



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 243 OF 2017.

FRANCIS AMINA JUMA.....1ST PETITIONER
JOYCE AMINA.....2ND PETITIONER
JOHN HUBA WAKA.....3RD PETITIONER
BERLY KHASINAH.....4TH PETITIONER

VERSUS

THE INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT
THE DIRECTOR PUBLIC PROSECUTION.....2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioners herein, who describe themselves as adult Kenyan citizens sued the respondents through the petition dated 24th May 2017 in which they sought the following orders:

- a) A declaration that the 1st petitioner's rights of arrested persons, freedoms and security of the person and freedom of movement were violated.***
- b) The 3rd petitioner prays to be granted a reasonable anticipatory bail.***
- c) The 3rd petitioner, if charged, prays to be admitted to reasonable bail and bond terms.***
- d) A permanent prohibitory order be and is hereby issued restraining the 1st respondent either directly or through its officers, agents, representatives or any person acting on behalf of the 1st respondent from unreasonably and without any just cause, arbitrarily, unlawfully and or unconstitutionally arresting, searching, detaining, harassing, investigating, threatening, intimidating and or infringing upon the petitioners' rights and or limiting their fundamental freedoms as enshrined in the constitution and or any other law.***
- e) The petitioners pray for compensation for violations of their rights and fundamental freedoms.***
- f) Any other or further relief that the court may deem just.***

2. The 1st and 2nd petitioners are husband and wife petitioners are husband and wife respectively, and similarly, the 3rd and 4th petitioners are also husband and wife.

3. The petitioners' case, which was supported by the affidavit of the 3rd respondent was that on 18th May 2017 at about 2pm, the 1st petitioner was arrested within the Nairobi Central Business District by police officers from the flying squad unit who him booked at Kileleshwa Police Station, before transferring him to their Nairobi Area Offices on the following day where he was interrogated until around

8.30 pm when he was once again returned to Kileleshwa Police Station and locked up till 22nd May 2017 when he was arraigned in court.

4. The 2nd and 4th petitioners were on 19th May 2017 also summoned by the Flying Squad Officers for interrogation and while the 2nd petitioner was released on police cash bail of kshs 5000/-, the 4th petitioner was locked up at Pangani Police Station and later arraigned in court on 22nd May 2017.

5. The 3rd petitioner's claim is that he has for several years had a long standing dispute with the police and has lodged an official complaint against the police over acts of harassment, arrest and demand for "cash bail" to the tune of kshs 300,000/- for which the police only issued him with a receipt for kshs 100,000/- and have to date not arraigned in court or refunded the money paid to them as cash bail.

6. It is the petitioners' case that they have all been subject to frequent arrests, detention, searches, arrest and blackmail by the police officers. They attached a bundle of documents marked as annexure "JHW1" in support of their case.

7. In the 3rd petitioner's further affidavit filed on 24th June 2017, he avers that he has never been charged before any court of law despite having been released on cash bail of kshs 300,000 in September 2016. He however states that the criminal charges preferred against the 1st and 4th petitioner being criminal case Nos. 915 and 926 of 2017 are trumped up charges that lack proof and witnesses.

8. He further states that the police have been employing harassment tactics in order to silence the petitioners and stop them from pursuing the instant petition.

9. The petitioner's case is that their rights as arrested persons and right to property were violated for which they seek a declaration of violation of rights and compensation for such violations through an award of damages.

10. At the hearing of the petition Mr Wambola, learned counsel for the petitioners submitted that the petitioners' arrest and detention amounts to false imprisonment for which the petitioners are entitled to compensation. For this argument, counsel relied on the decision in the case of **Kenya Flour Spar Company Limited vs William Mutua Maseve & Another [2014] eKLR** in which the court awarded the appellant both general and exemplary damages for false imprisonment. Counsel also conceded that the 1st and 4th petitioners had taken plea before the trial court, but that the prosecution had not proceeded while the 3rd petitioner had not been charged following a court order stopping his arrest.

Respondents case

11. The 1st and 2nd respondents opposed the petition through replying affidavit of Constable **Patrick Shiundu**, a police officer attached to the Flying Squad Unit of the Directorate of Criminal Investigations (DCI) who deposes that on or about the month of August 2016, he received a report to the effect that the 3rd and 4th petitioners had registered companies using forged documents whereupon he commenced investigations into the said allegations.

12. He avers that his investigations which entailed the recording of statements from various witnesses, forensic examination of documents/signatures and a perusal of documents from the registrar of companies revealed that the petitioners were involved in forgeries so as to effect changes in the directorship of a company known as **AERO DISPENSER VALUES LIMITED**. He attached copies of witness statements, memorandum and Articles of Association, letters, forensic examiners report, affidavits and minutes to the replying affidavit as annexures.

