



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 557 of 2012

DAVID GICHUHI GITAU 1ST PETITIONER

TIMOTHY MUCHIRI KANGARA 2ND PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS1ST RESPONDENT

OFFICER COMMANDING STATION MAVOKO POLICE STATION2ND RESPONDENT

THE PRINCIPAL MAGISTRATE MAVOKO LAW COURT3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

FORM MATTRESS LIMITED THIRD PARTY

JUDGMENT

1. The facts relating to this petition are not disputed and are set out in the petition dated 1st December 2012 and the supporting affidavit of David Gichuhi Gitau sworn on the same day and are as follows.

2. On 21st November 2012, the petitioners were arrested while transporting a consignment of goods and taken to Kabete Police Station. On 23rd November 2012, they were arraigned before the Chief Magistrate's Court, Nairobi and charged with offences related to stealing.

3. On 4th December 2012, the petitioners moved the High Court, under certificate of urgency, claiming that their rights were infringed as they had been denied an opportunity to apply bail in the Magistrates Court. The matter came up before me and in a ruling delivered on 4th December 2012, I states as follows;

I have considered the matter and in the particular the skeleton proceedings in Nairobi Chief Magistrates Criminal Case No. 1783 of 2012. The accused took the plea on 23rd November 2012 and there is no indication that an application for bail was made or an opportunity given to them to make the application. The matter was then transferred to Mavoko Law Courts. According to counsel, the accused are still in custody from 23rd November 2012 without the benefit of bail. In view thereof, I direct as follows;

(1) ***That the accused Timothy Muchiri Kagara, David Gichuhi Gitau, Paul Njoroge Mwangi and David Kinyua Wamai be taken before the Magistrate at Mavoko Law Courts on 5th December 2012 or at the earliest opportunity.***

(2) ***The Honourable magistrate is directed to hear and determine their application for bail.***

4. Counsel for the petitioners, Mr Wambugu, confirms that the order was complied with and the only issue that remains for determination is the petitioner's case for wrongful detention. Mr Wambugu submitted that the petitioners complaint is that they were denied their opportunity to apply for bail within a reasonable time as per provisions of **Article 49(g)** and **(h)**. They were not granted the opportunity when they were arraigned before the Magistrates Court, Nairobi. The Court ordered that the matter to be transferred to Mavoko and they were on diverse occasions brought before Court only to be informed that the Court file had not arrived from Nairobi and it is only on 8th December 2012 that the Court file was delivered at the Mavoko Court and this was the first time petitioners were given an opportunity to apply for bond. They claim they were unnecessarily detained by the administrative run-around leading to breach of **Article 49(g)** and **(h)**. Counsel also submitted that the petitioners were charged on 23rd November 2012 and that they remained in custody until 8th December 2012 when they were given the opportunity to apply for bail. In the circumstances, the petitioners seek damages for unlawful detention.

5. Mr Njogu, counsel for the Director of Public Prosecutions, denies liability on the part of the State as the petitioners were given an opportunity to apply for bail and as such there is no violation. Having been arrested on 21st November and arraigned on 23rd November, counsel noted that any delay was due to administrative processes depending on the time taken. As the time taken from arrest to arraignment was not set out in the petition or supporting affidavit as such no violation had been established by the petitioners.

6. The relevant provisions relied upon by the petitioners are to be found **Article 49** which deals with the rights of a person arrested and in my view, the period for violation falls into two. The first is the period of detention from 21st November to 23rd November when the petitioners were arrested and arraigned in court. The subsequent period is from 23rd November to 8th December when the petitioners were given an opportunity to apply for bail.

7. **Article 49(1)(f), (g) and (h)** which 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;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released.

8. I dealt with these provisions in the case of ***Salim Kofia Chivui v Resident Magistrate, Butali and Another Nairobi Petition 256 of 2011 (Unreported)***, “[24]The tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty-four hours or for the period necessary to secure his production in court of the next available date. In any other case any detention beyond 24 hours must be authorized by court as provided by Article 49(1) (g). Once the person's attendance has been secured within the 24 hours, the court may order the person

released or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.”

