



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CONSTITUTIONAL PETITION NO. 2A OF 2019

STANLEY KIMATHI RAINI.....PETITIONER

VERSUS

TRAFFIC BASE COMMANDER,

RUNYENJES POLICE STATION.....1ST RESPONDENT

NATIONAL TRAFFIC COMMANDANT.....2ND RESPONDENT

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

DIRECTOR GENERAL N.T.S.A.4TH RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

J U D G M E N T

A. Introduction

1. The petitioner commenced these proceedings by way of a Petition dated 3rd April 2019. It is deponed that the petitioner was unlawfully arrested, detained and prosecuted in the Senior Principal Magistrate's Court at Runyenjes in Traffic Case No. 102 of 2019 with the offence of driving without a licence contrary to Section 30(4) as read with 30(7) of the Traffic Act.

2. The Petitioner sought the following reliefs;

- a) *An order declaring the arrest and his prosecution as illegal, unlawful and therefore unconstitutional.*
- b) *General damages for unlawful arrest and detention that culminated to unlawful prosecution.*
- c) *Costs of this petition.*

3. In rejoinder, one Safari Katana, Chief Inspector of Police swore a replying affidavit on behalf of the 1st, 2nd, 3rd, and 6th respondents in which he deposed that the petitioner was stopped along the Embu – Meru road and upon inquiry and inspection his driving licence was found to lack his photograph. Despite

showing that the licence was to expire on the 18th July 2019 after being renewed on 19th September 2018, this information was found to be in contradiction of the National Transport Safety Authority (NTSA).

4. Mr. Katana further deposed that the NTSA records showed that the driving license had expired on 18th June 2018 after which he was arrested on suspicion of having an invalid driving license.

5. Ms. Mati for the 5th respondent in her replying affidavit sworn on the 20th May 2019 deposed that the petitioner was undeserving of the orders sought as he had not demonstrated any breach of his rights as alleged nor had he demonstrated how the formulation of the charges against him was a contravention of his constitutional rights.

6. Ms. Mati further deposed that the petition was an attempt by the petitioner to obstruct and interfere with the statutory and constitutional mandate of the 5th respondent and thus defeat justice.

7. The parties were to dispose of the petition through written submissions. Only the petitioner filed his submissions.

B. Petitioner's Submissions

8. The petitioner submitted that the 1st respondent failed and neglected his duties of respecting and protecting the rights of the petitioner by causing the petitioner to be arrested, roughed up and detained in the police cells at Runyenjes without any reasonable or justifiable cause.

9. The petitioner relied on the case of **M W K & Another v Attorney General & 3 Others [2017] eKLR** where it was held that it's the court's primary duty to protect the constitutional guaranteed fundamental rights of the people vis a vis action by government agents.

10. The petitioner further submitted that unnecessary force and violence was used to arrest him whereby he was slapped and wrestled to the ground. Reliance was placed on the case of **Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 Others [2016] eKLR** where the court found that the 1st respondent had used unwarranted and unnecessary force against the petitioner contrary to article 29(c) and (d) of the constitution and the petitioner was awarded damages.

11. The petitioner submitted that following his arrest, the 1st respondent blatantly violated his constitutional rights enshrined in article 49 (1) (a) that require him to be informed of the reason for his arrest which in turn caused him prejudice as he failed to communicate with his advocate in time thus leading to his lock up at Runyenjes Police station.

C. The Determination

12. There is no doubt that it is for the Petitioner to satisfy the evidential burden that a specific right exists and which right has been violated or restricted besides pleading the same with reasonable particularity and precision: see Section 107 of the Evidence Act (Cap 80) as well as the cases of: **Githunguri Dairy Farmers Co-operative Society Ltd v The Attorney General [2016]eKLR**, **Anarita Karimi Njeru v Republic [1979-80] KLR 154** and **Matiba v Attorney General [1990] KLR 666**.