13. He further avers that the investigation revealed that the 3rd and 4th petitioners had forged and uttered various false documents in order to secure the fraudulent registration of various companies and that the 1st petitioner was charged before the Milimani Court in criminal case No. 915 of 2017 while the 3rd and 4th petitioners are accused persons in the wanted list for trial in Milimani Criminal case Nos. 873 and 926 of 2017.

14. He further states that no charges were preferred against the 2nd petitioner who was refunded her casebail of kshs 5000/- and that her inclusion in this case is intended to mislead the court into believing that the police harassed petitioners.

15. He further avers that the allegation that the 3rd petitioner paid kshs 300,000 cash bail after which he was issued with a receipt of kshs 100,000/- only was raised with the Independent Policing Oversight Authority (IPOA) and later referred to the Internal Affairs Unit where the 3rd petitioner recorded a statement before a recommendation was made directing that the criminal proceedings initiated against the 3rd petitioner proceeds to its logical conclusion. He accuses the petitioners for approaching the court through a petition that is based on distorted facts intended to mislead the court on the truth concerning the matter that is the subject of criminal complaint investigations, and charges before a court of law.

16. The respondents' case is that the 1st respondent acted within to its mandate as provided for under the law in conducting investigations as mandated by Article 244 of the Constitution and Section 24 and 35 of the National Police Service Act.

17. At the hearing of the petition **Miss Spira**, learned counsel for the 1st and 2nd respondents, submitted that 3rd petitioner was arrested on 19th May 2017 and not 18th as alleged in the petition and that the claim in respect to extortion of the sum of kshs 324,808 from the 3rd respondent was deliberated upon by the Internal Affairs Unit which found the allegation to be lacking in merit and allowed the investigating officer to continue with the case.

18. Counsel submitted that the cash bail of kshs 100,000/- was refunded to the 3rd petitioner and that the investigating officer has not conceded to taking any money from the petitioners. She maintained that the 3rd petitioner has been charged in Milimani criminal case No. 926 of 2017 but is yet to take plea in the said case due to stay orders issued by the court while the 2nd petitioner was released without any charges for lack of evidence.

19. On the claim that the petitioners' rights were violated, counsel submitted that the petitioners were fully aware of the nature of investigations against them and should instead submit themselves before the trial court for the hearing of the cases against them. For this argument, the respondents cited the case of **Hussein Khalid & 16 Others vs The Attorney General and 2 Others HC Petition No. 324 of 2013** in which Lenaola J(*as he then was*) held that the issue of violation of rights ought to be raised before the trial court hearing the criminal cases against them.

20. Counsel further relied on the decision in the case of **Republic vs Commissioner of Police & Another exparte Michael Monari & Another [2012] eKLR** wherein Warsame J. (*as he then was*) stated that:-

“There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct in which amounts to an offence and on that account is deserving punishment”

Analysis and determination

21. I have considered the pleadings filed herein, the submissions filed by the parties' respective advocates together with the authorities that they cited. I find that the main issue for determination is whether in conducting investigations and preferring charges against the petitioners, the respondents violated the petitioners' constitutional rights and whether the petitioners are entitled to the orders sought in the petition.

22. As a starting point, it was not disputed that the petitioners were the subject of investigations by the 1st respondent which investigations culminated in the filing of criminal charges before the lower court in respect to the 1st and 4th petitioners while the 2nd petitioner was released for lack of evidence.

23. It was further not disputed that even though charges were preferred against the 3rd respondent, he is yet to take a plea before the trial court in view of the orders issued by this court, differently constituted, on 24th May 2017 restraining the respondent from arresting or incarcerating the 3rd respondent pending the hearing and determination of this petition.

24. The 1st and 4th petitioners' case is that their arrest and detention in police cells beyond the 24 hours prescribed by the Constitution without being granted cash bail before being arraigned in court amounted to a violation of their constitutional rights.

25. The 1st, 3rd and 4th petitioners further claim that there is no sufficient evidence to sustain the charges that have been filed against them in the criminal cases.

26. This court notes that Article 157(6) of the Constitution mandates the Director of Public Prosecution (DPP), the 2nd respondent herein, to undertake criminal prosecution and that under Article 157(11) of the Constitution, the court can only, intervene in the 2nd respondent's exercise of his mandate where it is shown that the principles listed in the said Sub Article have been breached. Article 157(6) and (11) stipulate as follows:

“6. The Director of Public Prosecutions shall exercise State powers of prosecution and may--

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

“(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

27. In the instant case, I find that even though the petitioners claim that their arrest and subsequent arraignment in court was actuated by malice and was without basis, I note that the criminal cases are still pending before court and no evidence has been presented to show that the respondents acted outside their mandate or breached the rules of natural justice in the exercise of their mandate. The respondents have demonstrated that they received a complaint which they investigated before arresting and charging the petitioners in court. I find that, at this juncture before the case before the criminal court are heard and determined, it will be premature to state that there is malice by the respondents.

