



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 3 OF 2014

IN THE MATTER OF SECTION 84 OF THE REPEALED CONSTITUTION

IN THE MATTER OF ARTICLES 19, 20,21, 23 AND 25 OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTIONS 70,72 AND 77 OF THE REPEALED CONSTITUTION

BETWEEN

JOHN KIMANI GITAU.....PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. In his Petition dated 24th January 2014, the Petitioner seeks the following orders:

- (a) a declaration that the fundamental rights and freedom freedoms of the Petitioner were contravened and violated various times during the trial;
- (b) a declaration that holding the Petitioner in Police custody custody for 21 days before taking him to court was unconstitutional;
- (c) a declaration that the trial of the Petitioner without takingtaking plea was illegal and unconstitutional;
- (d) a declaration that the three year period that the trial took was in contravention of the Constitution's provision for speedy trial;
- (e) a declaration that the Petitioner's right to have a trial concluded without unreasonable delay was contravened when his appeal was determined after six years;
- (f) a declaration that holding the Petitioner for 21 days before arraigning him for retrial when the Court of Appeal had ordered that he be arraigned in court within 14 days was unconstitutional;

(g) a declaration that charging the Petitioner with the offence of murder and later arraigning him for retrial for the same offence only to enter a *nolle prosequi* as there had never been any evidence to uphold the charge is a gross violation of the Petitioner's fundamental rights and freedoms;

(h) general, exemplary and aggravated damages;

(I) any other orders that the court may deem fit to grant; and

(j) costs of the suit and interest.

2. The Petition was supported by the Petitioner's affidavit sworn on 24th January 2014.

THE PETITIONER'S CASE & SUBMISSIONS:

3. On 4th November 2003, the Petitioner was arrested for the offence of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. He was held in custody until 25th November 2003 when he was arraigned in the High Court at Nakuru.

4. When he was presented before court, he was not given an opportunity to answer to the charges. Nonetheless, he was tried, convicted and sentenced to death but this death sentence was commuted to life imprisonment by the former president H.E. Retired President Mwai Kibaki.

5. The Petitioner subsequently appealed to the Court of Appeal against his conviction and sentence on 7th December 2006. This appeal was only determined after six years on 23rd February 2012.

6. The Court of Appeal found that the Petitioner had been tried without taking plea and set aside the conviction and sentence. It ordered that the Petitioner be arraigned in the High Court within fourteen days for retrial. Yet again, he was remanded beyond the fourteen days and only taken to court after twenty one days. The trial proceeded for some time until the Director of Public Prosecutions entered a *nolle prosequi* on 7th October 2013.

7. The Petitioner's case is against the Police and the Judiciary. He accuses the Police of violating his right to be brought to court within fourteen days from the date of arrest because he had been charged with a capital offence as provided for under **Section 72(3)** of the Old **Constitution** (now repealed).

8. Against the Judiciary, he argues that the courts violated his right to a fair administrative action by failing to give him an opportunity to take plea. Secondly taking three years to conduct his trial and a further six years to determine the appeal was a gross violation of his right to fair trial under **Section 77(1)** of the **Constitution**.

9. Before his arrest, the Petitioner, who is a graduate of the University of Nairobi, was a happy family man earning a decent living. However as a result of inadequate investigations and the negligence of these institutions he lost his job and was prevented from being with and providing for his family. It is for these reasons that he has asked for the orders of the court.

10. Counsel for the Petitioner submitted that the Petitioner's rights were infringed when he was illegally incarcerated from when he was arrested for the offence of murder to when was released on bond in 2013. During this time, he was detained in police custody for 21 days before being arraigned in court. He was then tried and convicted without being given a chance to answer to the charges. Further, the trial and appeal were not determined within reasonable time.

11. As a result, the Petitioner was unable to be with his family or to advance in his career and should be compensated. Counsel submitted that an award of Kshs. 12,000,000/= would be adequate compensation.

THE RESPONDENT'S CASE & SUBMISSIONS:

12. The Hon. Attorney General entered appearance and filed the Grounds of Opposition dated 4th December 2014. He argued that the Petitioner had not demonstrated how his rights had been infringed. He regarded the failure to take the accused's plea was a mere procedural technicality which was corrected by the Court of Appeal. He also regarded a *nolle prosequie* as a mere discharge, an administrative action, which does not amount to an acquittal.
13. State Counsel submitted that the fact that the Petitioner did not plead to the charges is a technicality. In addition, he had the chance to raise this issue at any time during trial but failed to do so. He waived his rights and cannot be heard at this juncture. In addition, the Petitioner pursued the recourse that was available to him by appealing against his conviction. He was successful and he cannot seek compensation after the issue was remedied.
14. On the issue that the Petitioner was arraigned for retrial after 21 days and not the 14 days ordered by the Court of Appeal, Counsel submitted that the Petitioner had not offered any evidence to prove this allegation.
15. It was his submission that the State cannot be blamed for the ten years that the Petitioner was in custody. He contributed for this delay by constantly seeking adjournments. The prosecutor on his part, took all steps to ensure that the matter is determined expeditiously by asking for early dates.
16. In regard to the appeal counsel also submitted that no evidence was availed that it was not the Respondent who had caused the delay in its determination. He had not tendered any evidence to show any steps that he took to have the appeal determined expeditiously.
17. Finally Counsel submitted that the fact that a *nolle prosequi* was entered is not an admission of insufficiency of evidence. It does not amount to an acquittal and is also not a bar to future prosecution.
18. Counsel submitted that there was no reason to compensate the Petitioner in this case. The Petition should be dismissed with costs.

