



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

PETITION NO. 345 OF 2015

BETWEEN

CHRISTINE KIDHAPETITIONER

AND

NAIROBI WOMEN'S HOSPITAL.....RESPONDENT

JUDGMENT

Introduction

1. The constitutional question raised by the Petition is whether the detention of the Petitioner by the Respondent, on grounds of non settlement of monies allegedly due and owing to the Respondent by the Petitioner, amounted to a violation of the Petitioner's fundamental freedoms and rights.
2. The Petitioner seeks a declaratory order that her detention by the Respondent was unlawful and unconstitutional. The Petitioner also seeks compensatory orders in form of damages as well as costs. The Petition is resisted.

Factual Background

3. The facts giving rise to the Petition are relatively straight forward.
4. The Petitioner sought and obtained medical care from the Respondent. That was on 14 May 2015. To obtain and access such medical care the Petitioner had to be admitted in the Respondent's medical establishment. Six days later, on 20 May 2015, the Petitioner was due to be discharged. At the time of her discharge, the Petitioner was however unable to fully settle her medical bill with the Respondent. The Respondent could not let the Petitioner go. As a result the Petitioner was confined by the Respondent within the Respondent's facility or establishment. The confinement continued until 3 September 2015 but only after the court had issued conditional orders for the Petitioner's release.

The Petitioner's case

5. The Petitioner's case is largely contained in the Petition. The Petitioner also swore three additional affidavits by the Petitioner dated 17 August, 2016, 25 August, 2016 and 9 October, 2016. The Petitioner also presented two other affidavits in support of the Petition sworn by Francis Ochieng Owino on 25

August, 2016 and Sam Aguko on 19 October, 2015.

6. The Petitioner contends that, at the time of her discharge, her medical bill stood at Kshs. 339,495.24. Kshs. 160,000.00 was then paid leaving a balance of Kshs. 173,000.00 which would have been cleared once she had been released. In the meantime, the Petitioner further contends that, her predicament was brought to the Respondent's attention and she further expressed her willingness to clear the outstanding balance by offering security in the interim.

7. It is the Petitioner's case that the security in form of motor vehicle KBA 703Q was rejected and instead, the Respondent resorted to unlawful confinement and detention until 3 September 2015 when she was released pursuant to a court order.

8. The Petitioner contends that the Respondent's actions violated the Petitioner's right to liberty as well as security and freedom of person.

The Respondent's case

9. A Replying Affidavit was sworn and filed on behalf of the Respondent on 25 August 2015 by Reuben Waweru, the Respondent's Chief Finance Officer.

10. The Respondent contends that, the Petitioner was admitted after paying a deposit of Kshs. 10,000.00. She later paid Kshs. 150,000.00 and that the debt due and owing from the Petitioner as at 25 August 2015 stood at Kshs. 982, 432.20 due to continued medical services that the Petitioner was receiving from the Respondent. Accordingly, the Respondent states that the Petitioner showed goodwill and intention to pay her debt by furnishing security in the form of a motor vehicle KBA 703Q, valued at Kshs. 560,000.00. This, in any event was not sufficient to cover the debt owed to the Respondent.

11. However, the Respondent states that, it does not deal with security assets and due to the nature of its business and the resultant magnitude of possible similar cases, the Petitioner ought to have pledged short term cash financing from short term lenders introduced to the Petitioner by the Respondent.

12. It is the Respondent's case that the Petitioner knowingly entered into a contract with the Respondent and agreed to pay monies for services rendered. Her refusal to pay for the services was a breach of the aforesaid contract.

13. Further, the Respondent states that, it was in an effort to enforce the contract that it was forced to confine the Petitioner for fear that the Petitioner would abscond and not honor the agreement, which would have been detrimental to the Respondent's operations.

14. Finally, the Respondent states that, the nature of the dispute between itself and the Petitioner is commercial and should be canvassed before the appropriate court and not in the nature in which it has been filed.

