



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 458 OF 2016

SOLOMON THAITI NJOROGE.....PETITIONER

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY.....1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF

AGRICULTURE LIVESTOCK AND FISHERIES.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. Solomon Thaiti Njoroge, the petitioner, filed this petition against Kenya Tea Development Authority, the Permanent Secretary, Ministry of Agriculture Livestock and fisheries, Inspector General of Police and the Attorney General, the 1st, 2nd, 3rd and 4th respondents respectively contending that the respondents violated his rights and fundamental freedoms.

2. The petitioner who was an employee of the 1st respondent avers that on 10th May 1994, the 1st respondent maliciously suspended him from employment and caused his arrest and prosecution in criminal case no 2184 of 1994, after he had been confined for 10 days. The petitioner states that his confinement and prosecution was malicious and driven by reasons other than pursuit of justice; that the 1st respondent caused his arrest and arrangement to be published in the media- daily newspapers causing him stress and anguish thus eroded his standing and dignity in the eyes of the right thinking members of society.

3. The petitioner's case is that the 4th respondent is liable for the actions in the criminal proceedings as the representative of the government for a claim commenced and maintained by police officers.

4. The petitioner further avers that while the criminal case was pending the 1st respondent terminated his employment on 19th September 1995 which was wrong, unlawful and was done without giving him a hearing. The petitioner avers that despite the prosecution, he was acquitted on 4th July 2001 of the criminal charge preferred against him and without terminal benefits despite provisions made by the 1st respondent to that effect.

5. The petitioner states that the 1st respondent's actions violated his rights guaranteed under Articles 10, 28, 29, 49, 50, 73, and 75 of the Constitution. He therefore sought the following reliefs:

a) A declaration that the petitioner's confinement by the police from 16th May 1994 to 26th May 1994 was unconstitutional and a violation of the petitioner's constitutional rights of respect of his dignity, right to freedom and right as an arrested person to be brought before a court of law within twenty four hours or a reasonable period of time.

b) A declaration that the suspension, arrest and prosecution of the petitioner was without any basis in law and was actuated by malice and ill will as no proper investigations had been carried out.

c) A declaration that the termination of the petitioner's employment on 19th September 1994 on the basis that he had been charged in a criminal court was unfair as the petitioner was eventually acquitted for lack of sufficient evidence after a full trial.

d) An order that the respondents do compensate the petitioner by way of damages for the illegal and irregular arrest and confinement by the police from 16th May 1994 to 26th May 1994.

e) An order that the respondents do compensate the petitioner by paying terminal dues that were never paid due to the unfair manner that the petitioner's employment was terminated.

f) An order that the respondents do compensate the petitioner for lost earnings as he lost his employment as he was forced to leave employment before his anticipated retirement age of 55 years.

g) The court do make, issue and give such further, other and consequential orders, writs and directions as it may consider appropriate for purposes of enforcing or securing the enforcement of any of the provisions of Articles 10, 28, 29, 49, 73, 75 and 132 of the Constitution.

h) That the respondent and the interested party do bear the costs of this petition.

1st Respondent's response

6. The 1st respondent filed grounds of opposition dated 24th April 2017, contending that the petition as drawn does not disclose a cause of action capable of being litigated as a constitutional question against the 1st respondent; that the petition is misconceived and misplaced; that the petition does not disclose a justiciable issue against the 1st respondent, and that the petition does not meet the threshold of a constitutional petition.

2nd, 3rd and 4th Respondents response

7. The 2nd, 3rd and 4th respondents filed a notice of preliminary objection dated 19th July 2018, contending that the petition emanates from an employment relation dispute; that by virtue of Article 162 (2) as read with Article 165 (5) of the Constitution, this court lacks jurisdiction to hear and determine the petition and the issues raised therein; that under section 12(1) of the Employment and Labour Relations Act, the ELRC has exclusive jurisdiction over disputes arising from employment relationships between an employee and employer and that under section 12(3) of the same Act, that court has power to grant the reliefs sought in the present petition. The respondents urged the court to decline to hear the petition for want of jurisdiction.

Petitioner's submissions

8. Mr. Njenga, learned counsel for the petitioner, submitted highlighting their written submissions date 13th September 2018, that the petitioner was arrested at the instigation of the 1st respondent and confined at Kilimanjiko police Station for 10 days; that he was later charged with the offence of stealing by a person employed in the public service; prosecuted in criminal case No. 2184 of 1994 and that the case was determined in the petitioner's favour when he was acquitted on 4th July 2001 and the court found that the petitioner was at all times doing what he was employed to do.

