



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO.33 OF 2009
IN THE MATTER OF SECTION (84) 1
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 70 (1) AND 76 OF THE CONSTITUTION OF KENYA
BETWEEN

DAVID MUGAMBI SIMON..... PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL..... 1ST RESPONDENT
COMMISSIONER OF POLICE..... 2ND RESPONDENT

JUDGMENT

David Mugambi Simon filed the petition dated 23/2/08 under S 84 (1) of the Constitution, alleging breach of his Constitutional rights by the police. He alleges breach of his rights under sections 70 (a), 72 (6), 73 (1), 74 (1), 76. The petition is supported by the affidavit of the Petitioner and submissions dated 6/7/09. The Respondents did not file any affidavit or grounds in response. However, Miss Mbilo counsel urged points of law at the hearing. The Petitioner was represented by Mr. Michael Waweru Advocate.

The case of the petitioner is that on 23/5/06 at about 12.30 p.m., while in his lorry on his business on Accra road, policemen arrested him handcuffed him on both hands and feet, he was whisked off to the police station in a police vehicle was beaten and tortured while at the police station. While under arrest, photographs of him were taken and appeared in the Daily Newspapers and which continues to be shown in the papers whenever thugs or robbers are mentioned (DMS 3 & 4). He was released the next day at 4.00 p.m. without being told why he was arrested and he therefore seeks the following declarations and orders;

1. A declaration that the circumstances under which the Applicant was searched arrested and held on Accra Road and detained in the police station constituted a breach of the Applicant's right and freedom of liberty and security of the person and the protection of the law under sections 70 (a) and 72 of the Constitution.
2. A declaration that the Applicant was held in servitude in contravention of S 73 (1) of the Constitution during the period he was searched arrested and detained.
3. A declaration that the tying of his legs, the hands and the thumb with sisal strings and kneeling the Applicant down amounted to cruel and inhuman treatment and was in breach of S 74 of the Constitution.
4. A declaration that the arbitrary search of this person, his property without his consent was a breach of S 76 of the Constitution.
5. Damages consequential thereto.
6. Costs of the petition.

Ms Mbilo who appeared for the Attorney General argued that this court's jurisdiction is not properly invoked and prima facie, no case of violation has been proved. That instead the issues raised should have been canvassed in an ordinary civil suit but that the Applicant came to this court because he was caught up by limitation of time and was circumventing the Limitation of Actions Act Cap 40 Laws of Kenya on defamation. That there was no evidence of police arrest and detention.

The Respondents did not file any affidavit in reply to the factual allegations deposed to by the Applicant in his affidavit. Those facts stand unchallenged. He has alleged arrest, torture, detention and release without any charges. The Respondents cannot just wish away those facts. The Respondent should have filed an affidavit to rebut them. There are photographs in the Taifa Leo and Nation Newspapers showing that the Applicant was indeed under arrest and even the pictures of the police officers are shown. There should have been specific rebuttal of those facts.

The petitioner alleged that his rights under S 70 (a) were violated. S 70 of the Constitution is the foundation of all fundamental rights and provides generally for all the rights and subjects them to rights of others and the public interest. S 70 (a) provides that every person in Kenya is entitled to the right to life, security of the person and protection of the law. He also invoked S 72 which is protection of right to a person's liberty save as may be authorized by law. The Applicant has alleged that he was arrested by police officers from his place of

business on Accra Road, tied up, detained from 12.30 p.m. to the next day at 4.00 p.m. and released without any formal charges. As earlier noted there has been no rebuttal of these allegations and I will find in favour of the Applicant that the Applicant was arrested detained against his will and he was deprived of his liberty from 23/5/06 at 12.30 p.m. to 24/5/06 at 4.00 p.m. for no good course.

The Applicant also complains that his rights under S 73 (1) was violated in relation to him. That section provides protection from slavery and forced labour. In the case of **DOMINIC ARONY AMOLO V THE HON THE ATTORNEY GENERAL MISC APP.494/03**, the court considered what constitutes slavery and servitude and said;

“Servitude is defined as “the state of the person who is subjected, voluntarily or otherwise to another person as his subject” and

‘slavery’ as “the condition of a slave; that civil relation in which a man has absolute power over the life, torture and liberty of another. (Blacks Law Dictionary, 6th Edition)”.

The Concise Thesaurus - the Bank of English 2010 editor defines slavery as **“bondage, captivity, enslaved. Serfdom, servitude, subjugation thralldom, vassalage “ and ‘servitude’ as bondage, bonds, chains, enslavement, obedience, serfdom, vassalage etc.”**

The Applicant was held by the police against his will from 23/5/06 at 12.30 p.m. to 24/5/06 about 4.00 p.m., over one full day. The holding of the Applicant against his will was in breach of his right not to be held in slavery or servitude and a declaration is granted as prayed at prayer (ii).

The Applicant also complained that he was treated inhumanely contrary to section 74 of the Constitution. That section offers protection against torture, inhuman or degrading punishment or other treatment. The Respondent has failed to explain why the Applicant was held. The pictures which were exhibited do show the applicant handcuffed and under police guard. His picture was in the Daily Papers, seen by the whole world. In the **ARONY** case, (supra) the court found that the confinement of a person in a small cell with insane persons is inhuman and offensive to decency. Though the Applicant claims that he was tortured and suffered injuries he has not produced any medical evidence to support those allegations.

The Applicant was just a suspect. There is no reason why the police had to handcuff him display him in the media in handcuffs and beat him up if at all. That is not part of the investigations if at all some were ongoing.

Though the treatment of the Applicant cannot measure up to that of case of **ARONY**, I do find that the Applicant was treated inhumanely and suffered degrading treatment and I would grant declaration No. 1 (iii).

The applicant also complains that he was arbitrarily searched on his person and his property contrary to S 76 of the Constitution. That section provides that except with his own consent, no person shall be subjected to the search of his person or his property. The limitation to that protection is under S 76 (2) and the Respondents did not demonstrate that they fall under one of those exceptions. The reason for the arbitrary search has not been shown and I would grant the declaration IV.

The Applicant prays for exemplary damages and general damages for the said violations. The Police have to do their work diligently and not carry out arbitrary arrests and detention and is therefore entitled to damages. Exemplary damages would be awarded in special circumstances where the applicant has not shown that he is entitled to them. In the **ARONY** case the court went into detail analysing cases where damages have been awarded for breach of constitutional rights. I find no justification for award of Kshs.10,000,000 as damages and Kshs.1,000,000 as exemplary damages that the Applicant prays for. In my view, a global sum of Kshs. 500,000/= plus costs and interest will be sufficient to compensate the Petitioner.

Dated and delivered at Nairobi this 7th day of June 2010.

R.P.V. WENDOH
JUDGE

In the Presence of :

Mr. M. Owuor for Applicant

Mr. Monge for Respondent

Muturi Court clerk