



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 167 OF 2018

VINCENT BAYA HARIRI.....PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE CHIEF MAGISTRATE, MOMBASA.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed this petition alleging violation of his constitutional rights to dignity, privacy and unjustified detention without charge. He alleges that these violations occurred when he was arrested and detained at Mombasa Airport Police Station on the 5th August 2015.

2. In the petition dated 20th June 2018, the Petitioner seeks the following orders:

- a. *A declaration declaring that the detention of the Petitioner, without charge and reason was unconstitutional and illegal.*
- b. *An Order of declaration declaring that the Petitioner's dignity had been abused and that the treatment meted out on the Petitioner was unconstitutional*
- c. *An Order of certiorari bringing before this Court for quashing and setting aside the decision by the 3rd Respondent to admit in evidence pellets and record unlawfully obtained.*
- d. *An order of the prohibition prohibiting the use and admission of evidence obtained by way of the use of the so called "drug loo"*
- e. *An order terminating the proceedings and prosecution of the Petitioner all together.*
- f. *An order directing that the costs herein be paid by the Respondents.*

The Petitioner's Case

3. The Petition is premised on the grounds set out therein, the oral submissions, of **Mr. Magolo**, learned Counsel for the Petitioner, dated 20th June 2018, the supporting affidavit sworn by the Petitioner on the same date and list of authorities dated 3rd December 2018.

4. The Petitioner alleges that he was unlawfully detained for 8 days without charge which allegation the Respondent has not denied.

5. The Petitioner alleges that during the said detention, he was subjected to torture and inhuman treatment which included being locked up in a dark room and later on taken to a "drug loo" with a view of taking evidence to use against him, and that during that process he was forced to answer the call of nature in the presence of other adults and as a result he was greatly humiliated and traumatized.

6. The Petitioner alleges that on or about the 5th August 2017 one Sergeant **Jacob Kipkorir** appeared in Court to produce MFI 7a to 7i and pellets marked MFI 8a to 8h. The Petitioner objected to the said production, but his objection was overruled by the 3rd Respondent and the said pellets were produced as exhibits against him, yet the same were illegally acquired evidence obtained in breach of the Constitution and the same will prejudice the Petitioner.

7. Mr. Magolo submitted that the evidence obtained during the illegal detention should not be used against the Petitioner since it was obtained while the Petitioner was subjected to inhuman treatment.

8. The Petitioner relied on **Republic vs. Michael Rotich and Coi & Another vs. Chief Magistrate, Ukunda Law Courts and 4 others**.

The Respondent's Case

9. The Petition was opposed, **firstly** by the 2nd Respondent's Replying Affidavit of Cpl. **James Nyamosi** sworn on 4th July 2018 and filed on the same day. **Secondly**, the 2nd and 3rd Respondent filed grounds of opposition dated 11th March 2019 to the Petition and the 1st Respondent filed its grounds of opposition dated 13th March 2019.

Submission for the 2nd Respondent

10. **Mr. Nyamosi** in his aforesaid Replying affidavit averred that the application by the Petitioner offended Articles 245(4) (a) & (b), 159(1) & (2) and 160(1) of the Constitution.

11. It was further averred that the Petitioner was arrested on suspicion of being a drug trafficker and this information was relayed to him as provided under Section 58 of the National Police Service Act and Section 80(1) of the Narcotic and Psychotropic Substances Act as regard to the search. Upon arraignment in Court, the police sought more time to complete their investigations and the same was granted by the magistrate. The deponent averred that no force, threats, or intimidation was used in extraction of the pellets as the Petitioner answered to the call of nature naturally.

12. **Mr. Makuto** learned Counsel for the 2nd & 3rd Respondents submitted that the Petitioner was arrested on the 5th August 2015 and presented to Court on the 6th August 2015 and the allegation of being held for 8 days is false. Counsel submitted that the Petitioner intends the Court to quash a lower Court Ruling that has not been brought before this Court. Mr. Makuto submitted that without the said Ruling the orders sought cannot issue.

13. Counsel submitted that the Petitioner is accused of a grave offence of drug trafficking and that limitation of his right under Article 24 was necessary and in public interest and that no force, threats or intimidation was used in making the Petitioner excrete the pellets. He was only placed under observation, and in the process he naturally released the pellets from his body through excretion.

Submission for the 1st Respondent.

14. In the grounds of opposition dated the 13th March 2019 the 1st Respondent states that the Petitioner was seeking to delay the lower Court Criminal Case No. 1553 of 2015 with the sole intention to scuttle the process. The 1st Respondent further stated that the forum for the admissibility of evidence against the Petitioner was an issue to be determined in the trial Court, and any order from this Court will interfere with progress of the trial in that Court.

15. **Mr. Ayieka**, learned Counsel for the 1st Respondent submitted that the manner of gathering narcotic evidence at the airport is based on international standards and any prejudice suffered by the Petitioner does not outweigh the public interest and that the Petitioner excreted the drugs under the watch of the officers.

