Kangeri & 2 others v Catholic Archdiocese of Nyeri & 3 others (Petition E001 of 2022) [2024] KEHC 12565 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12565 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

PETITION E001 OF 2022

MA ODERO, J

OCTOBER 18, 2024

BETWEEN

SIMON WANYIRI KANGERI ..... 1ST PETITIONER

ALOYSIUS WAWERU KAMAU ..... 2ND PETITIONER

JULIUS NJORA WANJERI ..... 3RD PETITIONER

AND

CATHOLIC ARCHDIOCESE OF NYERI ..... 1ST RESPONDENT

ARCH BISHOP ANTHONY MUHERIA ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

THE INSEPCTOR GENERAL OF POLICE ..... 4TH RESPONDENT

JUDGMENT

1. This constitutional petition dated 23rd November 2021 was filed by the three Petitioners namely Simon Wanyiri Kwangeri, Aloysius Waweru Kamau and Julius Njora Wanjeri seeking the following reliefs;-

> " i. A declaration that the omissions of the 3rd and 4th Respondent's agents violated *the constitution* of Kenya 2010.
>
> ii. A declaration that the Petitioners are entitled to the payment of damages and compensated for violations and contraventions of their fundamental rights and freedoms under the aforesaid provisions of *the constitution*.
>
> iii. General damages, Special damages on an aggregated sale under Article 23 (1) of *the Constitution* of Kenya for the unconstitutional conduct by Government servants and agents.

iv. Any further orders, writs, directions as this Honourable Court may deem fit.

v. The Respondents to bear the costs of this petition with interest at court rates.

v. Such further orders as this Honourable court may deem just and expedient."

2. The petition was supported by an Affidavit of even date sworn by the 1st Petitioner.

3. The 1st and 2nd Respondents being Catholic Archidiocese of Nyeri and Archbishop Anthony Muheria were vide a Ruling dated 20th April 2023 struck out of the Petition by the High Court which found that the petition disclosed no cause of action against the two.

4. The 3rd and 4th Respondents The Hon. Attorney General and The Inspector General of Police filed Grounds of opposition dated 12th September 2022 opposing the Petition on the following grounds:-

(a) That the petition lacks merit and does not meet the laid down threshold for a constitutional petition.

(b) That the petition does not disclose a specific provision of *the constitution* violated by the Respondents and how the same was violated and is therefore amorphous.

(c) That the petitioners claim if any, lies in the tort of malicious arrest and prosecution which is time barred prompting the petitioner to circumvent this by filing a constitutional petition.

(d) That the petitioner has not justified the excessive delay (18 years) in pursuing the alleged claim and this prejudices the Respondents case noting that material records are subject to destruction rules provided for in chapter 59 (National Police Service Records), Appendix 59(a) of Service Standing Orders.

5. The Petition was canvassed by way of written submissions. The Petitions filed the written submissions dated 29th April 2024 whilst the 3rd and 4th Respondents relied upon their written submissions dated 27th June 2024.

Background

6. The genesis of this petition is the arrest of the Petitioners way back on 20th May 2004. The Petitioners aver that they were arrested at night from their homes by police officers from Nyeri Police Station who were then under the command of one Chief Inspector Julius Mahole the OCS.

7. That on 24th May 2004 the Petitioners were taken to the Nyeri Chief Magistrates Court on a charge of cutting down 726 coffee stems at Hill Farm which belonged to the Catholic Archdiocese of Nyeri.

8. The Petitioners claim that they were not given a chance to explain themselves breaching Article 27 (1) of *the constitution*. They assert that the charge levelled against them were false and were not grounded on any evidence. That the said charges were in breach of Articles 48 and 50(1) of *the Constitution* of Kenya 2010.

9. The Petitioners state that they were placed in remand at the King'ong'o Prison in Nyeri where they remained for sixteen (16) days after which they were on 9th June 2004 released on bond.

10. The Petitioners go on to aver that the charges against them were heard vide criminal case no 1629 of 2004 and that they were eventually acquitted on 18th November 2004 when the Court ruled that the prosecution had failed to establish a prima facie case against the three.

11. The Petitioners complain that they were in custody from 20th May 2004 to 9th June 2004 and suffered loss of liberty due to their incarceration. That they were tortured, molested, harassed and persecuted by the Respondents agents in breach of Article 2 (a) (b) (c) (d) and (f) of *the constitution*. That they suffered physical injuries for which they had to seek treatment thereafter. That they have continued to suffer severe mental and psychological distress due to loss of income and jobs which has negatively affected their livelihoods and family life.

12. The Petitioners contend that the actions of the agents of the 3rd and 4th Respondents amounted to violations and infringement of their fundamental rights and freedoms for which they now seek redress from the court.

13. The Respondents in opposing the Petition stated that said petition did not meet the constitutional threshold set down by law. That the Petitioners failed to provide particulars of the allegations made and failed to demonstrate the manner in which their rights were infringed.

