



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Petition 9 of 2009

**IN THE MATTER OF SECTION 84 (1) (6) OF THE CONSTITUTION OF KENYA
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS OF THE INDIVIDUAL)**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 70 AND 73 OF THE CONSTITUTION**

BETWEEN

SADAT KEYA KISALI.....PETITIONER

MAXIMUM PRISON..... 1ST RESPONDENT

COMMISSIONER OF PRISONS..... 2ND RESPONDENT

REGISTRAR OF THE HIGH COURT OF KENYA.....3RD RESPONDENT

HON. ATTORNEY GENERAL..... 4TH RESPONDENT

JUDGMENT

The petitioner, Sadat Keya Kisali was convicted of Criminal offence by the Chief Magistrate's Court Makadara on 16/5/2006. He pleaded guilty and was sentenced to 4 years imprisonment.. He appealed against the sentence and on 22/10/2007, the sentence was reduced to 2 years from the date of imprisonment. Sadat was not released from prison till 31/10/2007. He is aggrieved by the act of detention for 9 days from 22/10/07 to 31/10/07 and alleges breach of his constitutional rights under section 70, 72 and 74 of the Constitution. He blames the prison security personnel and the High Court Registrar for the delay in his being released from Kamiti prison. Both the Deputy Registrar and the officer in-charge Kamiti prison have denied acting unlawfully, and claim that the delay was justified.

The issues for determination are;

1. Whether the Petition discloses a cause of action;

2. Whether the delay in releasing the Petitioner from prison amounts to violation of his rights under the various sections of the constitution, or was the delay justified.

The petitioner seeks the following orders:

(1) A declaration that the period between 22/10/2007 upto and 31/10/2007 when he was held at Kamiti Maximum G K Prison breached his right to liberty, security of the person and the protection of the law under section 70 and 72 of the Constitution;

(2) A declaration that the petitioner was held in servitude and subjected to cruel and inhuman treatment in contravention of section 73, (1) and 74 of the Constitution.

(3) Damages for purposes of enforcing the above named breaches.

(4) Any other such order the Court may deem fit to grant to.

According to the Petitioner, the 1st to 3rd Respondents were all aware that he was entitled to be released on 22/10/2007 because the state counsel, the prison warders were present in Court when the order was made by the court. Alternatively he contends that the 3rd Respondent delayed in transmitting the necessary radio signals to the 1st and 2nd Respondents for nine days that resulted in breach of his rights. Ntwigaan officer based at Kamiti prison swore the affidavit dated 10/3/2009 on behalf of the 1st Respondent. He did admit that the petitioner's sentence was reduced on 22/10/2007 after his appeal was heard and the duly signed order dated 29/10/2009 was received by Prisons Court officer on 31/10/2007 (A G 1). Upon receipt of the order the prisons officer sent the signal to Nairobi Remand and Allocation prison and the officer transmitted it through a radio signal (AG2) to the officer in-charge Kamiti Prison as proof that the order was from the Deputy Registrar Criminal Division. Once received, sentence was computed and the Petitioner was released forthwith. He denied having caused any delay in the release of the petitioner.

The Principal Deputy Registrar of the High Court Ms Wamae deponed that after the court made the order releasing the applicant on 22/10/2007 reducing the petitioner's sentence to 2 years, the judgment did not specify the date of release. She was required to extract a Court order from the Judgment, relay it to the Prison authorities for their action. The order was signed on 29/10/2007 and a signal was transmitted to the prison authorities on 31/10/2007. That it was due to pressure of work that the order was not extracted immediately. She was of the view that the release of the petitioner on 31/10/2009 was within reasonable time as provided by section 45 (1) of the Prisons act. She urged the court to dismiss the petition for want of merit.

The applicants were represented by Mr Kariuki and Mr Onyiso appeared for the Respondents.

