



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL PETITION NO. 49 OF 2018

PATRICK OKOTH OTIENO.....1ST PETITIONER /APPLICANT

ABDALLA ODUOR.....2ND PETITIONER /APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

1. The Petitioners herein are purported to be accused persons in Kakamega High Court Criminal Case No. 8 of 2016 where they are facing a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. They have filed the instant petition dated 11th October, 2018 citing various infractions of the Constitution of Kenya and challenging their detention stating that the said detention is unlawful owing to the fact that they have been in custody for two years and they have not yet taken plea in the criminal charge facing them. They are seeking for:-

- (a) A declaration that their detention without trial is unlawful and unconstitutional and null and void ab initio.
- (b) Compensation.
- (c) Costs of the petition.

The Petition –

2. The petition is supported by the affidavit of the 2nd petitioner and by the oral submissions of their counsel, **Mr. Manyoni**. The Director of Public Prosecutions, the respondent, opposed the petition through the oral submissions of **Mr. Juma**, Prosecution counsel.

3. The petitioners contend that they were arrested in 2015 and were charged and convicted in Mumias PMCC Criminal Case No. 688 of 2015 in which they were sentenced to serve 2 years imprisonment. That upon completion of their sentence in June, 2017 they were detained by the prison authorities on allegations that they were facing murder charges in Kakamega High Court Criminal Case No. 8 of 2016. The petitioners contend that despite being produced in court several times, they have never taken plea in the criminal case. They are therefore challenging the said detention as being unlawful.

4. Mr. Juma on his part admitted that the petitioners have been in detention for two years and are yet to take plea in the criminal case. He argued that the remedy for the petitioners is to file a civil suit to recover damages. That the petitioners have not explained the prejudice that they have suffered. That the charge sheet in the case for the petitioners was consolidated with another case way back on 14/4/2016 though they are yet to take plea. Therefore that the detention is lawful.

5. The issues for determination in the matter are:-

- (1) Whether the petitioners' constitutional rights were violated.
- (2) Whether the petitioners are entitled to compensation.

6. The petition is brought under Article 49 (1) (a) (i), (g), (h), Article 50 (1), 2 (b), (c), (j), Article 51 (1), Article 35 (1), (a), Article 28, Article 27 (1), (2) and Article 25 (a) of the Constitution.

7. Article 25 (a) provides that:-

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading

treatment or punishment;

(b)

(c) the right to a fair trial

(d)”

8. Article 27 (1) and (2) provides that:-

“(1) Every person is equal before the law and has the right to

equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights

and fundamental freedoms.”

9. Article 28 provides that:-

“Every person has inherent dignity and the right to have that

dignity respected and protected.”

10. Article 49 (1) (a) (i), (g), (h) provides that:-

“49. (1) An arrested person has the right—

(a) to be informed promptly, in language that the person

understands, of—

(i) the reason for the arrest;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) To be released on bond or bail, on reasonable conditions,

pending a charge or trial, unless there are compelling reasons.”

11. Article 51 (1) provides that:-

“A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.”

Whether the Petitioners’ constitutional rights were violated -

12. It is an established principle of law that a petitioner who is alleging violation of a constitutional right must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of **Anarita Karimi Njeru –Vs- Republic (1979) KLR 154** where the Court stated 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 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.” (See also Meme v Republic & another [2004] 1 KLR 637).

13. This principle was emphasized by the Court of Appeal in **Mumo Matemo –Vs- Trusted Society of Human Rights Alliance (2014) eKLR** where it was stated that:-

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

14. The petitioners herein are contending infringement of their rights under the Constitution in that they have been detained in custody for two years without them being charged contrary to the provisions of Article 49 (1) (a), (g) and (h) of the Constitution of Kenya which has essentially denied them a fair trial as envisaged under Article 50 of the Constitution. The petition herein pleads the constitution provisions that are infringed, the manner of infringement and the jurisdictional basis. The petition thereby complies with the criteria of a constitution petition as set out in **Anarita Karimi Njeru (Supra)**.

15. It is a constitutional edict that a trial should begin and conclude without unreasonable delay as provided by Article 50 (2) (e) of the Constitution. This was emphasized by the Court of Appeal in **Olwendwa Kilonzo & Another –Vs- Republic (2013) eKLR** where it was stated that:-

“We are all familiar with Section 77 (1) (2) (b) of the now repealed constitution. We need not reproduce it. It requires courts to be always alive to the need for speedy trials. That principle has been captured even in the current Constitution (See Article 49 (1) (a)). An accused person ought to be tried in the shortest time possible so that he/she knows the final determination of his/her case. An unnecessarily delayed trial causes anxiety, loss of time and liberty. A trial should commence as soon as it is possible and end quickly. The beginning of a trial takes into account the availability of time to the judicial officer, presence of police file, the prosecutor, defence counsel, witnesses and much more. A trial may start right away or be delayed for a certain period of time for one reason or the other. But the earlier the better and a court should never lose sight of this.”

16. In the case against the petitioners the trial has not commenced for a period of two years. No explanation has been offered why the petitioners have not been charged for a period of two years.

17. It is unlawful to detain a suspect beyond a period of 24 hours unless the detaining authority has authority from the court to do so. Article 49 (1) (g) provides that:-

“49. (1) An arrested person has the right—

(g) At the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released.”

