



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Civil Application 753 of 2005**

JOHN CHORE..... APPLICANT

V E R S U S

HON. ATTORNEY GENERAL..... RESPONDENT

J U D G M E N T

Before me is an amended Originating Summons dated 20th May, 2004 and amended on 23rd June, 2006 filed by Zablon Mokuia & Company advocates for the applicant named as JOHN CHORE. The Respondent is the ATTORNEY-GENERAL. It was filed under section 84 (1 &2), 70 (A), 73(1), 74(1),75(1&2), 81(1), 82(1&3) of the Constitution and section 3 of the Judicature Act (Cap.), as well as section 3 and 3A of the Civil Procedure Act (Cap.21).

It seeks the following orders –

(1) *A declaration be and is hereby issued declaring*

that the circumstances under which the Applicant is prevented to go to his homes, move freely and do his business as any other ordinary citizen amounts to breach of the fundamental rights as to freedom of movement and protection of life contrary to section 81(1) of the Constitution.

(2) *A declaration be and is hereby issued declaring*

that the circumstances under which the Applicant was arrested confined and subsequently charged on the 22nd day of July 2003 constituted a breach of the Applicant's rights and freedoms of liberty, security of the person and the protection of the law as provided in section 70(A) of the Constitution of Kenya.

(3) *A declaration be and is hereby issued declaring*

that the period between 14th day of July, 2003 when the applicant was arrested till the time the applicant was discharged on the 21st day of May, 2004 constituted a period of continuous breach of the applicant's rights as to liberty guaranteed under section 72 of the Constitution of Kenya.

(4) *A declaration be and is hereby issued declaring*

that, the applicant was held in servitude in contravention of section 73(1) of the Constitution of Kenya during the aforesaid period between 14th July, 2003 to 21st May, 2004.

(5) *A declaration be and is hereby issued declaring*

that the holding of the applicant in confinement in a segregated block and in a cell number 10 in Kodiaga main G.K. Prison where insane and epileptic prisoners were held for a period of three and half (3/1/2) months amounted to cruelty and inhuman treatment and was a breach of section 74 of the Constitution of Kenya.

(6) *A declaration be and is hereby issued declaring*

that the failure refusal and/or neglect of the Provincial Administration to accept the applicant back as the Assistant Chief of Bomwancha Location after he was set free amounted to discrimination in breach of section 82(2) of the Constitution of Kenya.

(7) *A declaration be and is hereby issued declaring*

that the Applicant be and is hereby immediately reinstated as an Assistant Chief of Bomwancha sub-location, and further the applicant be and hereby awarded general damages for illegal removal from office and loss of promotion to the next ranks upwards.

(8) *A declaration be and is hereby given awarding*

the Applicant state security and/or the group calling itself Kisungu Sungu also known as community policing group be permanently restrained from harassing, threatening to kill and/or putting the life of the applicant in danger and from further destruction of the applicant's properties and the District Commissioner and the OCPD Kisii Central District be ordered to ensure that the court orders are complied with.

(9) *A declaration be and is hereby issued declaring that the circumstances under which the Applicant was subjected to while in prison resulted to the Applicant being sick, stressed, shocked and was inhuman contrary to section 71 (1) of the Constitution of Kenya on the protection of life.*

(10) *A declaration be and is hereby issued declaring that the circumstances under which the applicant was arrested, confined, threatened during and after he was set free is and was contrary to the protection of life of the applicant, his wife and children contrary to section 71(1) of the Constitution of Kenya.*

(11) *A declaration be and is hereby issued declaring that the circumstances under which the properties of the Applicant were specifically and meticulously destroyed and the Applicant and his family kept at bay from his own home is and was contrary to the protection of property provided by section 75(1&2) of the Constitution.*

(12) *A declaration be and is hereby issued declaring that the circumstances under which the Applicant was arrested confined and set free without being tried for the offence allegedly charged with amounted to malicious arrest and prosecution contrary to section 72(6) of the Constitution.*

(13) *A declaration be and is hereby issued declaring that the circumstances under which the Applicant was arrested, treated before the public, amounted to defamation contrary to section 82(2) of the Constitution.*

14 *THAT a declaration be and is hereby given awarding damages to the Applicant consequent upon the above declarations and/or such orders writs and/or directions for purposed of enforcing and securing the enforcement of the provisions herein above discussed as having been breached in relation to the Applicant.*

(15) *THAT the costs of this application be provided for in favour of the applicant in any event.*

There are several grounds on the face of the Originating Summons. The said grounds are to the effect that the applicant who was an Assistant Chief was arrested, taken to the police, charged in court and detained in prison before a nolle prosequi was entered on 21st May, 2004 after he had spent about one year in remand.

The amended Originating Summons was filed with a further affidavit sworn by the applicant on 23rd June, 2006. The said further affidavit appears to be in response to grounds of objection filed by the respondent dated 3rd March, 2006. It was deposed in the affidavit, inter alia, that the applicant had been charged with murder in the High Court, that he was kept in custody, and later a nolle prosequi was entered. However, the applicant's request to be reinstated to employment has not been successful.