9. Learned counsel submitted that the petitioner's arrest, confinement and prosecution amounted to a breach of constitutional rights guaranteed under section 72, 74, 77 and 79 of the repealed Constitution and that the totality of the petitioner's averments had not been controverted by way of deposition through a replying affidavit, hence the factual content of those averments remain unchallenged.

10. Mr. Njenga went on to submit that the 1st respondent's actions violated the petitioner's constitutional rights hence they warrant the reliefs sought in the petition as against the respondents jointly and severally. He argued that section 72(3) (b) of the repealed Constitution provided a constitutional obligation to uphold the rights of the petitioner to produce him in court within 24 hours which did not happen and has not been explained. Learned counsel further argued that section 77 of the repealed Constitution required that a person charged with an offence be accorded a fair hearing within a reasonable time which again did not happen, since the trial took a long time (1994 to 2001); that under section 74 of the repealed Constitution the arrest, confinement and prosecution amounted to treatment that was inhuman and degrading. He relied on the case of Koigi Wa Wamwere v Attorney General [2015] eKLR which was determined on the basis of section 74 of the repealed Constitution.

11. On the jurisdictional issue, learned counsel submitted that this court has the necessary jurisdiction to hear and determine the petition since the violations are not based on the employee -employer relationship and also bearing in mind the prayers in the petition which seek declaration of unconstitutional actions and grant of damages.

1st Respondents submissions

12. Miss Opakass, learned counsel for the 1st respondent, submitted also highlighting their written submissions dated 3rd September 2018, that the petition is unsustainable because the petitioner has relied on the provisions of the current Constitution instead of those of the repealed Constitution which were then applicable; and relied on the decision of David Sironga Ole Tukae v Francis Arap Mugee (CA NO. 76 OF 2014)

13. On the question of jurisdiction, learned counsel submitted that the issue raised in the petition is about employment. She contended that under Article 162 (2) of the Constitution, it is the mandate of ELRC to deal with employment issues. She therefore submitted that this court has no jurisdiction to deal with the issues raised in that petition and urged the court should down its tools. She relied on Republic v Karisa & others [2017]eKLR where it was held that this court no longer has unlimited jurisdiction to deal with matters reserved for ELRC.

14. According to counsel, all courts have mandate to protect constitutional rights hence there is no reason why the petition was not filed in the ELRC. She relied on the decision in **United States International University v Attorney General & 2 others** [2012] eKLR. Miss Opakass further argued that the petition is also based on malicious prosecution which is a civil claim and not a constitutional issue. She contended that even if the petitioner was acquitted, that alone did not make the prosecution malicious. He submitted that even if the petitioner was held for more than 24 hours that did not make the 1st respondent liable hence there is no valid claim against the 1st respondent. She relied on the case of **Douglas Odhiambo Apel & another v Telkom Kenya Limited** [2014] eKLR for the submission that it is the state that should be held liable. It was counsel's view that that the petition does not meet the constitutional threshold and should be dismissed.

2nd, 3rd and 4th Respondent's submissions

15. Miss Omuom, learned counsel for the 2nd, 3rd and 4th respondents, submitted also highlighting their written submissions dated 19th November 2018 that this court has no jurisdiction to determine the issues raised in the petition. She relied on Article 165(5) of the Constitution as read with section 12 of the ELRC Act. Learned counsel also contended that the petition does not meet the constitutional threshold. With regard to malicious prosecution, learned counsel argued that there was no malice and relied on the case of **Isaac N. Okero V Samuel Otieno** [217] eKLR on the requirements that constitute malicious prosecution.

Determination

16. I have considered this petition, the responses and submissions made on behalf of the parties. I have also considered the authorities relied on. From the pleadings and submissions, two the questions arise for determination, namely; whether this court has jurisdiction to determine this petition and whether the petitioner has proved his case against the respondents.

17. The facts of this petition are not in dispute. The petitioner states that he was an employee of the 1st respondent; that in 1994, he was arrested and charged with the offence of stealing by a person employed in Public service. He underwent trial in criminal case **No. 2184 of 1994** but was acquitted in 2001. He filed this petition in November 2016 contending that his rights and fundamental freedoms had been violated and that his employment had been terminated unlawfully. He also contended that his arrest and prosecution was malicious.

