



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

PETITION NO 74 OF 2012

MARGARET WAIRIMU NJUGUNAPETITIONER

VERSUS

THE COMMISSIONER OF POLICE 1ST RESPONDENT

THE PC NAIROBI PROVINCE 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner, who is employed as a conductor on motor vehicle registration number KAE 186H which plies route number 8, Kibera, has filed this petition alleging violation of her constitutional rights. The petition dated 6th March 2012 is supported by her affidavit of the same date and a further affidavit sworn on 21st August 2012.

2. The petitioner seeks the following orders from the court:

a) A Declaration that the petitioner's rights to the freedom and security of the person as contemplated in Article 29(c), (d) & (f) of the Constitution of Kenya, Article 5 of the African (Banjul) Charter on Human and People's Rights and Article 1 of the United Nations Convention against torture were violated by the 1st and 2nd Respondents through their agents and/ or employees and/ or subordinates.

b) A declaration that the Petitioner's right to Human Dignity as enshrined under Article 28 of the Constitution of Kenya were violated by the state through its agents.

c) A declaration that the petitioner's right to legitimate expectation of police action and administrative action that was responsive, expeditious and efficient as espoused in Article 47 of the Constitution of Kenya was gravely violated.

d) A declaration that the respondents and the government of Kenya are responsible through the doctrine of "Respond eat Superior" for the actions of the perpetrators of various violations of the petitioner's rights.

e) A declaration that the charges against the petitioner of touting, incitement and resisting arrest

are an abuse of the court process and an affront to the justice system and therefore sustaining the said charges is a breach of the petitioner's rights under Article 47 of the constitution of Kenya.

f) A declaration that as a result of the breach and/ or violation of the rights enumerated in paragraphs 9a),(b) (c) and (d) above, the petitioner suffered damage, pain and suffering.

g) A declaration that the petitioner is therefore entitled to special, general; and exemplary damages against the respondents herein jointly and/ or severally.

3. The petitioner also seeks compensation by way of damages for violation of her rights, exemplary damages and special damages of Kshs 5,450 comprising the cost of procuring a medical report of Kshs 3,500 and medical costs of Kshs 1,950. She also prays for the costs of this petition, interest on damages and such other relief as the court shall deem fit and just.

The Petitioner's Case

4. The petitioner alleges that on 3rd June 2011, while she was at work, she was attacked and assaulted by an Administration Police Officer and was roughed up by other officers known to the Administration Police Officer. She avers that she sustained injuries on her legs; that she was arrested and incarcerated at Kilimani Police Station for hours and was not charged with any offence as required by law, and that she was thereafter released on a cash bail of Kenya Shillings Five Thousand (Kshs. 5,000).

5. The petitioner claims that prior to the assault, she had noticed a traffic snarl up on the road next to the District Commissioner's (DC's) Camp; that she alighted from the vehicle where she was working as a conductor and went to check what was causing the traffic snarl up, which she discovered was a minor accident. She alleges that it was at this point that she was suddenly accosted and violently attacked by an Administration Police Officer attached to the D.C's Camp at Kibera. The petitioner contends that the Administration Police Officer was in plain clothes but he was an officer she knew because she had seen him on several previous occasions in his uniform. She alleges that he attacked her in a frenzied manner and rained blows and kicks on her as she lay sprawled on the ground.

6. The petitioner avers that in the course of the attack, the Administration Police Officer was joined by two of his colleagues and they forcefully dragged her to the D.C's camp where she alleges they incarcerated her for close to an hour. She also alleges that she was saved from the assault by members of the public who heeded her distress call.

7. According to the petitioner, she telephoned her husband who came and took her, together with the Administration Police Officer, to Plaza Imaging Solutions on Ralph Bunche Road where she was checked and given first aid. The treatment note attached to her affidavit states that she was examined and an x-ray of her left ankle done. She was advised to put a bandage around her ankle and was also given medicine. She states that she suffered pain and damage namely blunt trauma to the left ankle joint and blunt back trauma.

8. The petitioner states that the Administration Police Officer asked her to report to Kilimani Police Station to record a statement; that on arrival at the station she was not given an opportunity to record her statement but was instead locked up in the cell. She states that on her husband's intervention, she was released on a cash bail of Kshs. 5,000 and instructed to appear in the Chief Magistrate's Court in Kibera on the 7th day of June, 2011 to answer to the charge of incitement.

9. The petitioner contends that she appeared in court on 7th June, 2011 as directed in the Cash Bail receipt. She alleges that her file was not availed in court on that day; that she went to the Kilimani Police Station to find out what had happened and to record a statement with regard to the assault but she contends that she was chased away from the station. Her statement has never been recorded to date despite several visits to the police station, and she avers that she did not get her cash bail back.