Pursuant to this Article of the Constitution, Parliament did amend the Criminal Procedure Code in 2014 and inserted Section 36A which provides as follows:-

“(1) Pursuant to Article 49(1)(f) and (g) of the Constitution, a police officer shall present a person who has been arrested in court within twenty-four hours after being arrested.

(2) Notwithstanding subsection (1), if a police officer has reasonable grounds to believe that the detention of a person arrested beyond the twenty-four hour period is necessary, the police officer shall-

(a) Produce the suspect before a court; and

(b) Apply in writing to the court for an extension of time for holding the suspect in custody.”

18. In **Betty Jemutai Kimeiywa –Vs- Republic (2018) eKLR** Muriithi J. held that:-

“Article 49 (1) (g) and (h) itself gives four scenarios on presentation of an arrested person before the court, namely, that the arrested person may-

i. "be charged"

ii. "be informed of the reason for the detention continuing";

iii. "be released"; and

iv. "be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

So that upon being brought before the court, an arrested person may be charged; or he may be informed of the reasons for detention being continued say to facilitate completion of investigations or his presentation for assessment of fitness to plead

before plea is taken; or he may be released if the court for example found no reasonable grounds for his continued detention; or he may be released on bond pending formal charge and or trial.”

19. It is clear that the petitioners have been denied their rights as required by the law. The respondent did not at any time make an application to the court for the continued detention of the petitioners. There has been no justifiable explanation as to why the petitioners have not been charged for a period of 2 years. A delay of two years in charging the petitioners cannot in any way be described as reasonable delay. The delay in taking plea and prosecuting the matter for two years translates to a gross violation of Article 50 of the Constitution especially with regard to having the case determined within reasonable period. The delay must be a psychological torture to the petitioners and amounts to condemning them unheard.

20. I therefore hold that the petitioners rights as stipulated in Article 49 (1) (a) (i), (g) and (h), Article 50 (2) (b), Article 51 (1), Article 28, Article 27 (1) (2) and Article 25 (a) of the Constitution were violated. The detention of the petitioner is thus unlawful and is tantamount to detention without trial. It is an impunity of the highest order wherein the respondent has misused its powers to detain the petitioners indefinitely.

21. However the fact that the petitioners’ rights have been violated does not warrant them an acquittal in a criminal case. They are only entitled to damages from the State. In **Patrick Daniel Lesadala –Vs- Republic (2019) eKLR**, the Court of Appeal held that:-

“.....Moreover, the appellant’s relief with regard to this violation is no longer an acquittal. Courts have since held that where there is such a violation, an accused’s remedy lies in compensation by way of damages against the State. For instance, in Julius Kamau Mbugua v Republic (2010) eKLR the Court of Appeal observed that a violation of the constitutional provision stipulating the time within which an accused must be produced in court does not give rise to an automatic acquittal since such an accused person could be adequately compensated by way of monetary damages.”

22. The Petitioners are seeking compensation for the violation of their rights. Article 23 (3) (a) and (e) of the 2010 Kenya Constitution provides:-

In any proceedings brought under Article 22, a court may grant appropriate relief, including -

(a) a declaration of rights

(e) an order for compensation.

23. I find that the petitioners are entitled to the declaratory orders that they are seeking and to compensation for violation of their rights. In **Susan Nyathira –Vs- Commission of Police & 2 Others (2015) eKLR** Mulwa J. awarded Ksh. 200,000/= for unlawful detention of 19 days. In that case the learned judge referred to the case of **Lechornai –Vs- Republic, Nakuru Criminal Petition No. 7 of 2010 (unreported)** where Emukule J. (as he then was) awarded Ksh. 500,000/= for unlawful detention of 10 days. In **POO (a minor) –Vs- DPP & Another (2017) eKLR** where a minor’s constitutional rights were violated by, inter alia, being held in adult cells, Omondi J. awarded Ksh. 200,000/= in compensation.

24. By the time the petitioners filed this petition in October, 2018 they had been in unlawful custody for a period of 16 months. The court should express its displeasure with the conduct of the respondent in detaining the petitioners in unlawful custody for that long by awarding the respondents a reasonable amount of general damages. I am of the considered view that an amount of Ksh. 500,000/= to each of the petitioners is sufficient compensation.

25. The respondent has not justified the continued detention of the petitioners. Under Article 49 (h) of the Constitution the Petitioners were when presented before court entitled to be released on bond or bail pending charge or trial unless there were compelling reasons not to be released. Upto now the respondent has not adduced compelling reasons why the petitioners should not be released on bond pending charge. This court considers this to be a deserving matter for the petitioners to be released on bond pending charge.

26. The upshot is that the petition is allowed. The court makes the following orders:-

(1) A declaration that the detention of the petitioners without trial is unlawful, unconstitutional and null and void ab initio.

(2) Each of the petitioners is hereby released forthwith upon signing his own personal cognizance of Ksh. 200,000/= pending charge in Kakamega High Court Criminal Case No. 8 of 2016.

(3) The court awards each of the petitioners Ksh. 500,000/= in compensation for unlawful detention payable by the respondent through the advocates for the petitioners.

(4) The respondent to bear the costs of the petition.

Delivered, dated and signed in open court at Kakamega this 18th day of July, 2019.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Onsando holding brief for Manyoni for petitioners

Mr. Juma for respondent

Petitioners - present

Court Assistant - George

14 days right of appeal.