Arguments in court

Petitioner's Submissions

15. The Petitioner submits that her detention by the Respondent was in violation of her constitutional rights and freedoms. On this, she relied on the case of **Sonia Kwamboka Rasugu vs. Salwood Hotel & Resort Limited t/a Paradise Beach resort & Anor, Petition No. 156 of 2011, [2013] eKLR** where the court held that any form of detention not sanctioned by the law that seeks to procure performance of a contractual debt is a violation of the right to liberty. Further reliance was placed on the case of **Millicent Awuor Omuya & Anor vs. The Attorney General & 4 others, Petition No. 562 of 2012**.

16. In the circumstances, the Petitioner submits that she is entitled to damages for false imprisonment and unlawful detention and lost business opportunities to the tune of Kshs. 7, 700,000.00.

Respondent's submissions

17. On behalf of the Respondent, it was submitted that the Petitioner knowingly entered into a contract for the provision of medical services with the Respondent, whereby she agreed to pay monies for services rendered. However, she failed to pay and in an effort to enforce the contract, the Respondent submitted that it placed the Petitioner under its care for fear that she would abscond and not honor the agreement.

18. It was further submitted that the Petition herein is vexatious and frivolous and falls short of the established threshold of a constitutional petition as it fails to disclose, with a reasonable degree of precision the manner in which the Petitioner's rights were violated. On this assertion, the Respondent sought to rely on the case of **Anarita Karimi Njeru vs. Republic (No. 1) [1979] KLR 154**. The Respondent also submitted that it was not in breach of the Petitioner's rights and freedoms. It sought to rely on the case of **Isaac Ngugi vs. Nairobi Hospital & 3 others [2013] e KLR**.

Discussion and Determination

Whether the Petition is competent

19. The Respondent took issue with the Petitioner for failing to disclose with a reasonable degree of precision the manner in which her rights were violated under the Constitution as required in the case of **Anarita Karimi Njeru vs. Republic (No. 1) [1979] KLR 154**. In the aforementioned case, the court stated that a party who alleges that his or her rights have been violated must demonstrate, with a reasonable degree of precision, the Articles of the Constitution that have been violated and the manner of violation.

20. On the principle enunciated in the case of **Anarita Karimi Njeru (supra)**, the Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** emphasized the need for precision in drafting claims. It *inter alia* stated thus:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

21. Slightly later in the same judgment, the Court of Appeal further held that:

“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.”

22. It is the Petitioner's case that she was detained by the Respondent. The Respondent does not dispute this claim. In fact, the Respondent in explaining away the detention stated that, there was in existence a contract between itself and the Petitioner. In an effort to enforce the contract, it placed the Petitioner 'under its care' for fear that she would abscond and not honor the agreement.

23. Article 22 of the Constitution provides that any person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. As stated above, it is not in dispute that the Petitioner was detained by the Respondent. In that regard, I am of considered view that the Petitioner has disclosed with a reasonable degree of

precision the manner in which her rights were violated under the Constitution. It was painless identifying the Petitioner's grievance and certainly, I have no doubt that the Respondent must have been aware of the Petitioner's claim and case, as it were.

Whether the detention of the Petitioner was in violation of her Rights under the Constitution

24. As earlier alluded to, it is not in dispute that the Petitioner was detained by the Respondent for failure to pay her medical bill. The Petitioner states that, she was due for discharge on 20 May, 2015. However, she was unable to fully pay her medical bill. The Respondent on the other hand averred that, it was forced to confine the Petitioner for fear that she would abscond and not honor the agreement which would have been detrimental to the Respondent's operations. The Petitioner was therefore held by the Respondent and only discharged by an order of this court. Did the detention of the Petitioner amount to violation off her rights under Articles 29 and 39 of the Constitution?

25. Article 29 of the Constitution *inter alia* provides that,

'Every person has the right to freedom and security of the person, which includes the right not to be- (a) deprived of freedom arbitrarily or without just cause; (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58.'

26. Article 39 on the other hand *inter alia* provides that,

'Every person has the right to freedom of movement.'

