



IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 387 OF 2013

BETWEEN

HUSSEIN ABDILLAHI NDEI NYAMBU PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner filed the petition herein on 25th July 2013 seeking the following orders:
 - a. *A declaration that the arrest and detention of the petitioner by the officers of the 1st respondent was a contravention of the petitioner's constitutional right to dignity; right to privacy; right to freedom and security; right to freedom of movement; right to be informed promptly in a language that he understands of the reason of his arrest, the right to remain silent and the consequences of not remaining silent; right to be taken to court within 24 hours of his arrest; and, the right to access justice.*
 - b. *Reasonable compensation for violation of constitutional rights herein.*
 - c. *The costs of this petition.*
 - d. *That this court does issue such other orders and give such further directions and/or reliefs as it may deem fit to meet the ends of justice.*
2. The petition is supported by the petitioner's affidavit sworn on 25th July 2013 and the affidavits of Habiba Wambui Ramadhan and Zenah Nyambu sworn on 25 September 2013. The petitioner and Zenah Nyambu testified. Nelson Mwangi, a police constable stationed at Shauri Moyo Police Station testified on the respondents' behalf.

Petitioner's Case

3. The petitioner testified that on 9th December 2012 at about 3 pm, while he was having lunch at Habibas Restaurant in Pumwani Majengo, Armed General Service Unit (GSU) police officers

stormed the premises and arrested him and others customers. He states that during the arrest, he was subjected to inhuman treatment while being frisked, he was pushed to the ground with blows and kicks, made to lie down facing down on dirty ground while being assaulted. He further testified they were all brutally forced into a waiting police lorry which was driven to Shauri Moyo Police Station. On arrival at the Police Station, the names of the persons arrested were recorded on a foolscap paper but in the Occurrence Book. They were then locked up in the police cells overnight.

4. The next day at around 4.00pm his photo, fingerprints and identity card numbers were taken. At that time some of the arrested people were released. At about 5.00pm, the deputy officer in charge of station assured him that he would be released as long as he had identification documents. He was also informed that he was at a restaurant where there was a notorious criminal who the people in restaurant failed to identify. The petitioner states that he was released unconditionally on 10th December 2012 at about 9.00pm without any charges being preferred against him.
5. Zenah Nyambu testified that she received a call from a cousin that the petitioner, her brother had been arrested in a police raid at Habiba Restaurant. She went to the Police Station after work on 10th December 2012 but she was unable to see the petitioner. She spoke to the officer in charge at the time who informed her that her brother would be released later in the day. She states that his name was not in the Occurrence Book. She confirmed that her brother was released at about 10 pm.

Respondents' Case

6. Police Constable Nelson Mwangi testified that there was a police operation at Majengo in Pumwani area which led to the arrest of 101 suspects including the petitioner. He explained that the operation was as a result of intelligence reports indicating that there was a terror gang operating in the area. He stated that all suspects who were arrested were booked in an Occurrence Book by entry No. OB 19/9/2012 at 4.00pm. He produced the original occurrence book which bore the petitioner's name as No. 44 as evidence to that effect.
7. Constable Mwangi explained that the screening of the suspects was done on 10th December 2012 by several agencies namely; the Immigration Department, the National Intelligence Service (NSIS) and the Anti-Terrorist Police Unit (ATPU). The suspects were all asked to produce their identity cards and their finger prints were taken for verification. After the screening some suspects, including the petitioner, were cleared for release and indeed released. Those who were not cleared were charged and taken to Makadara Law Court for failing to register and being in Kenya illegally.
8. The petitioner's release is recorded in a late entry in No. OB 3/11/2012 entry for 11th December 2012 shows that the petitioner was released after being vetted by the DCIO, NSIS, ATPU and Immigration officers. It is also recorded that the 41 suspects, "*left the station with no complaint.*"
9. Constable Mwangi stated that the Officer in Charge of Station (OCS) has the mandate to release suspects. He testified that Police Service procedures require him to visit the cells twice a day to find out whether the suspects have any complaints regarding their treatment arrest and detention. The OCS is also required to confirm that the suspects have no complaints before the suspect is release. Constable Mwangi stated that no complaint was lodged by the petitioner about his treatment at the Police Station and none has been lodged to date.