The Determination

16. I have considered the petition and submissions. I raise the following issues for determination:

a) Whether The Proceeding And Prosecution In The Lower Court Can Be Terminated.

b) Whether the Petitioners' Constitutional Rights were violated

Whether The Proceedings And Prosecution In The Lower Court Can Be Terminated.

17. In **Francis Anyango Juma vs. The Director of Public Prosecutions and another** the Court observed that:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself.”

18. Majanja J in the case of **Kenya Commercial Bank Limited & 2 others vs. Commissioner of Police and Another, Nairobi Petition No. 218 of 2012 [2013] eKLR**, held: -

“The office of the Director of Public Prosecution and Inspector General of the National Police Service are independent and this court would not ordinarily interfere in the running of their offices and exercise of their discretion within the limits provided by the law. But these offices are subject to the Constitution and the Bill of Rights contained therein and in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under the constitution”.

19. In **Paul Ng’ang’a Nyaga vs. Attorney General & 3 others [2013] eKLR**, it was held that:

“This court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they acted in contravention of the Constitution”.

20. From the foregoing it is the finding of this Court that it can only intervene in the decision of other constitutional bodies if it is satisfied that the facts of a complaint disclose a violation of the rights and fundamental freedoms guaranteed under the Constitution.

Whether the Petitioners’ Constitutional Rights were violated

21. The petition is brought under **Article 20, 22(1) and (2), 23, 41, 47(1)-(3), 73(2)A-E & 75(1)-(3)** of the Constitution. 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 vs. Republic & Another [2004] 1 KLR 637*.)”

22. The principle in *Anarita* case(supra) 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.”

23. In ***Meme v Republic* (supra)** In that case the court observed: -

“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”

24. In the case of **Nairobi High Court Petition No.361 of 2017 Hassan A.A.H. Zubeidi vs. DPP & 2 Others** it was held that: -

"Except where there is clear disclosure of some element of violation of the constitution, human rights and fundamental freedoms, the court would not intervene merely because a party has alleged violations. There must be clear and demonstrable facts to support such claim. This is because the issues raised in this petition are more of factual than legal or constitutional."

25. Upon perusal of all the pleadings, this Court is of the view that the Petitioner has not sufficiently demonstrated with particularity how his rights have been infringed. The Petitioner has not met the threshold of proof required. Neither has he discharged the burden of proof as provided for under sections **107(1) (2) and 109 of the Evidence Act** which section provides: -

"107 (1) and (2). Burden of proof

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

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."

26. The Petitioner herein has not set out in precision that which he is complaining about, though the provisions of the Constitution said to have been infringed have been stated, it has not been demonstrated to this Court the manner in which the said provisions have been infringed.

27. Article 49 of the Constitution. The Article provides thus:

“(1) An arrested person has the right –

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

(i) the reason for the arrest;

(ii) the right to remain silent;

(iii) the consequence of not remaining silent;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

(d) not to be compelled to make any confession or admission that would be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(f) to be brought before a court as soon as reasonably possible, but not later than –

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first 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 not to be released.”

28. 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...”

29. The Respondents in the Replying Affidavit averred that Section 36A of the Criminal Procedure Code which required the production in Court of all accused person within 24 hours of arrest was complied with during the Petitioner’s detention and that the trial magistrate extended time for detention as provided by the law. So this claim has no basis now.

30. The second claim is that the manner of taking evidence, being drug pellets from the Petitioner was illegal, inhuman, and degrading. To this it was submitted by Mr. Makuto that the Petitioner was merely put under observation and after a period of time the drug pellets fell out naturally.

31. This Court needs to interrogate this issue further. If a person is suspected to have swallowed drugs which can only come out by way of excretion, what would be the best procedure to remove the pellets? Is an operation an option? What about the process used in this matter - putting the suspect in an observation room and letting the pellets come out naturally? I should think that the second option is more accessible, safer and natural. This is so because the drugs come out of the suspect naturally. It does not matter that they come through the anus. That is the natural channel in the process of observation. It also does not matter that the suspect is being observed by other parties. Observation is necessary to confirm the delivery of would be evidence, and even for the safety of the suspect so that should there be a need for medical intervention it can be done in time.

32. Mr. Makuto submitted that the observation process is used internationally and is an acceptable way of getting the drug pellets out of a suspect. I agree. The Petitioner did not offer to this Court an alternative way the Respondents could have used to get the drugs out of his

body. This Court has noted that the Petitioner was not tortured or forced to release the drug pellets. He was merely given time and was observed, as the pellets dropped from his private parts. There is nothing tortious, humiliating or degrading in that process. It is the most natural way to get the said pellets out. It is also the only way even the Petitioner knew of how he would finally release the pellets in the event he was not discovered. The only discomfort was the fact that the Petitioner was being observed. To this, the Petitioner must remember that he was a suspect, and he was under arrest and had to be closely observed. There were no violations of Petitioner's fundamental rights and freedom under the constitution. This allegation is therefore baseless.

33. In the end it is the finding hereof that the petition before the Court is not merited and is dismissed with costs.

Dated, Signed and Delivered at Mombasa this 19th day of September, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Magolo for Petitioner

Mr. Fedha for 1st and 2nd Respondents

Mr. Kaunda Court Assistant