14. The Respondents state that the Petitioners were lawfully arrested following a report made to the police regarding the cutting down of 726 coffee stems at Hill Farm.

15. The Respondent further state that this Petition comes too late in the day. They state that all records relating to the original trial have now been destroyed in compliance with the provisions of the National Police Standing orders which provides for destruction of records after five (5) years. That the Petitioners ought to have filed a claim for malicious prosecution and that it is only upon realizing that such a claim is now time-barred the Petitioners have opted to pursue their claim for malicious damages cloaked as a constitutional petition.

16. Finally the Respondent point out that no evidence has been presented to prove the Petitioners claim for special damages. They urge the court to dismiss this petition in its entirety.

Analysis and Determination

17. I have considered the petition before this court, the Grounds of opposition filed by the 3rd and 4th Respondents as well as the written submissions filed by the parties.

18. The threshold of a constitutional petition was set out in the case of Anarita Njeru -vs- Republic [1979] KLR where the court observed as follows:-

> " If a person is seeking redress form 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 he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed....."

19. Similarly in Communications Commission of Kenya & Others -vs- Royal Media Servises Limited & 5 Others [2014] eKLR the court stated that

> " Although article 22 (1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right to freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention of infringement. Such principle plays a positive role, as a

foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

20. Finally the court while considering the elements of a sustainable Constitution Petition in Grays Jepkemoi Kilplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR stated that

> " It is indisputable that a constitutional petition to be sustainable as such must at a minimum satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of violation and/or threatened violation. I do not suppose it is enough to merely cite constitutional provisions. There has to be some particulars of the alleged infringements to enable the respondents to be able to respond to and/or answer to the allegations or complaints.....Although I have in my foregoing discussion adverted to grounds (c) and (d) of the preliminary objection that there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well Constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitioners which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court." [own emphasis]

21. The petitioners herein have cited which articles of *the constitution* they allege to have been infringed by the Respondents and in what manner. I am satisfied that this petition meets the required threshold.

22. I note that the arrest and trial of the Petitioners took place way back in May 2004. This petition was not filed until November 2021 a full seventeen (17) years AFTER the incidents complained of had taken place. The petitioners have maintained a very loud silence regarding the reasons for this delay in filing their petition. If the petitioners were truly aggrieved by the actions of the Respondents then my view is that they would have filed the petition much sooner. The delay of Seventeen (17) years amounts to inordinate delay for which no explanation has been advanced.

23. I am inclined to agree with the Respondents that the filing of the Petition was a clever attempt to circumvent the *Limitation of Actions Act* given that any civil claim they may have had was no longer tenable as the statutory period had elapsed.

24. The petitioners claim that the prosecution instituted against themselves by the Respondents was malicious. It is trite law that the burden of proving that a violation of their rights lies on the petitioners.

[see Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR]

25. The Petitioners allege that they were wrongfully arrested on an accusation of cutting down coffee stems at Hill Farm and were subsequently prosecuted for the same offence. The petitioners rely on the fact that the learned trial magistrate eventually found that they had no case to answer and acquitted them as proof that their prosecution was malicious.

26. However I find that the Petitioners are misguided in their suppositions. The tort of malicious prosecution is one that provides redress to a litigant for losses incurred arising from malicious proceedings – that is prosecution which is initiated unlawfully and without any justifiable cause.

27. In the case of Murunga -vs- Hon Attorney General [1979] eKLR the Court stated as follows

> " As to malicious prosecution the plaintiff must prove four things:-

1. that the prosecution was instituted by someone for whose acts he is responsible.

2. that the prosecution terminated in the plaintiffs favour.

3. That the prosecution was instituted without reasonable and probable cause; and,

4. that it was actuated by malice" [Own emphasis]

28. An arrest arising from a genuine complaint made to law enforcement authorities cannot be said to be malicious. Moreover the mere fact of acquittal is not proof that one's prosecution was malicious. One can be acquitted for a variety of reasons which include, lack of sufficient evidence, failure of witnesses to testify, technical reasons etc.

29. In Nzoia Sugar Company -vs- Funguti [1988] KLR 339 the court of Appeal stated as follows:-

> " Acquittal per se on a criminal charge is not sufficient basis to ground a suit for malicious prosecution. Spite or ill-will must be proved against the prosecutor. The mental element of ill will or improper motive cannot be found in an artificial person like the Appellant but there must be evidence of spite in one of its servants that can be attributed to the company."

30. Similarly in Robert Okeri Ombaka v Central Bank of Kenya [2015] eKLR, the Court of Appeal observed that:

> " In this appeal there is no evidence that the respondent made a "false" report or that it was actuated by "malice", or that his prosecution was brought "without reasonable or probable cause". That a suspect was acquitted of a criminal case is not a ground for filing a civil suit to claim damages for malicious prosecution or false imprisonment. Evidence of spite, ill will, lack of reasonable and probable cause must be established."
>
> [own emphasis]

31. There has been no proof of any spite or ill-will by any of the officers/agents of the 3rd or 4th Respondents in the manner in which they conducted their duties with respect to the arrest/prosecution of any of the three petitioners.