9. In this case the period of detention from 21st November 2012 to 23rd November 2012 prima facie exceeds 24 hours, although the petitions did not state precisely what time they were arrested and the time they were arraigned in court and since the time is of essence, the petitioners for breach is not made out in the petition. However, on the face of the Chamber Summons dated 1st December 2012, the petitioners avers that they were arrested at about 10am on 21st November 2012. Taking this to be the time of arrest, the petitioner ought to be arraigned in Court at 10am on 22nd November 2012 and not 23rd November 2012. I therefore find and hold that was a breach of **Article 49 (f)**.

10. In my decision of 4th December 2012, I found as a fact that the petitioners had not been availed the opportunity to apply when they were brought to court to take their plea. The opportunity to apply for bail was also denied due to administrative hitches in transferring the file from Nairobi to Mavoko. In my view, the lack of an opportunity to apply for bail at the first opportunity was remedied when I issued the order of 4th December 2012 in which I issued the necessary directions in accordance with **Article 23**. The fact that the file did not arrive at Mavoko immediately after the transfer order was made is not the fault of the petitioners and it does not affect the right of the accused to be given an opportunity to apply for and be granted bail. In short, **Article 49 (1)(h)** does not depend on a court file, it is a fundamental right.

11. In their petition, the petitioner seek the following reliefs;

(a) *A declaration that the detention of the petitioners without arraignment before the court for more than the stipulated 24 hours is unconstitutional.*

(b) *The continued detention of petitioners for almost two weeks without giving an option of a cash bail/or bond despite taking plea is unconstitutional.*

(c) *An order that the proceedings in Mavoko Court emanating from Nairobi Criminal 1783 of 2012 as a nullity having declared (a) and (b).*

(d) *An order for compensation do issue to the petitioners for violation of their rights.*

(e) *The respondents and cited 3rd party do pay the costs occasioned by and of this petition jointly and severally.*

12. The jurisdiction of the Court of grant relief under **Article 23** is discretionary and I think dependent on the circumstances of the case. Furthermore, apart from the indicative reliefs, the court is entitled to frame appropriate relief to vindicate violation of the Bill of Rights.

13. Prayer (c) cannot be granted in light of the decision of the Court of Appeal in **Julius Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 (Unreported)** where the Court of Appeal settled the issue that arrest and pre-trial violation of rights had no effect on the trial itself and the accused was entitled to apply for relief independent of trial itself.

14. As regards the violation of **Article 49(f)**, the time for detention beyond the permitted limit was at most 24 hours and in light of my decision in **Salim Kofia Chivui v Resident Magistrate, Butali and Another (Supra)**, I hold that the infraction was minor and there is no evidence that the arrest and detention which was for a period of less than 24 hours over the permitted time was deliberate or motivated by malice or ill will. In my view, this does not call for an award of damages.

15. As regards the violation the right of the petitioners to apply for bail at the earliest opportunity, I hold that that the violation was cured by my direction of the 4th December 2012 (see para. 3 above) and I think that was an appropriate remedy to deal with the issue. I do not consider that the mere fact that the petitioners were not given an opportunity to apply for bail after they had been charged rendered the

detention illegal or unlawful. The right to apply for bail is a constitutional right under **Article 49(1)(h)** and in order to give effect to it, the magistrate must give the accused an opportunity to apply for bail after the plea has been taken. Where this is not possible the reasons thereof must be recorded.

16. The petitioners were entitled in my view to apply for relief in view of the violations I have outlined. In view of the circumstances of this case and in light of what I have stated, I award the petitioners costs of the petition which I assess at **Kshs. 30,000/00** against the 1st and 4th respondents in the matter.

DATED and DELIVERED at NAIROBI this 20th day of December 2012

D.S. MAJANJA
JUDGE

Mr Wambugu instructed by S. N. Thuku and Associates Advocates for the petitioner.

Mr Njogu, State Counsel, instructed by the Director of Public Prosecutions.