The Submissions

10. Ms Kigera, counsel for the petitioner, urged this court to award the petitioner compensation for violation of his constitutional rights protected under **Article 49** of the Constitution. She submitted that the petitioner rights were violated when he was detained for more than 24 hours without being informed of the charges, when he was denied a chance to contact a person to represent him and when he was brutally and violently treated by the arresting officers and not taken to court. Counsel contended that the petitioner was entitled to damages. She suggested that an award of Kshs. 500,000 as general damages was reasonable in the circumstances.
11. Ms Nyamweya, counsel appearing for the Director of Public Prosecutions, argued that the delay in

taking the petitioner was justifiable considering that the nature of the case involved agencies. That the interrogations took place on 10th December, 2012 and it is on the same date that the petitioner was released. She argued that although the petitioner stated that the injuries he suffered were minor, no such evidence was furnished in court. She submitted that the petition should be dismissed on the grounds that the arrest was necessary in the circumstances and that the petitioner's rights were not violated.

12. Ms Irari, counsel for the Attorney General, supported the position taken by the 1st respondent.

Determination

13. The right implicated in this matter is to be found at **Article 49** of the Constitution which deals with the rights of an arrested person. The provisions relevant to the petitioners complaints are sub-article (1) (a), (b), (c) and (f) of the said article. They provide:

49. (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;*

(f) *to be brought before court as soon as reasonably possible, but not later than-*

(i) *twenty four hours after being arrested; or*

(ii) *in 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 day.*

14. From a clear reading of **Article 49(1)(f)**, the introduction of the words, "**but not later than**" circumscribes the period within which a person can be held in police custody prior to being brought to court. **Sub Article (f)(i)** provides a period not later than 24 hours in any case and **(f)(ii)** the end of the next court date where the 24 hours end outside the ordinary hours or on a day that is not an ordinary court date. **Sub articles (f)(i)** and **(ii)** provide outer limits of what is permissible for pre-trial detention and if the detention period falls outside the contours of this provision, then there is a breach of the petitioner's fundamental rights

15. Thus there is a violation of the Constitution when a person is held beyond the 24 hours irrespective of the reasons. In **Salim Kofia Chivui v Republic Nairobi Petition No. 256 of 2011[2012]eKLR** the court stated that, "*The tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty-four hours or for the period necessary to secure his production in court of the next available date. In any other case any detention beyond 24 hours must be authorized by court as provided by Article 49(1)(f). Once the person's attendance has been secured within the 24 hours, the court may order the person released or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.*"

16. Liability of the State arises once the clock strikes 24 hours and the suspect is still in police custody without being released or taken to court. In this case it is not in dispute that the petitioner was arrested on Sunday at about 4.00pm and released on Monday at about 9.00pm which was about four hours after the time permitted by the Constitution. I therefore find and hold that in this respect there was indeed a violation of **Article 49(1)(f)** of the Constitution.

17. The petitioner alleges that he was treated in an inhuman manner. In my view, I do not think that his treatment rises to the level of a constitutional violation. He was arrested by the police in the course of their carrying out lawful duties. No complaint was made regarding any inhuman treatment either at the Police Station or much later when the petitioner was free from the constraints of confinement at the police station. As a result I find it less likely that the petitioner was brutally treated as alleged. During the day he was in custody, he was informed the reason for his detention. The petitioner has not discharged his burden of demonstrating a violation of his rights and fundamental freedoms in this regard.

Relief

18. I have found that violation of **Article 49(1)(g)** of the Constitution and the task is to determine the appropriate relief under **Article 23(3)**. The petitioner has prayed for damages at large. In considering the kind of relief to award, the respondents' conduct is relevant. The circumstances were that the petitioner was part of a group of 100 people arrested and who had to be processed by several agencies which led to 55 of those arrested being charged in court. The detention was neither intentional nor malicious. The time taken for processing all suspects was reasonable considering the number of suspects and the multi-agency nature of the operation. In the circumstances I award nominal damages amounting to **Kshs 10,000.00**. A declaration to that effect is a necessary vindication of the violation of the petitioner's rights.

19. I will also award nominal costs in this matter as I believe that if a demand letter was written, it would have been apparent that contrary to the petitioner's assertions, the arrest and detention was duly recorded in the Occurrence Book.

Disposition

14. As a result of my findings, I make the following orders;

- a. I declare that the petitioner's rights and fundamental freedoms under **Article 49(1)(f)** of the Constitution were violated when he was detained for a period of more than 24 hours in police custody on 9th December 2012.
- b. I award the petitioner the sum of **Kshs 10,000.00** as nominal damages.
- c. The petitioner is awarded costs of the petition assessed at **Kshs. 10,000.00** exclusive of filing fees and disbursements to be certified by the Deputy Registrar.

DATED and DELIVERED at NAIROBI this 14th day of March 2014.

D.S. MAJANJA

JUDGE

Ms Kigera instructed by Sagana, Biriq and Company Advocates for the petitioner.

Ms Nyamweya, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the 1st respondent.

Ms Irari, Litigation Counsel, instructed by the State Law Office for the 2nd respondent.