



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
PETITION NO. 27 OF 2011
ELIUD GAKUNJU NGUTHA & 3
OTHERS.....PETITIONERS

V E R S U S

THE HON. ATTORNEY GENERAL & 3
OTHERS.....RESPONDENTS

JUDGMENT

Introduction

1. In their petition dated the 14th February, 2011, the petitioners, Eliud Gakunju Ngutha, Peter Miano Kigo, Abraham Mwangi Muthoni and Paul Mwangi Wainaina seek the following orders:-

(a) A Declaration that the period between 13th November, 2010 up to 15th November, 2010 when the Petitioners were held in Central Police Station, Nairobi constituted a period of continuous breach of the Petitioners' right to liberty security of the person and the protection of the law as provided for in Articles 49(2) 19, 29(a) and (d) and (f) of the Constitution of Kenya.

(b) Damages consequential upon the above declaration and/or such orders, writes or directions for the purpose of enforcing and securing the enforcement of the constitutional provisions hereinabove disclosed as having been breached in relation to the Petitioners in accordance with Article 23

(e) of the Constitution of Kenya.

(c) That such other orders as this Honourable Court shall deem fit and just.

(d) Costs of this suit.

It is supported by the affidavit of Eliud Gakunju Ngutha sworn on 14th February, 2011.

2. The orders are sought against the Officer Commanding Central Police Station, the Commissioner of Police the City Council of Nairobi and the Attorney General.

3. The respondents oppose the petition on the following grounds:-

(a) *The petition is an abuse of the court process.*

(b) The petition does not stand in law and the same lacks merits.

(c) The petition has no legal basis hence the prayer by the respondents for its dismissal with costs.

4. The petitioner filed written submissions and a list of authorities while the respondent filed submissions and supplementary submissions. On the 16th of November 2011, the parties agreed that the petition should be disposed of on the basis of the documents filed in court.

The Petitioners' Case

5. The petitioners allege that their constitutional rights were infringed by the respondents following their arrest and incarceration at the Central Police Station between the 13th to the 15th of November 2010. In his affidavit sworn on the 14th of February 2011, the 1st petitioner, Eliud Gakunju Ngutha avers that he and the other petitioners were arrested on the 13th of November 2010 on suspicion of engaging in hawking contrary to City By-Laws. They were taken to the Central Police Station where they were locked up until 15th November 2010. They were arraigned in court on the 15th of November, 2010, pleaded guilty and were convicted on their own pleas. The 1st petitioner was discharged while the 2nd, 3rd and 4th petitioners were fined various amounts. They allege that their constitutional rights were infringed by their being held in custody and that they were subjected to psychological torture and inhuman and degrading treatment. Their rights under Article 19-29 and 49 of the constitution were infringed by the respondents' failure to exercise due diligence in the exercise of their duties.

6. The petitioners argue that their being held at the Central Police Station between the 13th and the 15th of November 2010 amounted to a violation of their rights under Article 49 (2) which provides that

“A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”

They argue that since they were charged with offences under the Local Government Act and various City Council By Laws which attracted penalties of fines or custodial sentences of less than six months, the respondents were prohibited from ***‘remanding the Petitioners at the Central Police Station between 13th November 2010 and 15th November 2010.’***

They ask for damages for the violation of their rights.

7. The petitioners have annexed the charge sheets and the proceedings before the court to the 1st petitioner's supporting affidavit as annexure **‘EGN2’**. The petitioners were charged before V.W. Ndururu on the 15th of November 2010. The record indicates that there were several accused persons charged under different charge sheets to whom the elements of the charges were read and all of whom pleaded guilty. The charge sheets indicate different dates of arrest, with some showing that the arrests took place on 13th November 2010 while others show the date of arrest as 14th or 15th November 2010.

The Respondents' Case

8. The respondents' case is that the petitioners have not demonstrated how their constitutional rights have been infringed. They have not complied with the requirements set by the court in the case of **Anarita Karimi Njeru –v-Republic (No.1) (1979) KLR - Misc. Criminal Application No. 4 of 1979** in order for a constitutional reference to succeed namely setting out precisely what rights have been violated and in what manner.

The respondents further argue that the petitioners do not know when they were arrested and when they were arraigned in court as they give different dates in their affidavit, petition and statutory notice annexed to the affidavit in support of the petition.

