



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL PETITION NUMBER 1 OF 2012

SUSAN NYATHIRA.....PETITIONER

VERSUS

1. COMMISSION OF POLICE.....1ST RESPONDENT

2. DIRECTOR OF PUBLIC PROSECUTION....2ND RESPONDENT

3. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. On the 3rd June 2007 the Petitioner was arrested by police officers from Nairega Enkare Police Station on suspicion of having murdered one Ann Njeri, deceased. She was detained in police custody and arraigned in court on the 22nd June 2007 charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. After a full trial, the court convicted her of the offence of Murder and on the 13th July 2011 sentenced her to serve ten(10) years imprisonment at the Nakuru Government Main Prison.

2. In the Petitioner's Amended Petition dated 10th May 2012 and filed on the 11th May 2012, the Petitioner states that upon her arrest on the 3rd June 2007, she was detained for thirty three(33) days – 19 days over and above the period within which she ought to have been taken to court to take a plea in contravention of her constitutional rights enshrined in Section 72(3) (b) of the repealed Kenya Constitution.

She brings this petition against the Commissioner of Police, the Director of Public Prosecutions and the Attorney-General who she states were responsible for the proceedings and explanations that ought to have been proffered as to the extended illegal detention of nineteen(19) days.

3. The petitioner in her sworn affidavit dated 10th May 2012 in support of the Amended Petition states that at the time of her arrest, she had just given birth and the said baby was taken in custody together with her. That she was accused in **Nakuru High Court Criminal Case Number 55 of 2007** and that during the trial, the Commissioner of Police and the Director of Public Prosecutions (1st and 2nd Respondents) failed to explain to the trial court reasons for the unlawful detention of nineteen(19) days that would have secured her an acquittal but as the case is now concluded she is entitled to compensation under the provisions of Article 23(3) (a) and (e) of the Constitution.

It is her statement that despite writing to the Respondents through her Advocates by letter dated 16th May

2011, no response was ever received.

4. In her Amended petition brought under the provisions of Article 22 of the Constitution, she seeks the following reliefs:

- a. A declaration that the petitioner was unlawfully detained and the said unlawful detention amounts to breach to her fundamental rights.
- b. A declaration that the Respondent had the burden to proffer an explanation for the unlawful detention and by its failure to do so it is liable for proceedings under Article 22 for compensation under Article 23(3), of the Constitution
- c. An order for compensation to the Petitioner assessed at KShs.100,000/= daily thus KShs.1,900,000/= for the nineteen(19) days she was in custody, payable through the petitioners Advocates
- d. Other relief as the court may deem just.

5. Upon service of the Amended Petition and the Supporting Affidavit, the Respondents filed Grounds of Opposition on the 5th February 2015 that the petition is fatally and incurably defective, is bad in law and on abuse of court process, has failed to lay a basis of the claim, lacks merit and is based on distortion of facts, misrepresentation, frivolous and that the applicant came to court with unclean hands.

6. Parties agreed and filed written submissions on the petition. The issues that arise, in my view, from the affidavit evidence on record for the court's determination are:

1. Whether the petitioner was detained for nineteen (19) days beyond the prescribed period under the repealed constitution.
2. If the answer in 1 above is in the affirmation, whether the extended detention was explained and who had the burden to explain such extended detention.
3. Whether an award of damages is appropriate in compensation.

7. It is not in dispute that the Petitioner was arrested on the 3rd June 2007 and was first arraigned in court on the 22nd June 2007 after a total of 33 days in police custody. Section 72(3) of the repealed Constitution allowed a suspect to be detained in police custody for not more than fourteen(14) days on suspicion of having committed a capital offence as opposed to the 2010 Kenya Constitution Article 49 (1) (f) that allows not more than 24 hours. The Respondents through the office of the Director for Public Prosecutions did not proffer any explanation at all during the hearing of the case. The question as to who has the burden to offer an explanation is now well settled in a five Judge Bench in the case **Julius Kamau Mbugua -vs- Republic – 2010 KLR** where the Learned Judges of Appeal on the 8th October 2010, after considering prior pronouncements by other superior courts held that:

“---- under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution and we reject an proposition that the burden can only be discharged by the prosecution, if the person raises a complaint. But if the prosecution does not offer any explanation, then, the court as the ultimate enforcer of the provisions of the constitution must raise the issues.”

In **Nakuru Criminal Petition No. 7 of 2010**(unreported) **Lechornai Lorkurani -vs- R**, the Petitioner was unlawfully detained for 10 extra days before being taken to court. Justice Emukule, held that, even after an explanation was tendered, there was no reasonable explanation for the delay in bringing the petitioner to court within fourteen(14) days thus his constitutional rights were contravened and therefore entitled to damages in terms of Section 72(6) of the repealed constitution. The court awarded

KShs.500,000/= to the petitioner.

In **John Mureithi Kiagayu -vs- R Petition No. 141 of 2011 (2013) KLR** the Petitioner was unlawfully detained for forty-eight(48) days. The court held that it was a clear violation of Section 72(1) of the repealed constitution which provides:

“(1) No person shall be deprived of his personal liberty save as may be authorised by law...”

and the court awarded compensation in damages for unlawful detention and torture against the Respondents in the sum of KShs.2,000,000/=.

