



**Kasina v Attorney General & another (Petition E369 of 2021) [2024] KEHC 7573 (KLR)
(Constitutional and Human Rights) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E369 OF 2021

EC MWITA, J

JUNE 21, 2024

BETWEEN

MBUVI KASINA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

JUDGMENT

1. On 16th July 2011 at around 4.30 am, people claiming to be police officers, invaded the petitioner's residence flat 16, at TOWA flats Athi River Town, without a search warrant. They conducted a search in his house, confiscated two mobile phones and a laptop from which they took data and information without his consent.
2. They picked the petitioner in a vehicle, blindfolded him and took him to unknown place for close to four hours. The petitioner later found himself at Athi River Police Station cells where he was held incommunicado, denied water, food and basic human needs.
3. In the afternoon, the same day, another team of people also claiming to be police officers in civilian clothes, took the petitioner to industrial Area Police Station where he was booked in as a suspect. He was released on 18th July 2011 without being charged or informed of the reason for his arrest.
4. The petitioner was aggrieved and filed this petition seeking a declaration that the respondents' conduct infringed his constitutional rights guaranteed under articles 27, 29, 31, 48, 49 and 50 of *the Constitution*; general damages for violation of his constitutional rights, costs of the petition and interest.



5. The petition was supported by his affidavit and the testimony in court and written submissions. From the petition, affidavit, testimony and written submissions, the petitioner's case is that the respondents violated his constitutional rights during the arrest and detention, including the right to dignity guaranteed under 28 of *the Constitution*. He was subjected to physical and psychological suffering in violation of article 29 of *the Constitution*.
6. The petitioner asserted that contrary to the allegations in the grounds of opposition, he had demonstrated how his constitutional rights were violated in his petition, supporting affidavit and testimony.
7. In his testimony, the petitioner relied on his supporting affidavit sworn on 24th February 2023 as his evidence before the court. He reiterated that he was arrested on 16th July 2011 at about 4.30 am on a Saturday and released on 18th July 2011 between 10-11 pm. He urged the Court to find that the respondents violated his fundamental rights and freedoms and award him general damages for these violations, costs and interest.
8. In cross examination, the petitioner admitted that he did not give description of the phones and laptop, or produce evidence of ownership. He also did not produce evidence that he had made a claim for the items at the police station.
9. In his submissions, the petitioner cited article 49 of *the Constitution*, article 9 of the International Covenant on Civil and Political Rights and relied on decisions in *Siewchand Ramanoop v The AG of T& T*, (PC Appeal No. 13 of 2004); *Dendy v University of Witwatersrand, Johannesburg & Others* (2006) LRC 291; *Lucas Omolla Waweru v Attorney General and another* [2012] eKLR and *Daniel Waweru Njoroge & 17 Others v Attorney General* [2015] eKLR.
10. Relying on article 23(3) (e) of *the Constitution*, the petitioner urged the court to order adequate compensation on finding that the respondents violated his constitutional rights. He thus urged the court to award him general damages of Kshs. 10,000,00 for the violation of his constitutional rights, and damages of Kshs 1,000,000 for unlawful arrest and false imprisonment.

Response

11. The respondents opposed the petition through grounds of opposition, replying affidavit, witness testimony and written submissions. From all these, the respondents' case was that the petitioner had not demonstrated how his constitutional rights were violated, and the petition lacked critical information with regard to the arrest and of the alleged lost property.
12. According to the respondents, the petitioner is guilty of laches given that the alleged violations took place more than 10 years ago and the officers that alleged to have arrested him have since left the stations. The respondents again argue that the petition was not supported by an affidavit and has been brought in bad faith.
13. It is deposed in the replying affidavit sworn by CPL Judith Muthoni, (CPL Muthoni), the investigating officer in the case, that the petitioner was accused of improper use of registered telecommunication system; that on 16th July 2011, while on duty with CPL Kamau, they were called by the controller from Nairobi Area Head Office and informed of a suspect who needed to be collected from Athi River Police Station and taken to Industrial Area Police Station.
14. They proceeded to Athi River Police Station and picked the petitioner. They were not given any exhibits or property belonging to the petitioner at the time they collected him. They arrived at Industrial Area Police Station where the petitioner was booked in custody in good state.



