



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

PETITION NO. 32 OF 2013

**IN THE MATTER OF A PETITION UNDER ARTICLE 22 OF 23 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL FREEDOMS AND RIGHTS OF
THE PETITIONER UNDER ARTICLE 27(1) (2), 29(a)(b)(c)(d)(e)(f), 31 (a), 35(1)(a)(b), 39(1),
41(1) AND 47(1)(2) OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
THE FUNDAMENTS FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

AND

**IN THE MATTER OF ILLEGAL DETENTION, MALICIOUS PROSECUTION, UNDUE
WITHHOLDING OF LAWFUL DUES AND UNLAWFUL DEMOTION OF DAVID JOHN
ONYANGO OGOLLA IN BLATANT OF THE CONSTITUTIONAL PROVISIONS CITED**

DAVID JOHN ONYANGO OGOLLAPETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

By this petition dated 28th August, 2013 the Petitioner **DAVID JOHN ONYANGO OGOLLA** sought the following orders:-

- a. *A declaration that the Petitioner's fundamental rights and freedoms under Articles 27(1) and (2), 29 (a), (b), (c), (d), (e) and (f), 31 (a), 35 (1), (a) and (b), 39(1), 41 (1), and 47 (1) and (2) of the Constitution were infringed;*
- b. *A declaration that the Petitioner is entitled to damages and compensation for the violations of his fundamental rights and freedoms;*

- c. *A declaration that the Petitioner is entitled to payment of all unpaid dues of Ksh 216,000/= that were illegally withheld by the 1st Respondent together with interest computed from the date they were due;*
- d. *General, exemplary and aggravated damages;*
- e. *Any further orders that this court may deem necessary to grant;*
- f. *Costs of the petition together with interest.*

The Hon. Attorney General who entered appearance for both Respondents filed grounds of opposition dated 4th December 2014.

BACKGROUND

The Petitioner had been employed by the Kenya Police Force on 17th October, 1995 as an Administration Police Officer. He was promoted severally until he reached the rank of an Administration Police Sergeant. During the material time the Petitioner was serving in this capacity at Kehancha, Kegonga District Office in Kuria District.

On 7th June, 2002, the Administration Police Amory at Kehancha was broken into by unknown persons. Two G3 Rifles, 286 rounds of ammunition of 7.62 mm calibre, 13 rounds of ammunition of 9 mm calibre and 4 empty G3 magazines all worth Ksh 144,970/= were stolen.

On that same date being 7th August, 2002 the Petitioner was arrested in connection with this incident. He was held in detention until 16th August, 2002 when he was arraigned before the Resident Magistrate at Kehancha Law Courts vide **Criminal Case No. 143 of 2002** charged with the offence of **Breaking into a Building and Committing a Felony Contrary to Section 306 of the Penal Code**. The matter proceeded by way of a full trial and on 5th November, 2003 the court acquitted the Petitioner of the charge under Section 215 of the Penal Code.

The Petitioner alleges that during the period of his incarceration he was not informed of the reasons for his detention contrary to Article 29(a) of the Constitution. He further alleges that during his confinement he was physically tortured by being taunted, mocked and stripped contravening his rights under Section 29 (c) (d) (e) and (f) of the Constitution. The Petitioner also complained that his person and residence were subjected to searches violating his right to privacy under Article 31 of the Constitution.

The Petitioner states that during his trial he was on interdiction and was only paid half of his salary. He claims that the amount withheld amounted to Ksh 216, 000/= which has not been paid to him to date contravening his rights to fair labour practices under Article 41(1) of the Constitution. After his acquittal the Petitioner was demoted from the rank of sergeant without being informed of the reasons for such demotion contrary to Article 35(1) (a) and (b) and Article 47(1) and (2) of the Constitution. As a result of what he perceived to be a breach of constitutional rights by the Respondents the Petitioner filed this present petition.

The Hon. Attorney-General in his reply contended that the petition lacked merit, was misconceived and amounted to an abuse of court process. It was argued that the Petitioner failed to demonstrate how his fundamental rights and freedoms were violated. It was further contended that the Petitioner's claim was basically a civil claim for the tort of unlawful arrest and prosecution and ought to be filed as such, not by way of a constitutional petition.

