



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION 167 OF 2011

(FORMERLY HIGH COURT CRIMINAL CASE NO. 1488 OF 2007)

BETWEEN

ELLY ONYANGO

GUMBA.....APPLICANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. This matter arises from **Nairobi Chief Magistrate's Criminal case No. 1488 of 2007** where Elly Otieno Gumba, the applicant, and others not party to these proceedings are on trial. The applicant is charged with four counts of stealing contrary to **section 275** of the *Penal Code* and one count of attempting to steal contrary to **section 275** as read with **section 389** of the *Penal Code*. The applicant pleaded not guilty when he was charged on 11th September 2007.
2. On 2nd October 2008 the applicant made an informal application under **section 72(3)** of the Constitution. On the 5th December 2008 the learned magistrate ruled that there were substantial issues to be determined as a result of the breach of the applicant's fundamental rights and freedoms. Unfortunately, the learned magistrate did not immediately frame the questions for determination by the High Court as required by **section 84(3)** of the Constitution. The questions for determination were only framed on 9th June 2011.
3. The subordinate court set out the facts necessary for this court to determine the matter as follows:-
 - (a) The applicant Elly Onyango Gumba was arrested by the Kenya Police on 5th September 2007 and incarcerated in police custody at the Kilimani Police Station in Nairobi.
 - (b) On 11th September 2007 being the 7th day after the arrest and incarceration in police custody, the

applicant Elly Onyango Gumba was produced before the Subordinate Court at Nairobi and charged with offences of stealing contrary to **section 389** of the *Penal Code*.

(c) The applicant was charged with bailable and non-capital offences and in the circumstances the respondent was under a constitutional obligation to produce and charge him before a court of law within twenty four hours of his arrest or admit him on Police Bond pending finalization of investigations.

(d) The only explanation advanced on oath by Corporal Jonathan Chepkwony to the Subordinate Court as to why the applicant was held in custody for the period of 7 days before being produced in court was that the offences under investigations were complex.

Question framed for determination

4. The subordinate court framed the issue for determination as follows;

The question for determination by the High Court is whether Elly Onyango Gumba's detention for a period of seven (7) days after arrest on suspicion or allegation of committing the offence of stealing or attempting to steal amounted to violation of his fundamental rights and freedoms enshrined in Section 72(3) of the Constitution of Kenya, 1963 read with Article 22(1) 25(c) and 49(1) of the Constitution of Kenya, 2010 and Section 7, 19, and 22 of the sixth Schedule of the Constitution of Kenya, 2010.

5. Though the question framed by the Subordinate Court makes reference to the Constitution, the violation that is subject to this reference occurred in 2007 prior to the promulgation of the Constitution. As the Constitution is not retrospective in its application this matter must be determined by reference to the former Constitution and any reference to the Constitution in this matter unless otherwise stated is to the former Constitution.

The Submissions

6. Mr. Amolo submitted that the subordinate court has already found as a fact that the applicant was in custody for 7 days and this is not contested by the respondent. As the offence for which the applicant was charged with was bailable, the applicant was ought to have presented been presented to court within 24 hours in accordance with the *Police Act* and Constitution. Counsel further stated that in the subordinate court, Corporal Chepkwony advanced an explanation that the offences were complex in nature. Mr Amolo contended that the explanation proffered was wanting and this court must return a finding in favour of the applicant that **section 72(3)** of the Constitution was violated as the applicant should not be held for more than 24 hours.

7. Counsel contended that it is for this court to grant a remedy and that remedy is damages for unlawful detention. The court should take into account all the circumstances of the case including the illegality. Counsel referred to the decision of the Court of Appeal in ***Julius Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 (Unreported)***, where the Court settled the issue of unlawful detention and determined that such detention did not nullify the trial but the court may grant any relief considered appropriate including damages. Under **section 72(6)** of the Constitution the Court may award damages. The petitioner seeks damages for the 7 days he was detained.

8. Counsel relied on ***Dritoo v West Nile District Administration [1968] EA 428*** where the sum of Ushs.14,000.00 was awarded in 1968 for illegal detention. ***Peter M. Kariuki v Attorney General Nairobi Petition 403 of 2006 (Unreported)*** where the plaintiff was awarded Kshs. 7 million. In that case the court referred to other cases where damages awarded were in the range from Kshs.1 million to 3 million for unlawful detention, torture and inhuman and degrading treatment. In the case of ***Mwangi Stephen Mureithi v Daniel T Moi Nairobi Petition No. 625 of 2009 (Unreported)*** a substantial sum in excess of Kshs. 50 million was awarded for detention.