15. On 18th July 2011, the petitioner was released vide O.B No. 54, under the instructions of the former OCS, Industrial Area Police Station after a successful mediation. The petitioner left the station without any complaint.
16. CPL Muthoni stated that the petitioner had not provided proof of ownership of the items he alleged to have lost. The petitioner had also not provided serial numbers and IMEI numbers that would assist in finding the location of the items.
17. In the written submissions, the respondents reiterated that the petitioner was guilty of laches having filed the petition more than 10 years after the alleged violations without any explanation; thus denying the respondents an opportunity to mount a substantive response to the allegations. Reliance was placed on *James Kanyita Nderitu v Attorney General & another* [2013] eKLR, and *Abigael Barmao v Mwangi Theuri* [2014] eKLR.
18. The respondents again relied on *Anarita Karimi Njeru v Republic* (1979) eKLR, for the argument that the petitioner had failed to demonstrate how his right to non-discrimination, security of persons and right of access to justice were violated.
19. The respondents contended that, while the petitioner alleged that his two phones and laptop were confiscated during the arrest, he did not adduce evidence to prove ownership. He never provided serial numbers which would have aided in finding the location of the same.
20. It is the respondents' case that the petitioner was arrested by officers from Athi River Police Station within the jurisdiction he lived in, and handed over to officers from Industrial Area Police Station where the complaint had been lodged, and the jurisdiction to investigate the matter.
21. The arrest took place on a Saturday and he was released on a Monday. For that reason, the earliest the petitioner could have been presented to court would have been on the Monday the day he was released. It was the respondents' case, that due to the delay in filing the petition, they could not get hold of the arresting officers or the then OCS Industrial Area Police Station, to provide an account of the events leading to the petitioner's release.
22. The respondents asserted that petitioner's rights under articles 27, 29, 31, 48, 49 and 50 of *the Constitution* are not absolute. They are subject to limitation as provided for under article 24 of *the Constitution*. The respondents relied on *Republic v Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others* [2013] eKLR; *Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau & 3 others* [2016] eKLR; *Gregory Magara v University of Nairobi* [2017] eKLR and *Mandiki Luyeye v Republic* [2015] eKLR. They urged the court to dismiss the petition.

Determination

23. I have considered the pleadings, arguments by parties and the decisions relied on. The issue for determination is whether the petitioner's fundamental rights and freedoms were violated.
24. The petitioner's case is that his arrest on 16th July 2011 and confinement until 18th July 2011, violated his fundamental rights and freedoms during which he lost phones and a laptop. According to the petitioner, the impugned actions violated his rights guaranteed under articles 27, 29, 31, 48, 49 and 50.
25. The respondents on their part argued that the petitioner had not proved violation of his fundamental rights and freedoms; the petition was filed after an undue delay and there was no proof that the petitioner had lost the items he claimed to have lost.