The applicant, through his counsel, also filed written submissions. In the submissions it was contended inter alia that the prayers sought were in the Originating Summons dated 20th May, 2005 as amended on 23rd June, 2006 pursuant to leave granted by court on 12th

June, 2006. It was contended that this was a Constitutional reference wherein the applicant was claiming that his fundamental rights were violated, and the matter was brought to court under section 84 of the Constitution. It was contended that the applicant was put into prison cells with insane and epileptic prisoners who made noise and caused him sleepless nights; that the prisoners beat the applicant and snatched his food and his complaints to the prison authorities fell on deaf ears; the prison authorities mixed the applicants with prisoners suffering from tuberculosis; and that the prison authorities exposed the applicant to powerful bulbs throughout which made the applicant very thirsty thus forcing him to drink filthy and contaminated water and consequently the applicant was always sick; and that the state entered a nolle prosequi after one year of incarceration which was a violation of the applicant's constitutional rights.

The applicant, in the submissions, opposed the grounds of oppositions filed by the Respondent. It was contended that the application was not fatally defective. It was also contended that the orders sought do lie against the respondent. It was also contended that prayer 14 on damages can be awarded in an application of this nature. It was also contended that the police were malicious in charging the applicant in court.

Submissions were made to support each and every prayer made. Several case authorities were relied upon.

In response to the application, the respondent filed grounds of objection on 6th March, 2006 in the following terms-

1. *THAT the application is fatally defective.*
2. *THAT the orders sought cannot lie against the Respondent.*
3. *THAT the order sought vide prayer 14 cannot be granted in an application of this nature.*
4. *THAT the respondent's servants and/or agents in arresting and detaining the applicant acted with reasonable cause and within their powers.*
5. *THAT the Applicant was charged in a competent court of law and for an offence known to the law and none of his rights have been infringed in any way.*
6. *THAT the police officers acted strictly in accordance with the law after a complaint was made to the police by the complainant, the matter was thoroughly investigated, and evidence sufficient to charge the applicant was found.*
7. *THAT in light of the aforesaid, the application is incompetent and bad in law and the same should be dismissed with costs.*

At the hearing Mr. Kabaka for the applicant addressed me. The respondent was not represented. Mr. Kabaka informed me that the application was initially filed as an Originating Summons dated 20th May, 2004 with an affidavit sworn by the applicant. The respondent only filed grounds of objection. Therefore, in effect the application was unopposed, as no substantive response to the application was filed. Therefore the court should allow the application and grant the prayers sought.

I have considered the application, documents filed, submissions and authorities cited by the applicant's counsel, as well as the verbal

submissions made in court.

I must say that I don't agree with Mr. Kabaka that the application stands unopposed. The grounds of opposition are challenged to the application. Therefore, the application was opposed. Even the fact that the Attorney-General did not attend court on the hearing date, in itself, does not mean that the application was unopposed, because the Attorney-General had already opposed it by filing the grounds of opposition which are on record and I am bound to consider them.

Having considered the facts and the law with regard to this matter, I am of the view that this application will not succeed. This is because, in my view, no constitutional contravention has been demonstrated.

In the case of MATIBA –VS- ATTORNEY-GENERAL Miscellaneous Application No. 666 of 1990, the Court stated-

“An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement.”

The above position is important because not all infringements of an individual's legal rights amounts to a Constitutional contravention of someone's fundamental rights. In addition, the applicant must bring himself within the specific ambit of sections or subsections under section 70 to 83 (inclusive) of the Constitution. As I have said earlier not all breaches of someone's legal rights given rise to contravention of rights under the Constitution.

The applicant appears to be complaining about being charged without sufficient cause. That is a civil law matter, under the law of torts. It could fall in the area of malicious prosecution, if proved. It is not a Constitutional matter.

He is also complaining about being incarcerated in prison custody for about one year, before being released after a nolle prosequi was entered by the Attorney-General. Again, that would be in the area of the civil law for false imprisonment, if proved. He was himself charged with a capital offence, therefore in terms of section 72(5) of the Constitution he had to remain in custody, because he could not be released on bond. He cannot complain of constitutional contraventions because his confinement in custody is sanctioned by the Constitution.

The applicant also complains of loss of his job. His job as Assistant Chief is not constitutionally underpinned. That loss of job, if at all, is matter for the civil courts. His complaints on security and security of property are not peculiar to himself alone but to all people who live in that area. Therefore there is no Constitutional issue raised.

I find and hold that the pleadings herein do not disclose any Constitutional contravention and I dismiss this matter. I will not award costs to the respondent because they did not attend the hearing.

For the above reasons, I dismiss this matter. Each party will bear their respective costs.

Dated and delivered at Nairobi this 16th day of February, 2010.

George Dulu
Judge.

In the presence of-

Mr. Kabaka for the applicant

David Mutisya court clerk.