



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
CONSTITUTION PETITION NO. 1 OF 2012

BETWEEN

JANE WANJIRU MIGWI.....PETITIONER

VERSUS

OFFICER IN-CHARGE EMBU G.K. PRISON.....1ST RESPONDENT

COMMISSIONER OF PRISONS.....2ND RESPONDENT

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

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

JUDGMENT

1. The petitioner Jane Wanjiru Migwi failed this petition against the respondents seeking the following prayers in her petition dated 20.7.2012.

(i) **DECLARATION** that the period between 4th August 2011 and 14th June 2012 when the petitioner was held at Embu G.K. Prison (Women Prison) for a period of 10 months and 10 days was a violation of her right to liberty and security and protection of the law as guaranteed by **Articles 19, 20, 22, 29 (a), (d), (f) of the Constitution of Kenya.**

(ii) **DECLARATION** that the period between 4th August 2011 and June 2012 when the claimant was held at Embu G.K. Prison (Women Prison) for a period of 10 months and 10 days was a violation of her right to liberty and security protection of the law as guaranteed by **Article 9 (1) (5) of the International Covenant on Civil Political Rights (ICPR)** which came in to force on 23rd March 1976 and dully ratified by the State/Kenya.

(iii) **DECLARATION** that the period between 4th August 2011 and 14th June 2012 when the claimant was held at Embu G.K. Prison for a period of 10 months and 10 days was a violation of her right to liberty and security and protection of the law as guaranteed by **Articles 3 & 9 of the Universal Declaration of Human Rights (UDHR).**

(iv) **DECLARATION** that the petitioner was subjected to forced and compulsory labour for the period between 4th August 2011 up to 14th June 2012 which was a violation of **Article 8 (3) (a) of the International Covenant on Civil and Political Rights (ICCPR)** for a period of **10 months 10 days.**

(v) **DAMAGES** consequential upon the above declaration and/or such orders, writs or directions for the purpose of enforcing and securing the enforcement of the constitutional provisions hereinabove disclosed as having been breached in relation to the Petitioner.

(vi) That such other orders as this Honourable Court shall deem fit and just.

(vii) Costs of this petition

2. The applicant supported the petition with her affidavit sworn on 20.7.2012. Stating the facts giving use to this petition.

Petitioner's case

The petitioner filed the petition stating that she was charged in **Kerugoya SPM Criminal Case No. 415 of 2009** with the offence of infanticide contrary to **Section 210 of the Penal Code**. After trial, she was found guilty and sentenced to serve 5 years imprisonment. On 04/08/2011 in **Criminal Revision No. 290 of 2011**, the High Court revised the sentence and substituted it with community service order at Kutus Dispensary for 6 months however the respondents failed to release her until 14/06/2012, when Justice Ong'undi sitting at Embu High Court noted she was still detained in prison in spite of the substitution of the sentence and ordered her immediate release that is 10 months and 10 days thereafter. In that period, she was compelled to perform various acts of forced labour at the Embu GK prison (women wing) including cultivating prison land. That this was a violation of her right to liberty, security and protection of the law as guaranteed under the Constitution of Kenya and in contravention of her fundamental rights and freedoms. She proposed general damages of Kshs.25,000,000/= plus costs of the petition.

3. A memorandum of appearance was entered by the Hon. Attorney General on behalf of all the respondents. They proceeded to file grounds of opposition stating that:-

a) The petition is incompetent.

b) The right claimed are not absolute.

c) That there is no violation of Constitution or Constitutional right of the applicant/petitioner disclosed therefore no justifiable cause.

d) There is no Constitutional issue for the court to determine.

4. The respondents pray that the petition be dismissed with costs.

5. On 25.7.2013 when the parties appeared in court, they informed the court that they wished to settle the matter out of court. Despite being given time to explore a settlement outside time from 27.7.2013 to 20.11.2018 no settlement was reached. The court was informed that the parties had not agreed. Directions were given that parties do file written submissions.

6. The petitioner proceeded to file submissions and informed the court that they had served the respondent.

7. The respondent and not attend court nor did they file submissions as directed by the court. The court proceeded to give a date for judgement.

8. The facts of the case were not disputed. The petitioner produced the judgement and the charge sheet in criminal case No. 415/2009 showing that she was found guilty and sentenced to serve five years imprisonment, annexure JWM 1.

9. She further annexed the order on Revision the Sentence substituting the sentence with community service order for six months, annexure JMW 2.

10. She has also annexed the order by Justice Ong'undi, Embu High Court ordering her immediate release on realising that the petitioner was till detained in prison in spite of the substitution of the sentence, annexure JWM 3.

11. The issue which arise for determination is whether the detention of the petitioner for a period of ten months from 4.8.2011 to 14.6.2012 was a violation of her Constitutional rights to liberty, security and protection under the law all which are guaranteed in the **Constitution of Kenya**.