It is the Respondents contention that the Petitioner has not demonstrated that he has a cause of action because he has not disclosed the nature of the violations committed by the Respondents. It is trite law and the courts have repeatedly held that in constitutional applications brought under section 65 and 84 of the Constitution, the person alleging breach or likely breach of his rights must plead with precision the provision allegedly violated, the nature and manner of the violation in the famous case of **ANARITA KARIMI NJERU V THE REP (NOI) (1979) KLR 154 TREVELYAN AND HANCOX JJ** had this to say:

“ We would , however , again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that is to set out with a reasonable degree of precisions that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed” page 156.

The Court in the cases of **CYPRIAN KUBAI V STANLEY KANYONGA MWENDA MISC AP. 612/2002.**

MATIBA V AG MISC. 666/1990 and KBS V A G MISC 413/2005 all maintained the above position. The petitioner generally invokes section 70, 72, 73 , 74 of the Constitution. Section 70 secures the right to protection of the law. It is really the foundation of all fundamental rights and provides that the rights are not absolute but subject to the rights of others and to public interest. The petitioner did not specify that right was infringed under S 70 and what subsection of S 70 he seeks to enforce. S 70 has paras (a), (b), and (c). His pleadings in relation to section 70 is vague and the Respondent could not possibly respond to the allegation.

Section 72 guarantees protection to personal liberty but there are exceptions to that rule listed at section 72 , (1) (a) – 10, (J) that section reads;

“Section 72 (1) no person shall be deprived of his personal liberty save as authorized in the following cases

(a) In execution of the sentence or order of a Court, whether established for Kenya or some other country in respect of a criminal offence of which he has been convicted;

(b) In execution of the order of the High Court or the Court of Appeal punishing him for contempt of that Court or of another Court or tribunal (C – J)”

The applicant has to bring himself outside the various limitations under the Act. He had been convicted of an offence and was to serve sentence which the court has reduced on appeal. He was being lawfully held following the conviction. It is upon the Petitioner to show that from 22/10/2008 to 31/10/2008 he was no longer serving sentence. I will revisit that issue later in this Judgment.

The applicant also alleges breach of his right under section 73 (1) which is a protection from slavery. Nowhere in his pleadings has the petitioner alleged that he was being held in servitude or slavery. He alleges that there was a delay in releasing him from prison and in my view that is not slavery of servitude. He was still in prison where he had been serving sentence following a conviction. In the document exhibited by the respondent, **REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 2ND EDITION**, by Dinah Shelton defines the terms slavery and servitude slavery is said to be when someone actually owns another like a piece of property. Servitude is similar although one may live in the persons property, work for them, and be unable to leave but they do not officially own you. The Concise Oxford English Dictionary defines the two terms as follows –“ **‘slave’ – “a person who is the legal property of another and is forced to obey them. A person who is excessively dependent upon or controlled by”**

Servitude is defined as **“Completely subject to someone more powerful, the state of being a slave.”** The Applicant was none of the above. He was not held by anybody nor is he subject to or works for any of the Respondent but had been serving sentence and there was alleged delay in his release.

The last section that was invoked is S 74 that offers protection

from inhuman treatment. That section reads as follows:

“74 (1) No person shall be subject to torture or inhuman or degrading punishment or other treatment.”

The applicant has not deponed to having been tortured by anybody nor was he exposed to inhuman conditions or treatment. All he claims is that the delay in the release from prison subjected him to mental torture and agony. In the Concise Oxford English Dictionary, Torture is defined as **“the action or practice of inflicting severe pain as a punishment or a forcible means of persuasion, great suffering or anxiety”**. The Applicant has not demonstrated that he was exposed to any of the above. His prison term had just been reduced contrary to alleging mental torture, he should have been at ease awaiting release. I doubt that the period of 7 days while awaiting release would cause the Petitioner such anxiety as to cause him mental torture.

