



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 769 OF 2007**

**STEPHEN NDERU NJUGUNA .....PLAINTIFF**

**VERSUS**

**THE HON. COMMISSIONER OF PRISONS ..... 1<sup>ST</sup> DEFENDANT**  
**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

Coram: Mwera J.  
Kamau for Plaintiff  
Onyiso Defendant  
Court clerk Njoroge

On 12.11.07 the plaintiff filed this suit specifically against the Commissioner of Prisons, (1<sup>st</sup> defendant) with the Hon the AG (2<sup>nd</sup> defendant), as the nominal defendant who appears for the government and its officers, as the 1<sup>st</sup> defendant is, in civil cases.

The first defendant was said to have been responsible for the administration and supervision of G. K. Kamiti Prison when this cause of action arose.

The plaintiff averred that on 21.3.02 this court allowed his appeal HC.CR.A 1192/98 to the extent of the time already served. He had another appeal HCCRA 1341/99 against conviction and sentence of death. The sentence was reduced to 6½ in prison. That the court ordered that that sentence had to run w.e.f 15.12.99. That according to his reading and understanding of the provisions and rules in the Prisons Act (Cap 90) regarding computing of sentences, he completed the term on 14.6.06. However, by being held in continued detention in prison between that 14.6.06 up to 13.11.06, the 1<sup>st</sup> defendant forcibly confined the plaintiff in prison against his will. So he suffered damage. To mitigate that the plaintiff filed HC CR MISC APPL. No. 559/06 and on 13.11.06 the court found that SP Maimbo had wrongly computed the plaintiff's pending sentences. The plaintiff was to be released forthwith. He was then released – some 5 months (or 152 days) from the time he ought to have been released namely, 14.6.06. Accordingly, he filed this cause based on unjustified and unnecessary confinement by the 1<sup>st</sup> defendant in prison. For that time complained of the plaintiff's personal freedoms and liberty were curtailed; he slept in difficult situations, ate unsuitable food and was subjected to harsh prison discipline some of which amounted to ill-treatment, thus he prayed for general, aggravated and exemplary damages costs and interest.

In the defence filed on 7.1.08 it was denied that the 2 appeals referred to in the plaint were determined in the plaintiff's favour. The claim of unlawful confinement in prison was also denied. Such confinement was said to have been neither wrong nor unconstitutional. That the acts complained of were lawful, justified and reasonable according to the 1<sup>st</sup> defendant's statutory mandate. To the defendants, the plaintiff suffered no loss or damage and in any event the suit herein was incompetent and defective since it was statute – barred under the Public Authorities Limitation Act (Cap. 39).

On 30.3.08 the plaintiff filed four (4) issues for determination. These were expanded to six on 21.2.11 when an agreed set was filed.

Attempts to settle bore no fruit. So the parties prepared the suit for hearing as per Civil Procedure Rules, 2010 and the plaintiff (PW1) took the witness stand.

He narrated the history of his cause especially as to the effect of the two appeals set out in the plaint and what that meant for sentence to be served. While in the first appeal the plaintiff's prison term was reduced to the time served, in the latter the death sentence was reduced to 6½ years. The plaintiff calculated that he would have been released on 14.6.06. But when he approached SP Maimbo on that issue, he was told that his release was due in July 2007. The plaintiff could not agree. Therefore he filed the Miscellaneous Application no. 559/06 and this court decided and ordered his release which came on 13.11.06. That being so, the plaintiff had been unjustifiably held in prison for 5 months being subjected to the rules there when he ought to have been a free man. Documents relating to the foregoing testimony were contained in Exh. P1 ( a bundle).

In cross-examination the court was told that SP Maimbo informed this court on 7.11.06 (Exh P1 -9) that after due computation of the prison term(s) to be served following the successful appeal(s) the plaintiff would be released at the latest on 20.9.08. To the plaintiff this was an error which that officer was said to have admitted.

Mr. Onyiso for the defendants informed the court that SP Maimbo who computed the plaintiff's release dates had passed on. And so Cpl Morris Okumu (DW1) who had worked with SP Maimbo in the same records office where the plaintiff's release dates were computed, came forward to testify for the defence.

Referring the computation done by SP Maimbo (Exh P1-9), DW1 referred to the two appeals, already alluded to above and how the sentences therein were to be served. The appeals arose from conviction and sentence on a charge of handling stolen property and robbery with violence. While 10 years term for handling stolen property was on appeal reduced to the term served as at 21.3.02, the death sentence was reduced to six and a half years. That on the handling charge the plaintiff was found to have served 3 years, 6 months and 15 days so far. So the total sentences on the charges added up to 10 years and 5 days. With the remission given only on the 3½ years plus 10 days, the longest period of discharge was 20.9.08, while the earliest possible date of release with remission of one year and 2 months was 21.7.07. That Justice Lesiit who heard the plaintiff's application did not agree with that computation and she ordered for his release (with 2 other co-appellants) on 9.11.06.

In cross examination, DW1 referred to Prison Rules (under section 84 Prisons Act) – rule 92 (1) (2) in particular which read that a convict would remain in prison for whatever period stated unless otherwise the court ordered. That the order to release was made on 9.11.06 while the actual release was on 13.11.06 instead of the earliest date possible – 21.7.07, as the court's order to release. The plaintiff had been in prison for 5 months more from 14.6.06. That closed the trial and both sides submitted.