18. The respondents took out a preliminary issue contending that this is a labour matter between an employee and employer and, therefore, in terms of Article 162 (2) as read with Article 165 (5) of the Constitution and section 12 of the Employment and Labour Relations Act, this court has no jurisdiction to determine this petition. The petitioner has on his part maintained that this court has jurisdiction.

19. The court directed that the issue of jurisdiction be heard together with the petition hence this judgment.

Whether this Court has jurisdiction

20. Jurisdiction is the authority granted to a court of law to take cognizance of matters presented before it for adjudication. Jurisdiction is conferred by the constitution, statute or both. It may be general or limited. Jurisdiction is thus granted either by the constitution or statute and may be limited in like manner.

21. In **Samuel Macharia Kamau & another v Kenya Commercial Bank Limited**. [2012] eKLR, the Supreme Court stated that ***“[68] A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”***

22. A court to which a matter has been presented for adjudication, must, when an issue of jurisdiction is raised, determine first whether or not it has jurisdiction over such a matter. If it has no jurisdiction, it must down its tools and take no further step in the matter.

23. In **Re The Matter of the Interim Independent Electoral Commission** [2011] eKLR the Supreme Court again observed that:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent... jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours...”

24. And in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** [1989] KLR 1, the court stated;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. From the decisions, a court must only adjudicate on matters that it has jurisdiction to hear and determine.

26. The petitioner was an employee of the 1st respondent. He was not only arrested and prosecuted in a criminal case but also had his employment terminated. He contended that this was unlawful. It is, therefore, undisputed that the relationship between the 1st respondent and the petitioner was that of employer and employee. This fact is also clear in the pleadings and some of the reliefs sought.

27. In 2010 the country adopted a constitution that altered the system of courts of the Republic. Article 162(2) introduced courts of equal status to the High Court known as the Employment and Labour Relations Court (**ELRC**) and the Environment and Land Court (**ELC**). Parliament was then empowered to establish the two courts to deal exclusively with matters relating to employment and labour relations and environment and Land, including title to land, occupation and use of land.

28. With regard to employment matters, Parliament established ELRC under the Employment and Labour Relations Act. Section 12 of the Act, confers jurisdiction to that Court. Section 12(1) provides for the issues that court can deal with while section 12(3) provides for the reliefs the court can grant. The reliefs include a declaratory order; an award of compensation in any circumstances contemplated under the Act or any written law; an award of damages in any circumstances contemplated under the Act or any written law and ***any other appropriate relief as the Court may deem fit to grant***. The reliefs the court can grant include those the petitioner has sought in the petition such as declaration of unlawful termination of employment and compensation.

29. Article 165(5) (b) provides that this court has no jurisdiction to deal with matters falling within the jurisdiction of the courts contemplated in Article 162 (2). It is thus clear from the Constitution and statute that ELRC is the court that has jurisdiction to deal with the issues raised in the petition. The petitioner has not demonstrated how the issues he has raised in his petition could be excluded from the jurisdiction of ELRC or why this court should assume jurisdiction reserved for that court. He has also not shown that ELRC cannot grant the reliefs sought in his petition.

30. In that regard, therefore, I agree with the respondents that the genesis of the petitioner's claims in this petition arise from the employer-employee relationship. He was an employee, was arrested as an employee and his employment was terminated by the employer. By virtue of Article 162 (2) as read with Article 165(5) of the Constitution and section 12 of the ELRC Act, the petitioner's case falls within the jurisdiction of ELRC.

31. There must be no any illusion that ELRC cannot grant reliefs that appear to be of a constitutional nature. That is the court that the Constitution envisages should deal with issues of employment and Labour relations. It does not matter whether the issues are constitutional issues or not, as long as they arise in the course of that relationship.

32. Courts have held this to be the position in a number of judicial pronouncements. In ***Republic v Karisa Chango & others*** [2017] eKLR, after observing that the ELRC and ELC are Courts of equal status to the High Court, the Supreme court stated;

[50]... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of "equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other".

33. In ***United States International University v Attorney General & 2 others*** (supra) the Court stated;

"[41] Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in Section 12 of the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law."

34. The Court then went on to conclude that:

"[44]...the Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to interpret the constitution and fundamental rights in Article 41 and freedoms is incidental to the exercise of jurisdiction over matters within its conclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

35. The above position was approved by the Court of Appeal in ***Daniel N Mugendi v Kenyatta University & 3 Others*** [2013] eKLR, the Court of Appeal stated that the fact that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision in ***United States International University (USIU) v The Attorney General & Others***.