9. The respondents further argue in their submissions that the petitioners have lied to the court. They point out that according to annexure **EGN2 Case No. 23509/10** the 1st petitioner was arrested on the 14th

of November 2010 at 6.30 p.m and taken to court on the 15th of November 2010. They further point out that according to annexure **EGN2 Case No. 23521/10** and **EGN2 Case No. 23519/10** the 2nd and 3rd respondent were arrested on the 15th of November 2010 and taken to court on the same day. The 4th respondent, according to annexure **EGN2 Case No. 23515/2010**, was arrested on 13th November 2010 and charged in court on 15th November 2010.

The issues

10. While the petitioners have cited several provisions of the Bill of Rights in the Constitution as having been infringed by the respondents, the view of this court is that the success or failure of this petition turns on whether or not the petitioners' rights under **Article 49(1)(f)** and **49(2)** have been infringed. Article 49(1) (f) provides as follows:

49. (1) *An arrested person has the right—*

(f) *to be brought before a court as soon as reasonably possible, but not later than—*

(i) *twenty-four hours after being arrested; or*

(ii) *if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;*

11. From the facts as set out in the charge sheets annexed to the 1st petitioner's affidavit and admitted by the petitioners when they appeared before the trial court to plead to the charges as evidenced by the court record, the 1st, 2nd and 3rd petitioners were arrested on the 14th and 15th of November, 2010 respectively and were brought to court on the 15th of November 2010, well within the 24 hour limit required under the constitution. There is therefore no violation of the requirements of Article 49(1) (f).

12. With regard to the 4th petitioner who was arrested on the 13th of November 2010 and charged in court on the 15th of November 2010, there would be a violation of his rights under 49(1)(f) if these dates fell within '**ordinary court days**'. I have, however, looked at the calendar for 2010. The 13th of November 2010 was a Saturday, while the 15th of November was a Monday. The 4th petitioner was therefore arrested on a day which was not a court day and was charged in court on the next court day. This is in conformity with the requirements of Article 49(1) (f) that

“if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.”

13. The petitioners argue that since the offences they were charged with under the Local Government Act and City Council By Laws attracted a maximum of 6 months imprisonment, their being held at the Central Police Station amounted to a violation of their rights under Article 49(2). Whether or not there was a violation of this provision will depend on the interpretation placed on the words '**remanded in custody**' as used in Article 49(2) that

“A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”

14. It appears to me that the petitioners understand the provision to mean that if one is arrested for an offence that carries a penalty of less than six months' imprisonment, it would be unconstitutional for one to be held in police custody even for the period allowed under the constitution pending one's first appearance in court. To my mind, this would not be correct. Article 49(2) must be read in conjunction with Article 49(1), specifically 49(1) (f), which requires that a person who has been arrested must be brought before a court within 24 hours of his arrest unless the proviso with regard to the court hours applies. Article 49(2) cannot be read to mean that one cannot be held in police custody at all pending his first appearance and charging before a court.

15. What does the term '**remand**' as used in this context refer to? Black's Law Dictionary, 8th Edition defines the term as '**To recommit (an accused person) to custody after a preliminary examination**'

Black's Law Dictionary Second Pocket Edition defines to remand as '**The act or an instance of sending something (such as a case, claim or person) back for further action**'.

The term can therefore only be taken as meaning, with regard to an accused person, returning him or her to custody pending his or her trial.

16. In my view, therefore, the detention of a person in police custody for the period permitted by the constitution prior to his being charged in court does not amount to being '**remanded in custody**' within the meaning of Article 49(2).

17. My view of this is bolstered by a consideration of the mischief the constitutional provision was intended to cure. To my mind, it must have been intended to address those situations where persons charged with minor offences who plead not guilty are remanded in custody while awaiting trial for periods that are equal to or even longer than the period they would be sentenced to upon conviction. When read with Article 49(1) (f), section 49(2) can only properly be interpreted to mean that once a person is arrested and brought before a court, if one is accused of an offence "**punishable by a fine only or by imprisonment for not more than six months,**" one must be released on bail or bond while awaiting trial and should not be remanded by the court until completion of his or her trial. To hold otherwise would in my view wreak havoc on the administration of justice and would be contrary to the public interest.

18. I therefore find no merit in this petition and the same is hereby dismissed. Each party shall bear its own costs.

Dated and Delivered at Nairobi this 27th day of January, 2012.

Mumbi Ngugi
Judge