The plaintiff's side went over the case as pleaded and the evidence. Then focus was placed on Rule **92 (1)** of the Prisons Rules (Cap 90). What was reproduced was however in relation to **sub-rule 2**

“ **92. (1)** .....

**(2) Where a prisoner on the same occasion is sentenced to several terms of imprisonment on different counts, such sentences shall be consecutive unless the court otherwise orders.”**

The court was told that the six and a half years term imposed w.e.f. 15.12.99 was covered by the above provision. And so he ought to have been released on 14.6.06, under the powers and duties imposed on the 1<sup>st</sup> defendant under Rule 94 of the same rules. He did not do so. His view was that release was due on 21.7.07.

Then the submission went into the appeals results as contained in the appeals registers of 1998 and 1999. The court was told that that:

**“.....information and details can be confirmed and verified upon perusal of the High Court Criminal Appeals Division registry registers for 1998 and 1999.”**

These registers were not produced in evidence or with leave, appended to the submission. The court was left wondering how it was supposed to come by the details of the **“RESULT”** of the appeals No. 1341, 1339, 1340 of 1999 where it was decided that the 3 appellants there, including the plaintiff had their sentences of death reduced to 6½ years, on each of the 3 counts – the sentences to run concurrently wef 15.12.99. Anyway, it was computed as per Rule 95(5) of the Prison Rules that the 6½ term began to run on 15.12.99. That term could only end on 14.6.06 and the plaintiff ought to have been released then. And with that the defence and its evidence (DW1) was termed wrong as regards the time of release. That meant the plaintiff was unlawfully held in prison for five and a half months for which a global sum of between sh. 13m and sh. 15m was proposed for compensation. The court was urged to apply the same awards to HCCC 769, 770 and 771 all of 2007. The court does not know what these 3 cases are about or who the parties are. May they take their own course.

However going back to this case and on the issue of serving the statutory notice pursuant to the Government Proceedings Act (Cap 40) reference was made to Exh P1 – 11. There is the notice dated 8.8.07 served and received by the 1<sup>st</sup> defendant on the same date (stamped). Fair enough. But nothing is said of the time limit in the Public Authorities Limitation Act (Cap 39) – 12 months to sue on a cause in tort.

Regarding relevant authorities the plaintiff had them aplenty including HC MISC APP No. 494/03 ***Dominic Arony Amolo Vs The Attorney-General***, where 3 judges sat in a constitutional matter. The declared, inter alia, that

**“ (a) The continued imprisonment of the applicant between 27.9.1984 and 5.10.84 was in breach of his right to liberty contrary to section 70 of the Constitution.”**

The learned judges went on to find another breach contrary to section 73 of the (old ) constitution. The present case is one of a tortious action. Also cited was the case HCCC 207/02 ***James Orengo Vs The Ag & Anr*** again where breaches of the constitution were found to have been committed and damages were awarded including exemplary/aggravated damages. Together with other relevant authorities cited damages ranged from sh. 1m to sh. 10m. The court was therefore asked to award sh. 10m for violation of constitutional rights (note: this claim was not based on this); sh 7m for wrongful confinement and sh. 4.5m exemplary damages. However, putting all that together, the plaintiff thought that he would be satisfied with a **global settlement** of between sh. 13m and sh. 15m. (see above).

The defendants’ position was that the claim herein was essentially based on **unlawful confinement** and not on a **breach of a constitutional right**. While the former fell under private law (tort) the later was in the nature of public law and the case of **Lt. Col. Peter Ngari Kagume & Ors Vs The Hon the AG** [2009] eKLR was cited in support. That the plaintiff was in prison pursuant to lawful sentences. Computation thereof by the 1<sup>st</sup> defendant was found to be in error by the judge in the miscellaneous application. That no arguments preceded that finding and no reason was assigned to it. In that brief submission it was proposed that if the plaintiff’s claim succeeded, then sh. 400,000/= would be adequate compensation. Again there was no reference to the suit having been filed out of time as per the Public Authorities Limitation Act. That part is therefore deemed to have been abandoned by the defence.

In determining a case before it a court takes in regard factors including, in civil litigation, the principal pleadings (the plaint and defence), the evidence, the law, the submissions if any and the circumstances of the case.

In this case which the court considered as based on the tort of unlawful extended detention in prison, reference was made to Rule 95 of the Prison Rules on calculation of remission, particularly sub-rule 5.

“95. (1) .....

**(5) Whenever a capital sentence is commuted to a sentence of imprisonment for a term of years, the sentence so commuted shall, for the purpose of remission be deemed to have commenced at the date the sentence of death was passed.”**

The date of commutation from the death to the prison term of 6½ years was wef. 15.12.99. That is the date that the 1<sup>st</sup> defendant ought to have considered remission and date of release of the plaintiff. The release probably could even be earlier than 14.6.06. The date the plaintiff held on. Probably it may as well not have been necessary to bring up the sentence regarding the handling charge. But be that as it may.

Having considered the circumstances of this case, the time of the unlawful continued confinement in prison, the plaintiff is awarded a global sum of sh. 2 million plus costs and interest.

Judgement accordingly.  
Delivered on 5/7/11.

**J. W. MWERA  
JUDGE**