10. The petitioner submits that an arrested person has rights entrenched in Article 49 (1) (a) - (f) of

the Constitution. She asserts that contrary to this provision, the Administration Police Officer attacked her and arrested her without regard to her rights under Article 49. She submits, further, that she is yet to be charged with the offence which the police allege she committed on the morning of 3rd June 2011 nor has the Administration Police Officer who assaulted her ever been arrested nor charged with the offence of assault.

11. She asserts that she was arrested with no justification and relies on the decision of the court in **Joseph C Mumo vs. The Attorney General and Another HCCC 250 of 2004** for the proposition that there must be some tangible evidence of the commission of an offence for there to be reasonable grounds to justify an arrest. She therefore contends that the treatment that she received was in violation of her rights under Article 29 of the Constitution, and that it met the threshold for torture, cruel and degrading treatment.

12. She points out the failure by the respondents to produce any documentary evidence showing an entry in the Occurrence Book or the Investigation Diary indicating her arrest and the charge and urges this court to disregard the allegation that she committed an offence.

13. The petitioner asks the court to be guided by the case of **Harun Thungu Wakaba vs. The Attorney General Miscellaneous Application No. 1411 of 2004** and **Munene Kamau vs. The Attorney General Misc. Application No. 1743 of 2004** and grant her special damages of Kshs. 5,450.00 which she spent on treatment as well as general damages for the pain and suffering that she suffered. She also seeks exemplary damages against the respondents on the authority of **Dr. Odhiambo Olel vs. The Attorney General High Court Civil Case No. 366 of 1995**.

The Respondents' Case

14. In the replying affidavit sworn by Johana K. Chebii, the Deputy Officer Commanding Police Division (D/OCPD), Kilimani Police Station, on 19th July 2012, the respondents admit that the petitioner was arrested in Kibera on the 3rd of June 2011 by Administration Police Officers for the offence of touting, incitement and resisting arrest. He assert, however, that she was released on a cash bail of Kshs. 5,000/= when the Officer Commanding Station (OCS) realized that she had injuries on her legs to enable her access medical attention.

15. The respondents allege that the petitioner's allegations that she had been assaulted by Administration Police Officers have not been confirmed as she never made a formal complaint or recorded a statement to that effect; that following the filing of this petition, a Ms. Lydia Mambo (61223) Ag (IP) (w) was instructed to investigate the allegations vide Inquiry File No. 4 of 2012 which investigations are still going on, and that pending the outcome of the said investigations, it would be premature for the court to hold that the petitioner was assaulted by the arresting Administration Police Officers as this would be tantamount to condemning the said Administration Police Officers unheard.

16. The respondents allege that none of the petitioner's fundamental rights were violated; that the petitioner has not disclosed any violation of her constitutional rights for determination by the Court; and that this petition does not meet the threshold of a constitutional petition and should have been filed as a civil claim. They rely on the case of **Republic vs. Truth Justice and Reconciliation Commission and Anor Ex-parte Augustine Kathangu and 9 Others Nairobi Misc. App. No. 470 of 2009 (Unreported)** where the court held that **Article 22** as read with **Article 258** obliges every applicant to clearly set out the acts and/or omissions that, in his or her view, contravene the Constitution and also specify the provisions of the Constitution that those acts or omissions contravene and the prayers or reliefs he or she seeks. They therefore ask the court to dismiss the petition and to find that the petitioner is not entitled to special, general or exemplary damages as she has not proven her case.

Determination

17. The single issue for determination in this matter is whether there was a violation of the petitioner's constitutional rights following the events of 3rd June 2011 in Kibera. The petitioner alleges

that she was assaulted by an Administration Police Officer whom she states she knows but has not named; that she was arrested and kept in custody for some hours and then released on cash bail of Kshs 5000; that she was not charged in court but her bail was never refunded to her. She seeks special, general and exemplary damages.

18. On their part, the respondents admit that the arrest took place, but that it was for touting, incitement and resisting arrest; that the petitioner was released to seek medical treatment when the OCS noticed that she had injuries on her legs; that she has never made a formal complaint or recorded a statement on the incident and that the matter is now under investigation.

19. The petitioner has alleged violation of her rights under Articles 29(a) (c), (d) and (f), 28, 47 and 49 of the Constitution. These provisions are as follows:

28. Every person has inherent dignity and the right to have that dignity respected and protected.

29. 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)....

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

20. At Article 47, the Constitution guarantees to everyone the right to administrative action that is expeditious, efficient, fair, lawful reasonable and procedurally fair, while Article 49 contains the constitutional guarantee of rights to persons who have been arrested on suspicion of having committed a criminal offence, the relevant parts of this Article for our purposes being:

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;

(b) to remain silent;

(c) to communicate with an advocate, and other persons whose assistance is necessary;

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

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

(ii) if 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 court day;

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons

21. It is not in dispute that the petitioner is entitled to the rights enshrined in the Constitution, and that should they be violated, she is entitled to redress. The question is whether the facts before me demonstrate a violation of any of the petitioner's rights under the provisions set out above.