9. Mr Amolo stated that considering that the petitioner was charged with the simple offence of stealing and attempted stealing, there was no reason to detain him for 7 days. There was an option to admit the

petitioner to police bail. No such right was availed either under the **Police Act** or Constitution. He suffered serious anxiety, his family and friends were anxious. The incarceration was a condemnation of an otherwise innocent man. This case merits an award of exemplary and punitive damages. He asked me to award the sum of Kshs. 2 million.

10. The state was represented by Ms. Kahoro, who opposed this reference. She contended that the theft was not a simple but complex in the circumstances as it involved substantial documentation. An explanation was given under oath as to why there was a delay. There were several accused persons and the investigations required time therefore the explanation given at the time was reasonable. Counsel submitted that this court should not find a violation.

11. Counsel for the state agreed that the remedy of compensation was available should the court find a violation of the applicant's rights but the trial should proceed. She relied on the case of **Julius Kamau Mbugua v Republic (Supra)**. She asked me to take into account the facts that there was a reasonable ground for delay; the delay of seven days was neither unreasonable nor inordinate and no prejudice has been caused to the petitioner.

12. Ms Kahoro further contended that in the circumstances of this case, damages were not available to the petitioner as no damages were sought and this claim was only made at the level of submissions. Moreover, she argued, the petitioner had not given any evidence to warrant an award of damages. Counsel argued that even if damages were available, the authorities cited by counsel for the applicant are not applicable in this case as the petitioners in those cases suffered multiple violations such as torture in the Nyayo House Chambers. In some instances the periods of detention were up to 147 days in some cases and those cases cannot be compared to this case. She urged me to dismiss the petition.

Whether there is a violation of section 72(3) of the Constitution

13. In my ruling of 29th November 2011 on the application for conservatory orders, I stated as follows; ***"This case concerns alleged violations of rights occurring in 2007 before the applicant was charged. The violations alleged ceased upon the applicant being charged in court. The only issue for the court to determine whether the facts alleged constitute a violation of the applicant constitutional rights and if so what remedy should be issued. In my view, no purpose will be served by a conservatory order other than to delay criminal proceedings which are yet to commence."***

14. This reference was made while the law on pre-trial detention was still in a state of flux. The controversy surrounding the effect of unlawful pre-trial detention on the validity of a trial was finally laid to rest in the case of **Julius Kamau Mbugua v Republic (Supra)**. After reviewing several local and foreign decisions, the Court of Appeal concluded that the violation of an accused's constitutional rights in such circumstances does not render the trial a nullity.

15. In interpreting **section 72(3)** of the Constitution, the Court of Appeal in **Julius Kamau Mbugua** stated that, ***'Even if we were to agree that the extra judicial incarceration before a person is charged has a direct bearing on the subsequent trial, the detention must first be shown to be unreasonable using the same principles, standards and considerations including societal interest'***

16. **Section 72(3)** of the Constitution implies that the 24 hours stipulated is not absolute. The prosecution may, in an appropriate case, offer an explanation which may absolve it from blame for the delay. The wording of the section, as material, is as follows;

72(3). A person who is arrested or detained

(a) ...

(b) ...

and who is not released, shall be brought before a court as soon as is reasonably practicable 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. [Emphasis mine]

17. In *Julius Kamau Mbugua* the Court, in relation to the construction of **section 72(3)**, stated that, ‘**By section 72(3)(b) a suspect so arrested or detained and who is not thereafter released had to be taken to court as soon as reasonable practicable and if he is not taken within 24 hours, if arrested or detained for non capital offence or within 14 days, if he is arrested for capital offence, then the section cast a burden on a person who alleges that any detention beyond the specified period is still constitutional, of proving that the suspect was still brought before the court as soon as is reasonably practicable.**’

18. The issue of violation of the applicant’s rights was raised in the subordinate court and the investigating officer testified on oath as to the circumstances of the pre-trial detention. While it is proper for the subordinate court to conduct the inquiry and refer the matter to the High Court for determination, the jurisdiction to enforce fundamental rights and freedoms is conferred upon the High Court which is entitled to review the facts and conduct its own assessment of the evidence on record and any other evidence furnished.

19. What I am required to consider is whether on the facts and circumstances of the case, the respondent’s action were reasonable to the extent that the state is absolved from any liability under **section 79(3)** of the Constitution. Some of the factors to be considered and which alluded to by the Court in *Julius Kamau Mbugua* were the length of delay, waiver of time periods, the reasons for delay including the delay caused by the nature of the case, actions of the accused, actions of the state, limits of institutional resources and prejudice to the accused. It is the burden to the State to furnish proof of these matters to enable the court discharge it from liability.

20. I have read the evidence on record and I am not convinced that 7 days was reasonable in the circumstances. I do not find evidence to demonstrate that the offence itself was so complex as to hold the applicant for the period. Although the offences of which the applicant is charged may involve substantial documentation that of itself, does not render the matter so complex as to deprive the accused of his rights. I find and hold that the applicant’s rights under **section 79(3)** of the Constitution were violated. I shall now proceed to consider the issue of damages.