12. Whether the Petitioners fundamental rights and freedoms under **Article 9 (1) and 5 of the International Covenant on Civil and Political Rights, Article 8 (3) (a) of Universal Declaration of Human Rights, Article 29 (a) of the Constitution of Kenya**.

13. Whether the respondents had any lawful justification for prolonging the detention of the Petitioner for ten months and 10 days.

14. Whether the Petitioner is entitled to damages and if so the court to determine the quantum.

15. I have considered the Petition.

16. The petitioner rightly submits that this court has jurisdiction to hear and determine the petition under **Article 23 (1) of the Constitution and accordance with Article 165 (3) (b) of the Constitution**.

Article 23 (1) of the Constitution of Kenya Provides:

“(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

Under Article 165 (3) (b) of the Constitution which provides:-

“(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;”

17. The High Court has jurisdiction to determining whether a right or fundamental freedom in the bill of rights has been denied or violated. The issue of jurisdiction does not arise. This court is clothed with jurisdiction to determine the petition and make the declaration.
18. The Petitioner has proved that she was detained in prison after the High Court revised her sentence and ordered that she be released to serve a community service order at Kutus Dispensary for a period of six months.
19. The decision to revise the sentence lawful and there having been one appeal the order on revision was final and binding.
20. The issue brings to prove the interpretation of the provisions of the **Prisons Act** namely **Section 30 (1) and (2) and Section 45 (1)** and whether they were complied with. The Sections provides:-

“(1) Every prisoner confined in any prison shall be deemed to be in the lawful custody of the officer in charge of the prison and shall be categorized and detained in such manner as to take into account the safety of the prisoner, of the public and of other persons in the prison.

(2) Every officer in charge shall keep and detain all persons duly committed to his custody by any court or other competent authority according to the terms of the warrant or order by which such person has been committed, or until such person is discharged by due course of law.”

45. Release of prisoners

“(1) The officer in charge shall be responsible for the due discharge of all prisoners immediately upon their becoming entitled to release.”

21. It is not denied that the order revising the off sentence was revised nor was there any explanation as to why the petitioner was not released from prison. The court must draw an inference that the officer-in-charge Embu Women’s Prison was served with the order revising the sentence. This in my view the proper inference because there was no denial that the order for release of the petitioner was served on the officer in charge. The officer-in-charge failed to comply with the Provision of **Section 45 (1) of the Prison Act**. The Petitioner could only be in lawful custody in accordance with the terms of the committal warrant or an order committing the Petitioner to Prison.

22. The petitioner was therefore not in lawful custody after the court ordered her release and he decision was communicated to her with a court order annexure JMM2. The record shows that the Deputy Registrar confirmed that the order was released to the prison officers for compliance.

23. The second issue for determination is whether the delay in releasing the petitioner after the court ordered her release was a violation of her fundamental rights. As I have pointed out, there is no dispute that the petitioner was detained in prison for ten months after court ordered her release. The order by Justice Ong’undi dated 14.6.2012 is clear. She lamented that the petitioner whose sentence was reduced to six months had not been released by 14.6.13, annexure JWM 3.

24. The petitioner has deponed that her rights under the constitution were violated. There is no doubt that her rights and freedoms were violated as she was not released as ordered by the court.

25. Her right to liberty under **Article 29 (a)** it provides – was violated. The applicants right to protection from torture and other cruel and degrading treatment was violated.

Article 30 (2) provides for protection against forced labour.

The petitioner submits that her rights under **Article 9 (1) & 5 of International Covenant on Civil and Political Rights and Article 8(3) (a) of the Universal Declaration of Human Rights** which Kenya has satisfied and under **Article 2(5) of the Constitutes** incorporates the general rules of International Law as part of the law of Kenya. The articles guarantees right to liberty and security and protection from and arbitrary detention. It further provides that where the rights are violated the petitioner shall have an enforceable right to compensation.

26. The petitioner has demonstrated the particulars of the violation and infringed.

27. The petitioner has asked for damages and submits she be awarded 25,000,000/=. She has relied on various authorities which I have considered.

28. Having found that the petitioner’s rights were violated, I will proceed to consider the appropriate remedy. In so doing I will take into consideration that the petition was held in the prison unlawfully for ten months. I will also consider the cases cited and what I would be fair and reasonable. I also consider that the petitioner suffered both mental and psychological torture which through damages may be ordered it will take time to heal. This is a serious violation.

29. The case of Dominic was awarded Ksh.2 500,000/= was awarded for a detention of about 10 days.

30. In **Charles Gadhathi Mboko** – petitioner as detained for 107 days. He was awarded 3,500,000/=. I find that an award of Kshs5,000,000/= would be fair and reasonable. I find that the petitioner has proved her claim and I allow the declarations as prayed. I award her general damages of Ksh5,000,000/=. I award her the costs of the petition.

Dated at Kerugoya this 13th day of June 2019.

L.W. GITARI

JUDGE

13.6.2019