8. The Respondents submitted that where the prosecution detains a suspect beyond the stipulated time, they are allowed to give reasons for the delay and that it should not be inordinate. At this point, it is noted that the Respondents did not respond to the petitioners letter through counsel dated 16th May 2011 requesting for an explanation. Upon being served with the petition, no replying affidavit was filed, at least that could have given some explanation. An attempt to explain the delay in the submissions is too late in the day, and is only one sentence phrase that the delay was occasioned by logistical challenges when they were conducting investigations and that if the petition is allowed it will mean the petitioner who is a murderer will have benefited from her heinous act of killing another person, quoting **Nakuru High Court Criminal Case No. 67 of 2007** where case, the court held, (J. Emukule) that although the crime was heinous there was no justification to detain the suspect for more than 14 days and that his constitutional rights were contravened and therefore entitled to compensation in monetary damages. See also **Mwasia Mutua -vs- Republic, Criminal Appeal No. 120 of 2014** (unreported).

9. I am persuaded by the above cases and many others where the courts as the ultimate enforcer of the provisions of the constitution must rise to the occasion to hold that failure to adhere and uphold constitutional provisions under Chapter Four ought to be compensated in damages. I find that the petitioner herein was unlawfully detained for nineteen(19) days, and there being no reasonable explanation for the unlawful detention a declaration issues that the unlawful detention amounts to breach of the petitioner's Constitutional rights to freedom and personal liberty and is therefore entitled to compensation by the Respondents by way of damages as sought in the Petition.

10. Article 23 (3) (a) and (e) of the 2010 Kenya Constitution provides:

“ In any proceedings brought under Article 22, a court may grant appropriate relief, including

- a. **a declaration of rights**
- b. **an injunction**
- c. **a conservatory order**
- d. **an order for compensation.”**

The petitioner urged this court that there is value for denial of freedom and liberty of an individual and relied on the case **Lechornai Lorkurani -vs- AG** (Supra) where the petitioner was convicted and sentenced to serve a ten year jail term, and compensation was ordered by the court.

11. Section 72(b) of the repealed Constitution provides for a remedy by way of damages to a person who is unlawfully arrested or detained. It is a citizen's right and it is upon the state to ensure that the citizens enjoy the personal rights to liberty and movement unless such rights are lawfully withheld.

The Respondents were given an opportunity to explain the delay in taking the Petitioner to court by her advocate through a letter addressed to the Attorney General dated 16th May 2011 before conclusion of the trial. They ignored the olive branch extended. A second opportunity was extended when the petition was

served upon them. No response was filed. As stated earlier, an attempt to give reason on submissions is too late in the day. The petitioner is entitled to an award of damages.

12. Counsel for the petitioner urged the court to award a sum of KSh.100,000/= for every day of the nineteen(19) days the petitioner was unlawfully detained thus a sum of KShs.1,900,000/= . He did not lay any basis for this assessment. The court was not told whether the said sum is based on loss of income and if so, what type of business or work or the nature of income or even the station in life of the Petitioner. It is submitted that at time of arrest, there was small baby involved who was also detained with the mother and that if the petitioner was arraigned in court earlier within the time stipulated the Childrens' Department would have taken care of the child. He urges double compensation. With respect to Mr Maragia's argument, the child was not taken in custody as a suspect. I agree that the child may have suffered while in “custody” but again, though not the child's fault, the trial court while sentencing the petitioner took into account the child's interest and that earned the petitioner a reduced sentence of ten years imprisonment;

13. The respondents submitted that a sum of KShs.10/= would be fair taking que from the case **Zablon Ombati Ongeru – vs- R Nakuru High Court Petition No. 8 of 2010** when the court held that awarding the petitioner substantial damages would be awarding him with blood money. I beg to differ with the reasoning by the Learned Judge and with great respect hold that the petitioner's fundamental rights to freedom as enshrined in the Constitution was breached before she was charged, tried and found guilty by the court. **Article 50(2) of the 2010 Constitution** states:

“Every accused person has the right to a fair trial which includes the right

(a) to be presumed innocent until the contrary is proved.”

To that extent, the Petitioner's right to freedom was contravened before the verdict of guilt – was pronounced. Coming back to the award of damages, I find no basis upon which to award the sums as proposed by the petitioner. Taking all circumstances of this matter, this court shall award a sum of KSh.200,000/= for the unlawful detention.

14. For the above reasons,the Amended Petition succeeds and this court makes the following orders:

1. That a declaration is issued that the petitioner was unlawfully detained and the unlawful detention amounts to breach of the the Petitioners fundamental rights to freedom and liberty as enshrined in Section 72(3) of the repealed constitution.
2. That the burden to proffer an explanation for the unlawful detention lay upon the respondents and by their failure, they are held liable for proceedings for compensation under Article 23(3) (a) and (e) of the Constitution.
3. That this court in exercise of its unfettered discretion makes an award of KShs.200,000/= to the petitioner payable by the Respondents jointly and severally through the Petitioners Advocates being compensation for the unlawful detention.
4. The Respondents shall bear costs of the Petition.

Dated, signed and delivered in open court this 2nd day of July, 2015.

JANET MULWA

JUDGE

Maragia for the Petitioner

No Appearance for the Respondents

Court clerk – Linah.