13. Accordingly, it is my consideration that the issues for determination in the instant petition are as follows;

a) *Whether the arrest and prosecution was illegal and unlawful and thus violated his constitutional rights; and if so,*

b) *What general damages is the petitioner entitled to?*

14. Article 49 basically protects the interests of the arrested person. The said article embodies rules which

have always been regarded as vital and fundamental for safeguarding personal liberty in almost all legal systems where the Rule of law prevails. The abovementioned article provides as follows:

“49. RIGHTS OF ARRESTED PERSONS

(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; (ii) the right to remain silent; and (iii) the consequences 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 could 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 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 not to be released.

(2) A person shall not be remanded in custody for an offence if the offence”

15. The rights are also protected under article 9 of the International Covenant on Civil and Political Rights. It states as follows:

“Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

16. In light of the above, it is important to mention that the expression of the right to liberty in article 3 of the Universal Declaration of Human Rights reflects the inalienable nature of that right. The common conception of liberty formed the basis for the later articulation of the right to liberty in article 9 of the ICCPR.

17. Article 9(1) of the ICCPR basically prohibits arbitrary arrest and detention and the use of the term, “arbitrary” simply covers unjustifiable deprivation of liberty rather than seeking to list exhaustively all permissible causes of deprivation of liberty. As regards arbitrary arrest, article 49(1) of the constitution which is equivalent to article 9(2) of ICCPR comes into play. These provisions are often referred to as the Miranda rights following a well-known United States Supreme Court Case of *Miranda-v-Arizona*.

18. In that respect the Petitioner alleges that his right was violated on the account of his unlawfully arrest, detention and prosecution for the offence of driving without a licence contrary to Section 30(4) as read with 30(7) of the Traffic Act. The petitioner further states that unnecessary force and violence was used to arrest him whereby he was slapped and wrestled to the ground and that he was not informed of the reason for his arrest.

19. Wrongful arrest involves deprivation of a person’s liberty; it consists of arresting and holding a person without legal justification. Thus liability thereof is strict, a party need not show that the person causing the arrest was at fault or that he was aware that the arrest was wrongful. It is one that falls under *action injuriam*, and so proof of damage is not necessary to support the action. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to liberty.

20. Damages for unlawful arrest and detention should be exemplary and punitive in order to deter would-be violators. The Petitioners only need prove that the arrest or detention was illegal. This was stated in the case of **Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR**. They do not have to prove that the Respondents had intention to act illegally or to cause harm.

21. In order to establish the lawfulness of an arrest without a warrant, the onus of proof resides with the Respondents to show probable cause or reasonable suspicion. In exercising the power to arrest, he must act as an ordinary honest man would act, on suspicions which have a reasonable basis, and not merely on wild suspicion. However, the suspicion need not be a matter of certainty, or even probably, it must not at the other extreme, be vague, remote or tenuous. It is a question of a feasibility possibility, a matter of likelihood.

22. As a general rule an arrest of a suspect should not be made unless and until his or her case has been investigated with sufficient evidence requiring an answer on the complaint. The starting point for the investigating officer is not to depart from the enforcement of a right to a fair hearing and due process.

23. **Section 29 of the Criminal Procedure Code** provides for an arrest without warrant by a police officer in the following terms:

“29. Arrest by police officer without warrant

A police officer may, without an order from a magistrate and without a warrant, arrest—

(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;

(b) any person who commits a breach of the peace in his presence;

(c) ...

(d) ...”

24. **Section 36 of the Criminal Procedure Code** as it relates to detention after an arrest without warrant provides:

“36. Detention of persons arrested without warrant

When a person has been taken into custody without a warrant for an offence other than murder, treason, robbery with violence and attempted robbery with violence the officer in charge of the police station to which the person has been brought may in any case and shall, if it does not appear practicable to bring that person before an appropriate subordinate court within twenty-four hours after he has been so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person on his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where a person is retained in custody he shall be brought before a subordinate court as soon as practicable:

Provided that an officer in charge of a police station may release a person arrested on suspicion on a charge of committing an offence, when, after due police inquiry, insufficient evidence is, in his opinion, disclosed on which to proceed with the charge.”