In the Oxford English Dictionary, Inhuman treatment is defined as **“without compassion, cruel lacking positive human qualities, Barbaric, not human minded or character.”** The applicant has not demonstrated that one of the respondents treated him as described above.

In the book earlier referred to by the Respondent – **REMEDIES IN INTERNATIONAL HUMAN RIGHTS**

by Shelton, she defines torture as

“Torture occurs when someone acting in an official capacity (for example a police officer or soldier) deliberately causes serious pain or suffering (physical or mental) to another person. This might be to punish someone or to intimidate or obtain information from them.

- **Inhuman treatment or punishment includes:**
- **Serious physical assault**
- **Psychological interrogation**
- **Inhuman detention condition or restraints**
- **Failing to give medical treatment or taking it away from a person with a serious illness**
- **Threatening to torture someone, if the threat is real and immediate”**

The Applicant remained in the prison where he had been serving sentence for the nine days from 22.10.07. he has not shown that any of the above actions were committed against him.

After I find that the Petitioner did not bother to specifically plead how the rights guaranteed under the pleaded sections were violated. It is not enough to plead and allege. They must be pleaded and supported by facts.

Was there a delay in releasing the applicant from prison? After hearing the petitioner on appeal, the court reduced the sentence to 2 years. He had been convicted on his own plea on 23/5/2006. As of 22/10/2007 he had served 1 year and 5 months. The court never ordered that he was released as of 22/10/2007. The petitioner’s deponent at paragraph 13 of his affidavit that he had been declared a free man is not truthful. Since he had not yet served 2 years in prison, he could only be released if the 1st respondent invoked Section 46 (1) of the Prisons Act and gave him remission. That section reads:-

“46 (1) Convicted counsel prisoners to imprisonment whether by one sentence or consecutive sentences for a period exceeding one month may by industry and good conduct earn a remission of one third of

their sentences or sentences

(2) For the purpose of giving effect to the provision of sub-section (1) of this section, each person whose sentence is reduced shall be credited with full remissions to which he would be entitled at the end of this sentence if he had not lost any remission of sentence.

The prisoner can only be released upon completion of his sentence less the remission period in accordance with Section 95(1) of the Prison Act. Entitlement to remission is subject to good conduct and industry and this must be assessed and determined by the 1st Respondent. The Petitioner had served 1 year 5 months and the court would not have known whether he was entitled to remission or not. It is the 1st Respondent to determine whether or not the Applicant is entitled to remission. The 1st Respondent has the duty under S 30 of the Act to detain anybody committed to his custody in accordance to the warrant or order of the person who committed him. He had been sentenced to 4 years. When the court read the Judgment reducing the Sentence and the applicant could only be released upon receipt by the 1st Respondent, of a court order varying the sentence. The 1st Respondent did not receive the court's order till 31/10/2007 when it was forwarded it to him. The 1st Respondent had no authority to release the petitioner except with the court order and it seems he did so properly upon receipt of the order and must have taken into account the remission period.

The Deputy Registrar High Court has explained why the delay in remitting the order to the 1st Respondent. She was following due process and the applicant has not demonstrated that the Deputy Registrar just sat back and did nothing about extracting and preparing order of release. The Deputy Registrar High Court has pleaded justification in the delay in releasing the court order. The order of the court did not accord the Petitioner immediate release. The Petitioner's release was subject to his being granted remission. He has not demonstrated that he was entitled to be released on 22/10/09 and in my view he was still under lawful custody of the 1st Respondent between 22/10/09 and 31/10/09. He can not therefore claim infringement of rights at that time as that fell under the limitations allowed under S 72 of the Constitution

In sum, I find that the petition does not disclose a cause of action under Section 84 of the Constitution and the Petitioner, has failed to prove that there was a delay in his being released. The petition is dismissed with each party bearing their own costs.

Dated and delivered this 25th day of November 2009.

R.P.V. WEONDH

JUDGE

Present

Mr. Mutinda for Respondent

Muturi court clerk