22. The petitioner alleges that she was arrested without cause and assaulted by police officers, but the respondents deny the allegations of assault and allege that the petitioner was in breach of the law and was therefore properly arrested. She was however subsequently released to obtain treatment for the injuries noted on her legs, and granted cash bail of Kshs 5,000. The respondents then allege that the petitioner has never recorded a statement on the incident, while the petitioner counters that despite countless visits to the police station, the police have declined to record her statement.

23. There is thus before me very conflicting evidence with regard to alleged violation of the petitioner's rights. It is difficult for the court in this matter to make a determination on the circumstances under which the petitioner received the injuries on her ankles. Was it as a result of an assault? Was it in the cause of resisting arrest? This brings to the fore the need to balance the interests of the petitioner and the interests of the respondents in maintaining law and order. In my view, there is little before me to assist in making a definitive finding that there was a violation of the petitioner's rights under Articles 28 and 29.

24. The petitioner also alleges violation of her rights under Article 49, which provides for the rights of an arrested person. However, the evidence before me indicates that the petitioner was released on a cash bail of Kshs. 5,000 on the day of her arrest and required to attend court on the 7th of June 2011. Her sojourn in the hands of the respondents seems to have lasted a matter of hours, if not less than an hour. This, in my view, is in accord with the provisions of Article 49(h) of the Constitution. I can therefore find no violation of the provisions of Article 49 of the Constitution.

25. There are, however, certain facts that are of concern. The first is the fact that the petitioner has never been charged with any offence to date, yet her cash bail has never been refunded to her more than a year after the arrest. It is also a matter of concern that the respondents only started investigations after this petition was filed in court, a period of 9 months or so after the incident. Whether it was a case of the police abusing their powers, as the petitioner suggests, or exercising their legal mandate in enforcing law and order, expediency and openness in the conduct of their duties was required.

26. In my view, there is little before me on the basis of which I can make a proper finding that there was a violation of any of the petitioner's constitutional rights. The petitioner alleges assault by a person whom she states was not in uniform, but whom she does not name though she states that she knew him. It is noteworthy that she has not filed in court any affidavit from either her husband or the driver of the motor vehicle in which she was employed as a conductor which could have helped to shed more light on the incident. Her arrest is admitted, ostensibly being on the basis that she broke the law by touting, incitement and resisting, arrest. She was granted cash bail and released, and was not charged in court.

27. The petitioner submits that she has tried in vain to file a formal complaint against the person(s) she believes to be Administration Police Officers whom she alleges assaulted her, while the respondents allege that they have now set up investigations of the matter.

28. In my view, this is the kind of matter that merits inquiry by the institutions that have now been established to oversee the manner in which police deal with citizens in the course of maintaining law and order. Section 87 of the **National Police Service Act** establishes the **Internal Affairs Unit** whose functions, under **Section 87 (2)**, are to receive and investigate complaints against the police. The Independent Policing Oversight Authority also has power, under Section 7 of the Independent Policing Oversight Authority Act, No. 35 of 2011, to investigate the conduct of police officers, and under section 7(ix), to recommend to the Director of Public Prosecutions the prosecution of any person.

29. It appears to me that there was a failure by the respondents to carry out their functions to establish whether or not there was an assault on the petitioner by the alleged Administration Police Officer(s). If there was such an assault, then the said officer(s) should have faced disciplinary action to deter such conduct. It cannot be in the public interest that individual police officers who commit acts of assault against citizens should get away scot free while the public is required to carry the burden by paying damages to those whose rights have been violated.

30. While in appropriate cases those whose rights have been violated will be entitled to

compensation from the state, liability for any unlawful conduct on the part of police officers in the course of their duties but done in breach of the Constitution and their statutory mandate under the National Police Service Act must begin to be placed on the officers concerned, otherwise there will be no end to acts of misconduct by police officers.

31. The Constitution enjoins the court, at Article 23, to grant appropriate relief to a party who alleges violation of constitutional rights under Article 22. In the present case, I direct the petitioner to formally report the alleged assault to the **Internal Affairs Unit** of the **National Police Service** and to the **Independent Policing Oversight Authority** for investigation, both in relation to the alleged assault and the failure of the OCS, Kilimani, to permit the petitioner to record her complaint, if indeed this is the case. I believe that the Independent Policing Oversight Authority will, in exercise of its mandate, take appropriate action in the matter. A copy of this judgment should be availed to the two authorities for their appropriate action.

32. I also direct that the **Officer Commanding Station, Kilimani Police Station**, forthwith releases to the petitioner her cash bail of Kshs 5000 which she deposited with the Police Station to secure her release.

33. Each party shall bear its own costs of this petition.

Dated, Delivered and Signed at Nairobi this 8th day of May 2013

MUMBI NGUGI
JUDGE

Mr. Odera instructed by the firm of Tonny Moses Odera, Advocates for the Petitioner

Ms. Muchiri instructed by the State Law Office for the respondents