25. **Section 58 of the National Police Service Act** gives a police officer power to arrest without warrant in these terms:

“58. Power to arrest without a warrant

Subject to Article 49 of the Constitution, a police officer may without a warrant, arrest a person—

(a)...

(b)...

(c) whom the police officer suspects on reasonable grounds of having committed a cognizable offence;

(d)”

26. Having laid out the statutory provisions upon which the Petitioners’ arrests were based, I must now interrogate whether in the circumstances, that arrest was unlawful resulting in false arrest and detention of the Petitioners. My starting point is what constitutes a false arrest. In **Daniel Waweru Njoroge & 17 Others v Attorney General Civil Appeal No. 89 of 2010 [2015] eKLR** the court held:

“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.”

27. A determination on whether or not there is false imprisonment is predicated on the circumstances of each case. The learned judge in the case of **Daniel Waweru Njoroge & 17 Others v Attorney General (supra)**, adopted the holding in **Jorgensen v Pennsylvania R.R., 38 N.J Super 317{App. Div. 1955}** where it was held that: ***“The gist of an action for false imprisonment is unlawful detention, without***

more.”

28. For the arrests of the Petitioners to be deemed as lawful, I must find that the arrests were for a cognizable offence and that the Respondents had reasonable grounds to believe the Petitioners had committed such offence. I find it necessary to seek out what “probable and reasonable cause” ought to entail. In the case of **Hicks v Faulkner, (1878), 8 Q.B.D. 167 at para 171** Hawkins J. defined probable and reasonable cause as follows:

“Reasonable and probable cause is an honest belief in the guilt of the Accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed.”

29. Rudd, J. in **Kagane v Attorney General & Another, (1969) EA 643** aligned himself with the **Hicks** definition by reiterating that:

“... to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of the facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty.”

30. In the instant case, it is my view that the lack of photograph of the petitioner in his driving license combined with the fact that the NTSA application returned a finding of “licence expired” upon checking, raised reasonable suspicion in the police officers’ minds to warrant his arrest.

31. The petitioner stated that his arrest was effected by force and violence however there was no evidence to support the use of violence Mr. Katana for the 1st, 2nd 3rd and 6th respondent deposed that the petitioner did not resist arrest to warrant a fight or a struggle and that he was the one who drove himself to the police station. The evidence on oath was not controverted by the petitioner.

32. The petitioner also alleged that the 5th respondent maliciously prosecuted him vide the proceedings in Senior Principal Magistrates Court at Runyenjes Traffic Case No. 102 of 2019.

33. The ingredients for the tort of malicious prosecution have been settled in this jurisdiction in several cases among them; **Kagane and Others v Attorney General and Another [1969] EALR 643**, **Mbowa v East Mengo District Administration [1972] EA 352**, **Murunga v Attorney General [1979] KLR 138** and they are as follows;

- a) *The plaintiff must show that the prosecution was instituted by the defendant, or by someone for whose acts he is responsible.*
- b) *That the prosecution terminated in the plaintiff’s favour.*
- c) *That the prosecution was instituted without reasonable and probable cause.*
- d) *That the prosecution was actuated by malice.*

These elements were summarized by the East Africa Court of Appeal in **Mbowa v East Mengo District Administration (Supra)** as follows;

“The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must “unite” in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action.”

34. In the instant case, having established that there was reasonable cause to warrant the arrest of the petitioner it is my considered view that the act of prosecuting the petitioner was warranted. Furthermore, I do note that the prosecution of the petitioner is still pending before the Senior Principal Magistrates Court at Runyenjes in Traffic Case No. 102 of 2019.

35. It is my considered opinion that the petitioner has failed to demonstrate that the respondents violated his constitutional rights as alleged in the petition.

36. I find this petition lacking merit and I dismiss it accordingly.

37. Each party will meet their own costs of the petition.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Lokorio for Respondent

Mr. Okwaro for Muthoni for Gitari for petitioner

Petitioner present