The Respondent maintained that the Petitioner's arrest and prosecution was done in accordance with the law. The mere fact that the court eventually acquitted him does not make the prosecution malicious.

The petition was disposed of by way of written submissions. **MR. OREGI** Advocate represented the Petitioner whilst **MS KHATAMBI** learned State Counsel appeared for the Hon. Attorney General for both Respondents. All parties duly filed their written submissions and matter is pending for the court's judgement.

Counsel for the Petitioner submitted that the Petitioner had proved the facts of his arrest, detention and torture which amounted to inhuman and degrading treatment. Counsel relied on the Police Force Standing Orders enacted pursuant to Section 5(1) of the Police Act which provided for the procedure of conduct in disciplinary proceedings against a police officer. The standing orders required that due process be followed including informing the officer of the allegations against him and allowing him ample time and opportunity to defend himself. It is alleged that the Respondent failed to accord the Petitioner this due process when it detained and demoted the Petitioner without giving him any reasons for doing so.

The Petitioner sought to be paid the sum of Ksh 216,000/= which he claims was unlawfully withheld by the 1st Respondent. It was further submitted that the Petitioner was entitled to aggravated and exemplary damages for being arrested without probable cause. The Petitioner sought to be paid all inclusive sum of Ksh 2,000,000/= (two million only) as general damages for torture and unlawful imprisonment.

The learned State Counsel submitted that the High Court lacked the requisite jurisdiction to determine this matter. The issues raised in the Petition being unlawful interdiction during his trial, payment of half his salary and his demotion after acquittal were all submitted to be Employment and Labour Relations matters which would properly fall under the ambit of the Employment and Labour Relations Court for determination pursuant to Article 162(2) (a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act. Counsel submitted that Article 165(5) (b) of the Constitution expressly ousted the jurisdiction of the High Court in regard to Employment and Labour relations matter.

Ms Khatambi for the Respondents further submitted that under Section 3(1) of the **Public Authorities Limitations Act** any tortious claims for unlawful arrest and malicious prosecution ought to have been filed within twelve (12) months from the date when the cause of action arose. Thus this suit ought to have been filed **before** 7th June, 2003. Counsel submitted that this constitutional petition was merely an attempt to circumvent this law and thus amounted to an abuse of the court process. The mere allegations that a human right or a fundamental freedom has been or is likely to be contravened – does not entitle the applicant to file a constitutional petition. Counsel insisted that it was apparent that the allegation of breach of constitutional right was merely thrown in to avoid coming to court in the appropriate manner *ie* through the Employment and Labour Relations Court.

Lastly counsel for the Respondents submitted that the Petitioner is not entitled to exemplary and general damages which are discretionary and are not awarded as a matter of right.

DETERMINATION

I have carefully perused and considered the written submissions filed on behalf of the parties in this case. Where an objection touching on jurisdiction is raised by any one of the parties then the court is obliged to determine the question first because as it is said **‘jurisdiction is everything’** and without proper jurisdiction a court cannot move a step further. **In OWNERS OF THE MOTOR VESSEL “LILIAN S” Vs CALTEX OIL(K) LTD [1989] KLR** Hon. Justice Nyarangi J. A (as he then was) held as follows:-

“..... 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In **SAMUEL KAMAU MACHARIA Vs KENYA COMMERCIAL BANK LTD & 2 OTHERS, [2012] eKLR** the Supreme Court held:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred (to it) by the Constitution or other written law. It cannot abrogate to itself jurisdiction exceeding that which is conferred upon it by the law.”

We agree with counsel for the first and second Respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere

procedural technicality, it goes to the very heart of the matter for without jurisdiction, the court cannot entertain the proceedings.”