32. From the evidence available it is quite clear that the petitioners were not arrested capriciously. They were arrested following a complaint made to the police (specifically to one Inspector Mahole) by the Manager of Hill Farm which belonged to the Catholic Archdiocese of Nyeri. The police then proceeded to investigate the complaint as they are legally required to do and thereafter arrested and charged the petitioners. There is no evidence that this Inspector Mahole knew any of the petitioners before or that he had a grudge against any of them which would motivate him to charge them maliciously.

33. In the Tanzanian Case of James Funke Gwagilo -vs- Hon. Attorney General [2002] E.A 381, the Court held that in the context of malicious prosecution malice is proved by evidence showing that there existed intent to use the legal process for a purpose other than its legally appointed and appropriate purpose or that the prosecution did not believe the case they were prosecuting was genuine.

It must be shown that the prosecution was mounted on a wrong motive and the petitioners must prove that motive, in that case the court stated that

> " The burden was on the Appellant to prove absence of a reasonable and probable cause for the prosecution ....."

34. The question is, whether in the circumstances, that arrest of the petitioners was unlawful resulting in false arrest and detention of the Petitioners. On what constitutes a false arrest, the Court in Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR held that:

> 'False arrest which is a civil wrong consists of an unlawful restraint of an individual's personal liberty or freedom of movement by another person purporting to act according to the law. The term false arrest is sometimes used interchangeably with the tort of false imprisonment, and a false arrest is one method of committing a false imprisonment. A false arrest must be perpetuated by one who asserts that he or she is acting pursuant to legal authority, whereas a false imprisonment is any unlawful confinement. Thus, where a police officer arrests a person without probable cause or reasonable basis, the officer is said to have committed a tort of false arrest and confinement. Thus, false imprisonment may be defined as an act of the defendant which causes the unlawful confinement of the plaintiff. False imprisonment is an intentional tort."

35. No material has been placed before this court to prove that the arrest and/or prosecution of the three petitioners was malicious. In my view their prosecution was above board arising from genuine complaints made to the police. I therefore dismiss this ground of the petition.

36. The Petitioners further allege a breach of their constitutional rights in that they were arrested on 20th May 2004 and were released on bond on 9th June 2004. That they were therefore illegally detained for a period of nineteen (19) days. The Petitioners also claim that they were tortured, molested and harassed by the agents of the respondents.

37. The allegations of torture and molestation are not supported by any specifics. What was the nature of the torture? What injuries if any were occasioned to the Petitioner?

38. The record indicates that the petitioners having been arrested on 20th May 2004 were arraigned in Court on 24th May 2004 i.e four (4) days after their arrest. They were charged and entered a plea of 'Not Guilty" to the charge. The prosecution objected to the release of the suspects on bond. The Court reserved its ruling to 7th June 2004 on which date the Petitioners were granted a bond of Kshs. 200,000/ = plus one surety of a like amount.

39. From the date when the Petitioners were arraigned in Court being 24th May, 2024, they were no Longer under the custody of the police but were being held at the instance of the Court. The Petitioners were granted bond on 7th June 2004 but it would appear that they only managed to secure sureties on 9th June 2004 when they were released.

40. It is misleading for the Petitioners to claim that they were in police custody for nineteen (19) days. The record clearly shows that they were in police custody for only four (4) days.

41. It must be remembered that the arrest of the Petitioners took place in the year 2004. Once again I question why they have waited for close to twenty (20) years to raise any grievance they may have had regarding their arrest and the period of detention. These are issues which ought to have properly been raised before or during their original trial.

42. Be that as it may *the Constitution* of Kenya 2010 vide Article 49

    (i) provides that an arrested person must be presented before a court within twenty four (24) hours of his arrest.

43. Prior to the enactment of the 2010 constitution the Court relied on Section 16 (3) of the old constitution which provided that

> " Any person who is arrested or detained:
>
> a. For the purpose of bringing him before a court in execution of the order of a court; or
>
> b. Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with" [own emphasis]

44. Therefore in the year 2004 when the petitioners were arrested the law required that they be arraigned in court 'as soon as reasonably practicable' and if later than twenty four (24) hours then the holding authority would be called upon to explain any delay. This explanation cannot be demanded now as the officers who effected their arrest are not known.

45. In any event the Petitioners were arraigned in court four (4) days after their arrest and were granted bond. Given the law prevailing at that time I do not find any evidence of a breach of their fundamental rights.

46. The Petitioners pray to be awarded special damages. It is trite law that special damages must be specifically pleaded and proved. No evidence has been tendered in support of the petitioner's claim for special damages. This claim has no basis and is hereby dismissed.

47. Finally I find no merit in this petition. The same is hereby dismissed in its entirety

48. Costs be met by the petitioners.

DATED IN NYERI THIS 18TH DAY OF OCTOBER 2024.

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MAUREEN A. ODERO

JUDGE