27. The Petitioner's detention was as a result of her inability to pay her medical bill. In essence, she was detained for being indigent. The court in **Sonia Kwamboka Rasugu** (*Supra*) had occasion to deal with a similar issue. Majanja J., rendered himself thus:

"The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual's physical freedom. Article 9 of the Universal Declaration of Human Rights provides that; 'no one shall be subjected to arbitrary arrest, detention or exile'. Similarly, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) secures the right to liberty and security of the person in the following terms; "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." Article 11 of the ICCPR further states that, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." The provisions of the Article 2(5) and 2(6) of the Constitution incorporate into Kenyan Law the Convention (see Re Zipporah Wambui Mathara Milimani BC Cause No. 19 of 2010 (Unreported)."

See also, **Millicent Awuor Omuya & Anor vs. The Attorney General & 4 others, Petition No. 562 of 2012.**

28. The Court in the **Sonia Kwamboka Rasugu** (*supra*) in citing with approval the case of **Sunbolf vs. Alford (1838) 3 M & W 248, 150 ER 1135**, on whether the Petitioner was unlawfully held stated that,

"If an Innkeeper has a right to detain the person of his guest for non-payment of his bill he has a right to detain him until the bill is paid, which may be life..... The proposition is monstrous. Again, if he have any right to detain the person, surely he is the judge in his own cause..."

29. Article 24 (1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. I am in agreement with the proposition in the case of **Sonia Kwamboka Rasugu** (*supra*) that, detention of a person that seeks to procure or compel a person to perform a contractual duty is an insult to the right to liberty and a violation of that right under the Constitution. See

also Issac Ngugi vs. Nairobi Hospital & 3 others [2013]eKLR.

30. The law allows any person to move the court with a view to recovering any debt due whether disputed or not. That is the due process. The law will also where appropriate limit any fundamental right when it comes to enforcement of any judgment of the court. Thus property may be attached as authorized by the law and in recovery of monies due under a decree. Likewise, the law allows the detention of an individual in civil jail for purposes of settlement of a debt but with and under judicial authority and oversight. The law does not however allow arbitrary detention of persons in the pretext of recovering any monies due and owing. It would be a violation of the constitutionally guaranteed right to security of person. There is a constitutional commitment that a person will not be deprived of his liberty without due process ordinarily obtained through the judicial process. Every person has a right to be left alone.

31. In the circumstances therefore, the detention of the Petitioner in the instant case without the due process was unjustifiable, arbitrary and a violation of her constitutional right.

Whether the Petitioner ought to only be liable for costs of medical services extended to her up to her due date of discharge, that is, 20 May 2015

32. The Petitioner seeks for orders that she is only liable for the costs of medical services extended to her by the Respondent until her due discharge date, being 20 May 2015.

33. As already discussed above, the act of detaining the Petitioner for a contractual debt is unlawful and against the Petitioner's rights as enshrined under Articles 29 and 39 of the Constitution. The Petitioner did not refuse to settle her medical bill. It is not in contention that she sought to give security in the form of a Motor Vehicle, KBA 703Q. In fact, the Respondent averred that, the Petitioner refused to pledge the purported security for short term cash financing from short term lenders introduced to her by the Respondent. The contention by the Respondent is that it does not deal with security assets as it would be practically impossible due to the nature of its business and the magnitude of possible similar cases and the resultant cash flow difficulties of running the hospital.

34. Granted, however, I am of the considered view that furnishing the motor vehicle was a show of good faith on the Petitioner's part and the same would have been able to cover the debt due and owing as at the time of her discharge. From the evidence adduced, the amount due as at the time of the Petitioner's discharge was Kshs. 339,495.24. The Respondent has previously received an amount of Kshs. 160,000.00 as deposit from the Petitioner. The balance therein would have been sufficiently, if not substantially, covered by the security pledged. In any event, this was a civil debt and the Respondent was at liberty in the event of default to pursue it as such.

35. Under the circumstances therefore, I am of the considered view that the Petitioner ought to only pay the amount owed as at the time of her discharge.

Whether the Petitioner is entitled to an award of damages and compensation for loss suffered.

36. I have found that the Petitioner's constitutional rights have been violated. Nothing in the Constitution prohibits me from awarding the Petitioner damages. A sense of justice dictates that I should indeed seek to have the Petitioner reasonably compensated. No other form of relief appears available for the Petitioner now.

