 1374 of 2003 (OS) (Unreported)* the sum of Kshs. 2 million was awarded in similar circumstances.
35. In this case, the unlawful act was not accompanied by torture and it was for a period of four days. But it was a deliberate and intentional act designed to humiliate the petitioner to ensure that payment was made despite the fact that she was not liable for the debt and payment terms had already been agreed upon by the time the workshop began. KCDF had made a clear commitment to pay the debt. In the circumstances, I think a sum of **Kshs.1,000,000.00** as general damages would be an appropriate award.

Conclusion and Disposition

36. In summary and based on what I have stated I find and conclude as follows;
- a. The petitioner was unlawfully detained by the respondents in breach of her constitutional rights.
 - b. I find that the respondents had no right to detain the petitioner on the ground of non-fulfilment of a contractual obligation by her employer in the circumstances.
37. I therefore enter judgment for the petitioner against the respondents jointly and severally as follows;
- a. **I declare that the petitioner's right to freedom and security of the person under Article 29(a) was violated when the petitioner was detained without her consent at the 1st respondent's premises at Paradise Beach Hotel from 28th to 31st January 2011.**
 - b. **I award the sum of Kshs. 1,000,000.00 as general damages to the petitioner.**
 - c. **The petitioner shall have costs of the petition as against the respondents.**
 - d. **Interest shall accrue on general damages at court rates from the date of judgment.**

DELIVERED and DATED at NAIROBI this 26th day of July 2013.

D.S. MAJANJA

JUDGE

Ms Oduor instructed by Nungo, Oduor and Waigwa Advocates for the petitioner.

Dr. Khaminwa instructed by Khaminwa & Khaminwa Advocates for the respondents.