ISSUES FOR DETERMINATION

19. I have carefully considered the Petition, the Grounds of Opposition, all documents annexed as evidence and the submissions of Counsel. The issues for determination in this Petition are:
 - (a) whether the Petitioner's right under **Article 72(3)** of the repealed Constitution was infringed;
 - (b) whether the Petitioner's right to fair administrative action was infringed;
 - (c) whether the Petitioner's right to a fair hearing was infringed; and
 - (d) the amount of damages, if any, that the Petitioner is entitled to.

WHETHER THE PETITIONER'S RIGHTS UNDER ARTICLE 72(3) WAS CONTRAVENED

20. The right to liberty was provided for under **Section 72 (3)** of the **Former Constitution** as follows:

“(3) A person who is arrested or detained -

- (a) for the purpose of bringing him before a court in execution of the order of a court; or**

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.”

21. The Respondent did not dispute that the Petitioner, who had been arrested for the offence of murder, was in police custody for 21 days. He was detained for seven days more than the 14 days prescribed by the Constitution. Therefore his right under **Section 72(3)** was contravened.

22. However, whether or not he is entitled to compensation depends on if the State has a reasonable explanation for the delay. In this regard, I am guided by the decision in Lechornai Lorkurani V. Attorney General Nakuru, Petition No. 7 of 2010, [U/R] where the court held that-

“Whereas I note with great respect, the holding of the Court of Appeal in this case, and my sister Lady Justice Kasango in the case of Republic V. Samwel Mbogo Ndwiga & Another (supra), that the mere fact of detention beyond the requisite period is not unconstitutional provided there is a reasonable explanation, it seems to me that since the contravention occasioned by the delay could already have occurred, the reasonable explanation only goes to lessen and mitigate the amount of damages that could have been awarded in an action of unlawful detention by an accused person for damages under **Section 72 (6) of the former Constitution**, that is, where an explanation is acceptable, the damages if any would be minimal and substantial where there is no reasonable explanation for bringing the accused person to court.”

23. The Respondent offered no explanation for the delay in this case or before the trial court when the Petitioner was first arraigned in court. There was no attempt to show that the delay was inadvertent or that it was not negligent.

24. Without any explanation, I find that the Police, without any justification, failed to present the Petitioner to court within the fourteen days provided for by **Section 72(3)** of the **Constitution**. The State is therefore liable for infringing the Petitioner's right to liberty.

WHETHER THE PETITIONER'S RIGHT TO FAIR ADMINISTRATIVE ACTION WAS INFRINGED

25. It was not disputed that before the Appellant's trial commenced, he was not given an opportunity to answer to the charges. This was one of his main grounds of Appeal in John Kimani Gitau V. Republic, Court Of Appeal Criminal Appeal NO. 314 OF 2006 and the basis on which a retrial was ordered by the appellate court.

26. The Appellant argued that this was an infringement of his right to fair administrative action contrary to **Article 47** of the **Current Constitution**. However, in my considered view, the facts as alleged do not in any way cast doubt to the fairness of the proceedings of the trial court. The right to fair administrative action in essence is interlinked to the rights of natural justice that is, the right to be informed of the charges, to be able to be afforded a chance to present his defence and to have the case heard by an impartial tribunal. Neither of these allegations were pleaded against the court.

27. The Appellant's grievance falls under the right to fair trial as was held by the Court of Appeal when determining his appeal. **Section 77 (1)** of the repealed **Constitution** stated:

“If a person is charged with a criminal offence, then, unless the charge is withdrawn, the

case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

28. While determining the Petitioner’s appeal, the Court of Appeal judges discussed the effect of failing to plea before hearing of the case commences. It held that plea taking was part of a fair trial and not a mere procedural technicality. It went to the root of the fairness of the proceedings.

29. Citing **Section 77(2) (b)** of the **Constitution** the learned judges held that it is during plea taking when an accused person is informed of the charges against him and their elements. This enables him to understand the case against him and to prepare his defence to meet the charge. They held that by failing to allow the Petitioner to plead, the court contravened his right to a fair trial.