37. The Petitioner seeks an award of damages for Kshs. 7, 700, 000.00, being Kshs. 3,200,000 for lost business opportunity as a result of the detention and Kshs. 4,500,000.00 in general and aggravated damages.

38. I will first deal with the issue of lost business opportunity and the amount of Kshs. 3,200,000.00 that the Petitioner seeks. The same has not been deponed save for the submissions that state that the Petitioner 'lost business opportunities, to wit performance of an L.P.O. that she had already secured with the Rural Electrification Authority from which she would have made a tidy profit of Kshs. 3, 200, 000.00.'

39. Apart from this assertion, there is no evidence on record that indeed the Petitioner had secured an 'L.P.O.' from the Rural Electrification Authority. I am of the considered view that loss of business opportunity is a special damage and the same ought to be specifically pleaded and most importantly, strictly proved. In this instance the same has not been done. The same remains mere assertions through submissions and the court cannot simply act on this. As stated by the Court of Appeal in **Cecilia Mwangi & Another vs Ruth W. Mwangi, Civil Appeal No. 251 of 1996 (unreported)**,

"...it will suffice to say that Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them."

40. The principle is sound. Besides, submissions can never substitute evidence. I am therefore of the considered view that the prayer for the award of lost business opportunity has not at all been proven and ought to fail. It fails.

41. I will now visit at the prayer for general and aggravated damages.

42. In the case of Sonia Kwamboka Rasugu (Supra), the court held that,

'there is no fixed formula for the determination of the quantum of damages. Such determination lies in the discretion of the court, which must determine the quantum by taking into account all relevant factors and circumstances according to what is just and fair. Such an award should express the importance of the constitutional right to individual freedom, it should properly take into account the facts of the case, the personal circumstances of the victim, and the nature, extent and degree of the affront to his dignity and his sense of personal worth.'

43. In the Sonia Kwamboka Rasugu (Supra), the court awarded general damages in the sum of Kshs. 1,000,000.00 to the Petitioner since the unlawful act was not accompanied by torture and the same was for a period of four days. In arriving at that decision, the court cited the cases of Rumba Kinuthia & others vs. The AG **Nairobi HCCC No. 1408 of 2004 (Unreported)**, where seven claimants who were detained for long periods of time and were subjected to torture, cruel and inhuman treatment were awarded Kshs.1.5 million each and Nelson Akhahukwa Muyela vs. Attorney General Nairobi Petition No. 783 of 2008 (Unreported) and Israel Okemo Agina vs. AG **Nairobi Petition No. 1374 of 2003 (OS) (Unreported)** where the court awarded the sum of Kshs. 2 million in similar circumstances.

44. In the instant case, the Petitioner was detained for more than three months. However, the same was not accompanied by torture. Since the same was deliberate and for purposes of ensuring that the Petitioner honors a contractual debt, I do view it that the sum of Kshs. 1,000,000.00 as general damages would suffice.

45. With regard to costs, I have the discretion. The circumstances of the case leave me with no option. The Petitioner has been successful in her claim. The Respondent ought to pay the Petitioner's costs.

Conclusion and Reliefs

46. Running from what I have stated above, I conclude that

- a. The Petitioner was unjustifiably, arbitrarily, unlawfully and unconstitutionally detained against her will and in complete disregard and violation of her constitutional rights.
- b. The non-settlement of a contractual and thus civil debt was not a basis for the Petitioner's detention.

47. I accordingly enter judgment for the Petitioner against the Respondent as follows:

- i. I declare that the detention and confinement of the Petitioner by the Respondent between the days

of 20th May 2015 and 3 September 2015 and without the Petitioner's consent was unconstitutional and a violation of the Petitioner's right to freedom and security of person under Article 29(a).

ii. The Respondent shall pay the Petitioner the amount of Kshs 1,000,000/= being general damages together with interest for violating the Petitioner's rights.

iii. The Respondent shall also pay the Petitioner costs of the Petition.

DELIVERED, SIGNED and DATED at Nairobi this 7th day of December 2016

J.L.ONGUTO

JUDGE