The Supreme Court also dealt extensively with the question of jurisdiction in the **MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION (THE APPLICANT)**, (Constitutional Application Number 2 of 2011), and said

“Where the constitution exhaustively provides for jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined in the Constitution. When the Constitution confers powers upon Parliament to set the jurisdiction of a court of law or Tribunal the legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by Statute”

Article 165(3) (b) of the Constitution of Kenya vests in this court the jurisdiction **“to determine whether a right or fundamental freedom in the Bill of rights has been denied, violated infringed or threatened”**. This jurisdiction of the High court is only limited by Article 165(5) which provides:-

“The High Court shall not have jurisdiction in respect of matters –

- a. ***Reserved for the exclusive jurisdiction of Supreme Court under this Constitution; or***
- b. ***Falling within the jurisdiction of the courts contemplated by Article 162(2)”*** (my own emphasis)

The Courts which are contemplated under Article 162(2) are the courts established by Parliament to hear and determine disputes relating to the following

- a. ***employments and labour relations***
- b. ***the environment and the use and occupation of, and title to, land”***

Pursuant to Article 162 (2) (a) of the Constitution Parliament established the Employment and Labour Relations Court, under Section 4 of the **Employment and Labour Relations Court Act Cap 234B**. Section 12 of this Act vests in the Employment and Labour Relations Court exclusive original and appellate jurisdiction to hear and determine **all** disputes relating employment and labour relations including disputes relating to or arising out of employment between an employer and employee. Section 12(3) of the Act grants to the Employment and Labour Relations Court powers to make interim preservative injunction orders, prohibiting orders, orders of specific performance, declaration orders, award of compensation or damages, an order for reinstatement and/or any other order/relief the court may deem appropriate.

This present Petition raised the following issues for determination

- a. ***Whether the Petitioners rights were violated when he was detained for 10 days without probable cause and without being allowed to confer with counsel or to be visited by relatives.***
- b. ***Whether during the time he was incarcerated the Petitioner was subjected to torture and other degrading and inhuman treatment contrary to the provisions of Article 29(c) (d) and (e) of the Constitution.***
- c. ***Whether the 1st Respondent subjected the Petitioner to unfair labour practices by interdicting him and awarding him only half his salary and by demoting him upon conclusion of his trial.***
- d. ***Whether the 1st Respondent contravened the Petitioner’s right to fair administrative action when its demoted him without giving reasons and without hearing the Petitioner.***

This court is vested with the necessary jurisdiction to hear and determine the first two issues (a) and (b) concerning the violation of the Petitioners rights by way of unlawful detention prosecution and torture. However the issues raised in (c) and (d) are labour and employment issues that occur between an employer and employee and therefore fall exclusively within the jurisdiction of the Employment and Labour Relations Court.

In **UNITED STATES INTERNATIONAL UNIVERSITY (USIU) –Vs- ATTORNEY GENERAL [2012] eKLR**, the court dealt exhaustively with the question of the jurisdiction of the High Court vis a vis that of the Industrial Court (which is the predecessor of the present Employment and Labour Relations Court). It was held that the latter court holds equal status with the High Court and has exclusive jurisdiction to determine matters relating to employment and labour relations. In addition the court held that in determining these matters the Industrial court also had jurisdiction to determine questions regarding the breach of fundamental rights including interpretation of the Constitution which such questions arose in the context of the matters within its jurisdiction. The court held that:-

“Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamentals rights and freedoms is incidental to the exercise of jurisdiction 17 over matters within its exclusive 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.

.... i find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental right and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011”.

In **JUDICIARY SERVICE COMMISSION Vs GLADYS BOSS SHOLLEI & ANOTHER [2014] EKLR**, Okwengu, JA held interpreted articles 23(1) & Article 165(3) (b) as read together with articles 20(3) and 23(2) and (3) of the Constitution to mean that the powers to determine questions concerning an infringement of fundamental rights and freedoms is **not** exclusively vested in the High Court. The judge held:

Article 23(1) & Article 165(3) (b) of the Constitution grants the High Court powers to hear and determine questions involving redress of violations of 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 freedoms.

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. 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. In my considered view, 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.” (my own emphasis)

The above Court of Appeal authority is binding on this court. I find that this petition was only filed in the High Court because the Petitioner realized that he was time barred in bringing a civil claim. I find that the Employment and Labour Relations Court being of equal status with the High Court had exclusive jurisdiction to determine all the issues raised in this Petition **including** the issues regarding the allegations of breach of fundamental rights and freedoms that arise in the course of the litigation.

As such I find that this court has no jurisdiction to hear and determine the issues raised in this petition. The same is struck out for want of jurisdiction I make no orders on costs.

Dated in Nakuru this 1st day of July, 2016.

Maureen Odera

Judge