Jurisdiction to award damages

21. This matter came before this court as a reference from the subordinate court pursuant to the provisions of **section 84(3)** of the Constitution. Thus, counsel for the respondent submitted that this court cannot award damages. **Section 84(3)** provides as follows;

(3) If in proceedings in a subordinate court a question arises as to the contravention of sections 70 to 83 (inclusive), the person presiding in that court may, and shall, if any party to the proceedings so requests, refer the question to the High Court

(4) where a question is referred to the High Court in pursuance of subsection (3) the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.

In addition **section 84(2)** provides as follows:

(2) The High Court shall have original jurisdiction –

(a) -----

(b) determine any question arising in the case of a person which is referred to it in pursuance of subsection (3) and may make such orders, issue writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

22. Once a matter is referred to this court by the subordinate court to make a determination under **section 84(3)**, this court is empowered by **section 84(2)(b)** to frame any relief appropriate that will vindicate or secure the enforcement of the rights and fundamental freedoms protected under the Constitution.

Assessment of Damages

23. The assessment of damages is not easy task. Damages must bear a reasonable relation to the wrong done to the applicant taking into account the circumstances of the case.

24. I was referred to several cases. In the case of *Peter Kariuki v Attorney General (Supra)* the petitioner was awarded Kshs.7 million for several breaches of his rights. He was subjected to torture and degrading treatment, denied adequate time and facilities to prepare his defence, he was afforded different treatment while in custody. In the case of *Rumba Kinuthia v Attorney General, Nairobi HCCC No. 1408 of 2004 (Unreported)* the plaintiff was held at Nyayo House Torture Chambers for 14 days where he was tortured. He was awarded Kshs.1.5 million. Other plaintiffs in that case were awarded similar amounts.

25. In all these cases, there were multiple violations of the petitioner's rights. In other cases the unlawful confinement however short was coupled with deliberate acts of torture, inhuman and degrading treatment.

26. In the case of *Patrick Mbaka Majiwa v OCS Kendu Bay Police Station and the Attorney General Nairobi Petition No. 75 of 2008 (Unreported)*, the petitioner was held incommunicado by the police for a period of 20 days. The Court awarded him Kshs. 300,000.00 as general damages for wrongful confinement and Kshs. 400,000.00 as exemplary damages. In that case the court stated that, '**Damages awarded in a matter of this nature should reflect the seriousness of violation of a citizen's constitutional right. Fundamental rights and freedoms which are expressly laid out in our constitution must never be given casual observance or breached with impunity by the Government or its servants. If we show disrespect to the supreme law of the land and fail to punish or penalize those who violate important provisions of the Constitution we will be encouraging such violation.**'

27. In the case of *Robert Kisiara Dikir and 3 Others v Officer Commanding Keiyan General Service Unit and Others Kisii Petition No. 119 of 2009 (Unreported)*, the 1st and 2nd petitioners were arrested and detained for 4 to 5 days respectively without access to their relatives. During this time they were also subjected to degrading and inhuman treatment by being beaten senselessly to extract confessions. Each petitioner was awarded the sum of Kshs. 200,000.00 for unlawful arrest and confinement and a further Kshs. 200,000.00 as exemplary damages.

28. It is common ground that the applicant was in police custody for a period of 7 days. During the day he would be taken from Kileleshwa Police Station to either Central Police Station or the Banking Fraud Investigation Unit. I note from the record there is no allegation or evidence that detention was in bad faith, deliberate, intentional or malicious. There is also no allegation or evidence that the applicant was held incommunicado or that he was subjected to cruel and inhuman treatment. No doubt he and his family were anxious and distressed about the situation.

29. Taking into account these facts and the authorities I have cited and doing the best I can in the circumstances, I award the applicant **Ksh.150,000/00** as general damages.

Conclusion

In conclusion, I enter judgment for the applicant against the respondent as follows:-

(a) I declare that the applicant's rights protected under **section 72(3)** of the Constitution were violated by being detained in police custody from 5th September 2007 to 11th September 2007.

- (b) I award the applicant **Kshs.150,000/00** as general damages for the aforesaid violation.
- (c) I award interest of the said sum at court rates from the date of this judgment.
- (d) I direct that the applicant's trial in the Subordinate Court shall proceed for hearing and determination expeditiously.
- (e) The applicant shall have the costs of these proceedings.

DATED and **DELIVERED** at **NAIROBI** this 3rd day of February 2012.

D.S. MAJANJA
JUDGE

Mr Amollo instructed by Amolo, Kibanya and Company Advocates for the applicant.
Ms Kahoro instructed by the Office of Director of Public Prosecutions for the respondent.