26. There is no denial that the petitioner was arrested on 16th July 2011. Indeed, this is admitted by CPL Muthoni who was one of the officers instructed to collect the petitioner from Athi River Police Station and take him to Industrial Area Police station. They took the petitioner to Industrial Area police station where he booked in. Both the petitioner and respondents agree that the petitioner was released on Monday 18th July 2011.
27. Violation of fundamental rights and freedoms is a question of fact that a petitioner has to prove before the court to the required standard, on a balance of probabilities. A party has the duty to prove that the action complained of was violative of his fundamental rights and freedoms.
28. The burden of proof rests on the plaintiff or the person filing the suit to prove that the allegations in his pleadings are true and that the defendant, or the other party, was responsible for that action. In this respect, sections 107(1) of the Evidence Act states that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. That is, the burden of proof lies on he who asserts the existence of a fact.
29. Section 108 further states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. While section 109 is to the effect that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
30. The 2nd respondent, the Inspector General of Police, holds a constitutional office established under Article 245(1) of the constitution and exercises independent command over the National Police service. While performing his command duties, the 1st respondent does not receive direction from anyone. The Attorney General is only responsible for defending the government in civil litigation and has nothing to do with investigations and prosecution in criminal cases.
31. Under Article 244 the objectives of the National Police Service, include prevention of corruption and promotion and practicing transparency and accountability as well as complying with constitutional standards of human rights and fundamental freedoms. The National Police Service also has a legal obligation to prevent crime and protect life and property. In that respect, section 24 of the National Police Service Act confers on the Police the duty to investigate crime and recommend prosecution. Once that is done, it is then the file is forwarded to the DPP to decide whether or not to prosecute.
32. In this petition, there is no doubt that the petitioner was arrested on 16th July 2011 and released on the Monday, 18th July 2011, the first working day following his arrest. He stated that he was informed why he was arrested. The respondents however stated that the petitioner was arrested because of a complaint over misuse of a registered communication device.
33. As already seen, the law mandates the police to prevent crime and protect life and property. They have power to arrest where they have reasonable grounds for taking one into custody for interrogation on suspicion of commission of a crime. It is not every arrest that amounts to violation of fundamental rights and freedoms. The party alleging violation, must show that the policed had no reasonable ground to take him in.
34. In this case, the petitioner has not shown that the police did not have reason to arrest him. The respondents have stated that a complaint had been made at Industrial Area Police Station which led to the arrest of the Petitioner at Athi River town by officers from Athi River Police Station. He was then taken to Industrial Area for interrogation. He was however, released without charge. The fact that he was released without being charged cannot, on its own, be termed to have been in violation of his



fundamental rights and freedoms. The petitioner must show that malice or improper motive informed the arrest. To this end, the petitioner has fallen short.

35. The petitioner further argued that he was treated in a manner that violated his fundamental rights. The petitioner did not, however, adduce evidence to prove that the manner he was treated was indeed in violation of his human rights and fundamental freedoms. Although the petitioner was released on Monday 18th July 2011, he did not produce any medical documents or other evidence to show that he had been badly treated in a manner that amounted to a violation of his rights constitutional rights.
36. There was no evidence that the petitioner lodged a complaint with the police or any other organ on his treatment while under police custody. There were no medical treatment notes to show that he had been tortured while in the hands of the police. The petitioner merely alleged mistreatment and torture without providing any proof. It is not enough to allege violation of fundamental rights and freedoms. A petitioner has to prove violations on a balance of probabilities.
37. Regarding loss of phones and a laptop, the petitioner again did not demonstrate that he had phones and a laptop which were taken away by the police. There was also no report as correctly argued by the respondents, that the petitioner complained, or reported the loss to the police station concerned or any other station. Again, the petitioner alleged without any proof.
38. A claim for violation of fundamental rights and freedoms, must just like any other claim, be proved to the required standard; that of balance of probabilities. The petitioner has fallen short.
39. The respondents also raise the issue of the petition having been filed after an inordinate delay which would not give them an opportunity to call the relevant witnesses including the OSC who released the petitioner from Industrial Police cells. The petitioner did not respond to this contention even though he filed an affidavit in February 2023.
40. Although the law is settled that there is no limitation period for filing petitions challenging violation of fundamental rights and rights, the Supreme Court emphasised on the need to explain any delay in filing such petitions.
41. In Mary *Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019* (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment). the Supreme Court stated that where there is delay, a petitioner ought to explain the reasons for the delay to the satisfaction of the court. That is, whether a claim for violation of rights has been instituted within a reasonable time is to be determination based on the peculiar circumstances of each case. In this petition, the petitioner did not attempt to explain why the petition was filed in 2021 after about 10 years after the alleged infractions.

Conclusion

42. Having considered the petition, responses and arguments by parties, the conclusion I come to, is that the petition did not prove that his fundamental rights and freedoms were violated. The mere arrest and confinement over a weekend would not on its own be termed as a violation of constitutional rights.
43. The petitioner did not also prove that his phone and laptop were taken away by the police. The petitioner did not give details of the items including models and identifying features or receipts. He also did not formally complain or demand release of such documents. The allegation was only made in the petition.



Disposal

44.

1. The petition is dismissed.
2. I make no order on costs

DATED SIGNED AND DELIVERED AT NAIROBI THIS 21 DAY OF JUNE 2024

E C MWITA

JUDGE

