



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CONSTITUTIONAL PETITION NO. 119 OF 2009

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND
PROCEDURE RULES, 2006, RULES 11-24**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOM UNDER**

**SECTIONS 70 (a) (b) AND (c), 72 (3) (b), 72 (5) & (6), 74, 75 AND 77 OF THE CONSTITUTION
OF KENYA**

BETWEEN

ROBERT KISIARA DIKIR.....1ST
PETITIONER

LIARAM KITANGU.....2ND
PETITIONER

KILETIA OLOL DIKIR MAISIA.....3RD
PETITIONER

ELIJAH MAISIA.....4TH
PETITIONER

AND

THE OFFICER COMMANDING KEIYAN GENERAL SERVICE UNIT (GSU) POST.....1ST
RESPONDENT

THE ASSISTANT CHIEF, ENOSAEN SUB LOCATION.....2ND
RESPONDENT

THE ATTORNEY GENERAL.....3RD
RESPONDENT

RULING

The Petitioners are residents of Moita sub location, Moita location, Keiyan Division within Trans-Mara District. In their petition filed on 23rd September 2009, they stated that on 11th July 2009 at about 6.00 a.m., General Service Unit (GSU) Police Officers under the command and instructions of the 1st and 2nd respondents arrested the 1st and 2nd petitioners from their house and took them to Keiyan GSU Post. The officers did not give the reason for effecting the arrest. The 1st and 2nd petitioners were detained for 4 and 5 days respectively without being informed of the reasons for such arrest. The efforts of their family members to have access to them and establish the cause of their arrest were in vain as the concerned GSU Officers and the Assistant Chief in whose custody and care the two petitioners were kept were extremely hostile to the petitioners and their relatives. Subsequently 3 GSU Officers attached to Keiyan GSU Post together with the 3rd and 4th respondents went to the 2nd and 3rd petitioners' home on 14th July 2009 and took away 8 cattle, 4 belonging to the 3rd petitioner and 4 to the 4th petitioner. That was done by use of force and violence without giving any explanation. The animals were taken to the GSU Post and the petitioners were denied access to the camp. The petitioners alleged that their fundamental rights as provided for under **section 72 (3) (b), 74, 75 and 77** of the **Constitution of Kenya** (now repealed) had been violated.

The 1st respondent ordered the release of the 1st petitioner on 15th July 2009 at 2 p.m. without any charges having been preferred against him. By then the 1st respondent had been held *incommunicado* for a period of 5 days. The 2nd petitioner was released on 14th July 2009 at about 3 p.m. Similarly no charges were preferred against him. The 1st and 2nd petitioners alleged that over the period of their unlawful detention they were subjected to degrading and inhuman treatment by being beaten senselessly to extract admission that they were thieves and had stolen 5 cattle belonging to the 4th respondent. The petitioners alleged that the 4th respondent was also liable for the damages suffered because he had accompanied the officers who effected the arrest and participated in assaulting the 1st and 2nd petitioners.

Despite their release, the respondents continued to hold the 3rd and 4th petitioners' cattle without any reasonable cause or justification whatsoever.

For the aforesaid reasons, the petitioners urged the court to declare that their arrest and confinement *incommunicado* is unconstitutional and amounts to breach and/or violation of their fundamental constitutional rights and freedoms. They also urged the court to declare that the seizure of the 8 cattle is unconstitutional and order return of the same and/or payment of equivalent monetary value thereof. They further prayed for an award of compensation as provided for under **section 72 (6)** of the **Constitution**.

The petition was supported by an affidavit sworn by the 1st petitioner for and on behalf of all the petitioners. The said affidavit amplified the issues stated in the petition. There is also a supplementary affidavit sworn by the 1st petitioner to which is attached a report by Dr. George Omondi Atinga, District Veterinary Officer, Trans-Mara, stating the value of the animals that were taken from the petitioners. They comprised of five cows and three bulls. The market value for a bull is Kshs.40,000/= to Kshs.45,000/= while that of a cow is Kshs.20,000/= to Ksh.25,000/=. The petitioners claimed Kshs.260,000/= as the market value of the said animals.

The respondents were served with the petition and the accompanying affidavits in September 2009 but upto July 2010 no reply had been filed. **Mr. Mutuku, Senior Principal State Counsel**, told the court that his office sought instructions from the 1st and 2nd respondents but there was no response given to the Attorney General. The court directed both parties to file their written submissions but only the petitioners' counsel did so.

This petition was filed on 23rd September 2009 before the new Constitution came into being. Under the **6th Schedule Sub-article 22** of the **new Constitution** all judicial proceedings that had been filed before promulgation of the new Constitution were to continue and be determined accordingly. This petition will therefore be determined with reference to the provisions of the old constitution under which

it was filed.

From the evidence on record, it is clear that the 1st and 2nd petitioners were held **incommunicado** for a period ranging from 4 to 5 days. The police officers who effected the arrest did not tell them the reasons for so doing. The 1st and 2nd petitioners ought to have been taken to court within a period of 24 hours from the date of their arrest or as soon as practicable. The respondents therefore violated the provisions of **section 72 (3) (b) of the Constitution**. I have therefore no hesitation in making the declaration as sought in prayer (1) of the Petition.

The respondents also violated the constitutional rights of the 3rd and 4th petitioners by taking away their animals for no apparent reason. The value of the said animals was assessed at Kshs.260,000/= and I award the same.

Section 72 (6) of the Constitution provides that a person who is unlawfully arrested or detained by another shall be entitled to compensation from that other person. In **PATRICK MBAKA MAJIWA – VS- OCS KENDU BAY POLICE STATION & THE ATTORNEY GENERAL**, Constitutional Petition No. 75 of 2008, the petitioner was held **incommunicado** by the police for a period of 20 days. This court awarded him Kshs. 300,000/= as general damages for unlawful arrest, Kshs.300,000/= for wrongful confinement and Kshs.400,000/= as exemplary damages. In that case the court stated:

“Damages awarded in a matter of this nature should reflect the seriousness of violation of a citizen’s constitutional right. Fundamental rights and freedom 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 provisions we will be encouraging such violation.”

The above sentiments are equally applicable in this petition.

In view of the foregoing, I award the 1st and 2nd petitioners Kshs.200,000/= each for unlawful arrest and a similar sum to each for wrongful confinement. The 1st and 2nd petitioners are further awarded a sum of Kshs.250,000/= each as exemplary damages.

In summary, the damages awarded are as follows:

1. Damages for unlawful arrest payable to

the 1st & 2nd petitioners Kshs. 200,000x2 Kshs.400,000/=

2. Damages for wrongful confinement payable to

the 1st & 2nd petitioners Kshs.200,000x2 Kshs.400,000/=

3. Exemplary damages payable to

The 1st & 2nd petitioners Kshs.250,000x2 Kshs.500,000/=

4. Market value of cattle payable

To both the 3rd & 4th petitioners Kshs.260,000/=

TOTAL Kshs.1,560,000/=

The 3rd respondent shall bear the costs of this petition.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF SEPTEMBER, 2010.

D. MUSINGA

JUDGE.

30/9/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Sagwe for Mr. Otieno for the Petitioner

N/A for Respondent

Court: Ruling delivered in open court on 30th September, 2010.

D. MUSINGA
JUDGE.