30. I am well guided by this decision. The Appellant’s right to a fair trial was compromised when he was not allowed to plead to the charges. **Section 77(2) (b)** which requires an accused person to be informed, in a language that he understands and in details, of the charges against him was contravened.

31. The second limb of the right to fair trial provides that a trial must be commenced and concluded within a reasonable time. The Appellant’s case was that his first trial was only concluded after three years. After conviction he lodged an appeal in the year 2006 which was only determined six years later on 23rd February 2012. He alleges that this was an inordinately long period of time.

32. The Court of Appeal in **Mwendwa Kilonzo & another V. Republic**, [2013] eKLR interpreted this right as follows:

“It requires courts to be always alive to the need for speedy trials. That principle has been captured even in the current Constitution (See Article 49(1)(a)). An accused person ought to be tried in the shortest time possible so that he/she knows the final determination of his/her case. An unnecessarily delayed trial causes anxiety, loss of time and liberty. A trial should commence as soon as it is possible and end quickly. The beginning of a trial takes into account the availability of time to the judicial officer, presence of police file, the prosecutor, defence counsel, witnesses and much more. A trial may start right away or be delayed for a certain period of time for one reason or the other. But the earlier the better and a court should never lose sight of this.”

33. On perusing the court record, the appellate judges found that there were reasons for not moving the trial faster. From this holding therefore, it is apparent that whether or not a trial was concluded within a reasonable time depends on the circumstances of the case.

34. In the instant case, I note from the trial court record that the trial court did not commence until 18th November 2005 because of various reasons advanced by both the prosecutor and the defence counsel. The prosecutor experienced problems on several occasions due to the unavailability of witnesses. The matter was also delayed when the defence counsel was appointed to the bench.

35. Nonetheless I do not find any negligence or utter disregard of the Appellant’s right by the court, by the prosecutor or by the defence counsel to have the trial determined expeditiously. Under the circumstances I find that this trial was determined within reasonable time.

36. The Petitioner also alleged that his appeal was concluded after an unreasonably long time. However, the mere fact that the trial was heard after six years is not in itself absolute proof of contravention of the right to fair trial. As stated above, the circumstances surrounding the case must be considered. In particular, it is noteworthy that at the time, there was a limited number of Court of Appeal judges who were tasked with hearing appeal cases from all courts in the country.

37. The Petitioner failed to offer evidence that the court was indifferent to his predicament, despite any steps he took to prosecute his matter. He did not present the proceedings to show that the delay was not as a result of any act on his part. There was no allegation that the prosecutor stalled the hearing of the

appeal.

38. As a result, I find that the petitioner has failed to prove his right to a speedy trial was contravened. I find the trial was concluded within a reasonable time under the prevailing circumstances.

DAMAGES:

39. The Petitioner prayed for general, aggravated and exemplary damages for the violations of his rights. Under Article 23 of the Constitution, an award of damages is discretionary and may be awarded in addition to any other declarations that the court may make. Where there have been multiple violations arising from the same transaction, the court may make a global award to compensate the Petitioner. (See **Dick Joel Omondi V. Hon. Attorney General [2013] eKLR**).

40. The Petitioner asked for an award of Kshs. 12 million and relied on the case of **Koigi Wamwere V. Attorney General**, [2015] eKLR as a comparable guide of the figure this court should award. However, the circumstances of that case are different from those pertaining in this case. The Petitioner in that case was incarcerated for a longer period during which time, he was tortured and subjected to inhuman and degrading treatment. In contrast, the Petitioner was held in custody for seven days before being arraigned in court. There was no allegation of torture or other violations of his rights while in custody. In addition, the Petitioner's trial which was conducted without him pleading to the charges was set aside by the court and a fresh trial ordered.

41. I have considered awards made in comparable cases. In **Elly Onyango Gumba V. Republic**, [2012] eKLR, the Applicant was awarded **Ksh.150,000/00** as general damages, after being detained for seven days after arrest. In **Dick Joel Omondi V. Hon. Attorney General** (*supra*) the Petitioner who was unlawfully detained and tortured was awarded in the global award of **Kshs.250,000/=**.

42. Taking all the above into account, I award the Petitioner a global sum of Kshs.200,000/= as damages.

DETERMINATION:

43. For the reasons aforesaid, this court makes the following findings.

(a) The Petitioner's rights under **Sections 72(3) and 77 (2) (b)** of the repealed **Constitution** were contravened and he is entitled to damages in the sum of Kshs. 200,000/= with interest from the date of this judgment until payment in full.

(b) The Petitioner shall also have the costs of the Petition.

(b) The Petitioner shall also have the costs of the Petition.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 5th day of June, 2015.

A. MSHILA

JUDGE