36. In ***Judicial Service Commission v Gladys Boss Shollei*** [2014]eKLR, the Court of Appeal again observed that;

"[40] Article 23(1) & Article 165(3) (b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, Article 23(2) provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, Article 23(3) does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers "a court" to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is Article 20(3) that places an obligation on "any court" in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but

anticipates the enforcement of the Bill of Rights by other Courts.

37. The court went on to state:

[41] Under Article 162(2) (a), the Constitution has provided for special Courts with the “status” of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the “status” of the High Court enhances the power and discretion of the Court in granting relief.... the general power provided to the Industrial Court under Section 12(3) (viii) of the Industrial Court Act to grant relief as may be appropriate, read together with Article 23(3), empowers the Industrial Court to grant the kind of reliefs that the respondent sought in her petition.”

38. And in *International Centre for Insects Physiology and Ecology (ICIPE) v Nancy McNally* [2018] eKLR, the Court of Appeal once again stated that;

“[27] There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of United States International University (USIU) vs Attorney General [2012] eKLR which was upheld by this Court in Daniel N. Mugendi vs Kenyatta University & 3 Others [2013] eKLR. We are not in doubt too, that the relationship between the appellant and the respondent was not a private matter between the two parties but a public activity intrinsically connected to the operations of the appellant. With respect, the contention to the contrary by Ms. Kilonzo has no substance.”

39. Flowing from the above decisions and taking into account the facts of this petition, it is clear to me that the genesis the nature of the pleadings, tenor of the claim and the reliefs sought in the petition are such that they can be granted by the ELRC which is the court with jurisdiction in terms of Article 23(3) as read with section 12 of the Employment and Labour Relations Court Act. That court has jurisdiction to determined issues including those of violation of fundamental rights and freedoms in the Bill of Rights that arise from employment relationship. I therefore find and hold that this court has no jurisdiction to determine this dispute being a labour related issue.

Whether the petitioner has proved his case against the respondents

40. If I be wrong, then I proceed to determine the second issue. The petitioner has complained that he was arrested and detained beyond twenty four hours that was allowed by the repealed constitution. Section 72(3)(b) of the repealed constitution provided that a person arrested and detained had to be produced in court within twenty four hour or fourteen days depending on the nature of the offence. (*Albanus Mwasia Mutua v Republic* [2006] eKLR).

41. The petitioner did not testify but prosecuted this petition through written submissions. He did not call evidence to show when he was arrested and when he was produced in court. It appears he wanted the court to rely on those written submissions to make a finding of fact in his favour.

42. It is a principle of law that he who asserts must prove. That is what sections 107 through 109 of the Evidence Act envisage that a party who alleges existence of facts he wishes the court to rely on as a basis of proving a factual issue, bears the burden of proof. It is plain without more, that the petitioner did not attempt to prove this fact. This complaint must therefore fail.

43. With regard to the contention that his prosecution was malicious was not also proved. It is not enough for party to plead that the arrest and prosecution was malicious. The petitioner had the burden of proving that his arrest was actuated by malice. The fact that prosecution ended in an acquittal did not *per se* amount to malice. For one to establish a case for malicious prosecution, he must prove that the prosecution had no legal basis and that it was actuated by malice.

44. This position was well stated in *Mbowa v East Mengo Administration* [1972] EA 352, thus;

“The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit... It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings..... It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth”.

45. The court then enumerate essential ingredients of the tort of malicious prosecution as follows:

1. “The criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority;

2. The defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified;

3. The defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and

4. The criminal proceedings must have been terminated in the plaintiff’s favour, that is, the plaintiff must show that the

proceedings were brought to a legal end and that he has been acquitted of the charge.”

46. And in Robert Okeri Ombaka v Central Bank of Kenya [2015] eKLR, the Court of Appeal observed;

“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 filling 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.”

47. The petitioner had the onus of proving the above elements if he was to succeed on the basis that his arrest and prosecution was malicious. He did not attempt at all to prove any of these ingredients either against the 1st or 2nd respondents. He did not therefore discharge the legal burden of proof.

48. Having given due consideration to the petition, the responses, submissions and the law, I find no merit in this petition. Consequently, the petition dated 2nd November 2016 is declined and dismissed. Each party will bear their own costs.

Dated Signed and Delivered at Nairobi this 7th Day of June 2019

E C MWITA

JUDGE