28. I am guided by the decision in the case of **Republic vs Commissioner of Police & Another Exparte Michael Monari & Another[2012] eKLR** wherein it was held:

“There is no evidence to show that the respondents exceeded jurisdiction, breached rules of natural justice or considered extraneous matters or were actuated by malice in undertaking the investigations against the applicants. The purpose of criminal proceedings is to hear and determine finally whether the accused has engaged in conduct in which amounts to an offence and on that account is deserving punishment”

29. I will now deal with each of the prayers sought by the petitioners separately in determining whether or not they should be allowed while taking into account the fact that prayers 2 and 3 are already spent.

1. A declaration that the 1st petitioners rights of arrested persons, freedoms and security of the person and freedom of movement were violated.

30. The 1st petitioner claimed that his rights as an arrested person were violated when the respondents held him for more than 24 hours without being released on bail before presenting him in court. The respondent on the other hand stated that the petitioners were arrested on Friday 19th May 2017 and that the earliest time that they could be presented in court was on Monday 22nd May 2017.

Article 49 provides as follows:-

(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 is punishable by a fine only or by imprisonment for not more than six months.

31. In this case, while the petitioners claim that they were arrested on 18th May 2017, the respondents on the other hand place the date of the arrest to be 19th May 2017. No evidence was tendered before this court by the petitioner to show the exact date of their arrest but if the respondents version of the date of arrest is to be believed then, I find that the respondent complied with the 24 hour rule of presenting suspects before the court as provided for under Article 49(f) (ii) of the Constitution.

32. Regarding the claim that the petitioners right to security of persons and freedom of movement were violated, I find that the right to freedom of movement is not an absolute right and can be limited, as was done in the instant case, when a person is under arrest on suspicion of having been involved in a criminal. Indeed the legal position is that a police officer is entitled to effect an arrest as long as he has reasonable grounds for entertaining a suspicion at the time of such arrest even if subsequent events may show that the officer was in error. See **Dillion Vs O'Brien and Davis [1887] 16 COX CC 245.**

2. A Permanent order of prohibition to restrain the 1st respondent from arbitrarily limiting their fundamental freedoms as enshrined in the Constitution.

33. In order to buttress their case that the respondents are arbitrarily arresting, intimidating, arresting and detaining them without any basis, the petitioners contended that there was no proper evidence to support the charges that the respondents were leveling against them.

34. Infact, the petitioners' case was that the respondents did not have any witnesses to support the criminal cases filed against them and were instead, using the charges to intimidate them.

35. As I have already noted in this judgment, the 2nd respondent is mandated under Article 157(6) of the Constitution to institute and

undertake criminal proceedings against any person before any court and Article 157(11), requires the Director of Public Prosecution to have regard to public interest and to avoid abuse of legal process.

36. In the instant case, it was not in dispute that while the 1st and 4th petitioners have already taken plea before the Magistrates Court in respect to the criminal charges preferred against them, the 3rd respondent is yet to take plea following orders issued by this court stopping his arrest.

37. It is important to note that under Article 157(10) of the Constitution, the decision by the Director of Public Prosecution to institute criminal proceedings is discretionary and that in the exercise of such discretion, he is not subject to the direction or control of any authority. However, the court may only intervene where it is shown that the criminal proceedings have been instituted for other reasons other than the honest enforcement of criminal law or otherwise abuse of the court process.

38. In the instant case, I note that the 1st and 2nd respondents have filed a detailed replying affidavit supported by numerous annexures explaining the nature of the investigations that they conducted following a complaint filed against the complainant. They have also attached copies of charge sheets in respect to the charges filed against the petitioners.

39. I am therefore unable to find that the arrest and arraignment in court was actuated by malice or for any other reason other than the honest enforcement of the criminal law. No material has been placed before me to show that the respondents acted unlawfully or in excess of their authority in the exercise of their mandate. It is critical for this court to balance the interest of the complainant who filed the complaint before the respondents and the petitioners herein and in doing so, I find that the order of prohibition sought by the petitioners is not merited in this case as the petitioners have not shown that there is misuse of the court process or that there is danger that they will not be accorded a fair trial before the criminal court.

40. For the above reasons, I find that the petitioners have not proved their case against the respondents to the required standards and the prayers for compensation for violations of rights cannot be issued.

41. In a nutshell, I find that the petition is without merit and I hereby dismiss it. Each party will bear his/her own costs of the petition.

Dated, signed and delivered in open court at Nairobi this 7th day of December 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Wambola for the petitioners

No appearance for respondent

Court Assistant – Kombo