



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

PETITION NO.163 OF 2011

PASCAL KIBET KENY.....PETITIONER

V

**COMMISSIONER OF
POLICE1ST RESPONDENT**

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. This Petition relates to a complaint by one, Pascal Kibet Keny, that on 22nd January 2007 while lawfully working as a police officer attached to Bondeni Police Station in Nakuru, he was unlawfully arrested and detained incommunicado for seven days. That he was released without any charges being preferred, when his wife instituted a *habeas corpus* application i.e. H.C. Miscellaneous Application Number 14 of 2007 at the High Court in Nakuru.

2. He claims that as a result of the alleged arrest and incarceration, he suffered serious violation of his Constitutional Rights and Fundamental Freedoms.

Case for the Petitioner

3. The Petitioner in his Petition dated 16/9/2011 and in submissions by his advocate, has argued that as a result of the alleged actions of the agents of the Respondents, as set out above, his rights to equality and freedom from discrimination, deprivation of freedoms, human dignity, detention without trial and unlawful seizure of property were all breached because;

On the day of his arrest, apart from his freedom of movement being curtailed, he was also deprived of, and use of, his three mobile phones with airtime worth over Kshs.10,000 and to date the same have not been returned to him.

4. That for the above reasons, he was entitled to the following Orders;

a) A declaration that the act of arresting and detaining him amounted to deprivation of freedom arbitrarily without just cause and also amounted to without detention trial and offends Article 29(a) and (b) of the Constitution

b) A declaration that by seizing his property aforesaid, the actions of the Respondent's agents amounted to a breach of Article 31(b) of the Constitution

c) Compensation.

Case for the Respondents

5. From the record, there would seem to be no response to the issues of fact raised in the Petition but in the Grounds of Opposition filed on 6th December 2011, and in Submissions by learned State Counsel on behalf of the Respondents, it is their joint case that the Petition is incompetent, lacks merit, is defective and should be struck off for the following reasons;

6. Firstly, that no reasonable cause of action has been disclosed to warrant the orders sought and no facts have been properly laid before court to enable any finding in favour of the Petitioner.

7. Secondly, that the claim is statute time-barred and in that regard, reliance is placed on the provisions of **Section 3** of the **Public Authority Limitation Act, Cap.39** which provides as follows;

“(1) No proceedings founded on tort shall be brought against the Government or Local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the government or a local authority after the end of three years from the date on which the cause of action accrued.

(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the government or a local authority and the proceedings were brought after the end of-

(a) twelve months, in the case of proceedings founded on tort; or

(b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.”

8. Thirdly, that no liability can attach to either Respondent if no evidence is tendered to show that their actions were actuated by malice and that in this case no such evidence was tendered at all.

Determination

9. I should begin by stating that although the Petitioner actually tendered oral evidence in support of his case, there was no representation on the part of the Respondents and so no challenge was made to that evidence. Since no evidence by way of affidavit or any other form was submitted by the Respondents, either in pleadings or in court, it is very difficult for this court to find against the petitioner as regards his narration of facts. ***(See Rumba Kinuthia vs Attorney General, HCCC No.1408 of 2004 – unreported).***

10. If that be so, is the evidence of his arrest, incarceration and subsequent release after 7 days sufficient to warrant a finding that his fundamental rights and freedoms were thereby violated?

11. At the time of the incident under consideration, the operating constitutional provision was **Section 72** of the **Repealed Constitution** which provided as follows;

“(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases -

(a) in execution of the sentence or order of a court, whether

established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

- (b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;*
- (c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;*
- (d) for the purpose of bringing him before a court in execution of the order of a court;*
- (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;*
- (f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;*
- (g) for the purpose of preventing the spread of an infectious or contagious disease;*
- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;*
- (i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the*

expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

- (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably*

justifiable for the taking of proceedings against that person to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person

during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(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

(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that that offence save upon the order of a court.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person. Protection from slavery and forced labour.

Section 72 above is almost word by word reproduced in Article 49 of the Constitution, 2010 which provides as follows;

“(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;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to be held separately from persons who are serving a sentence;

(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;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

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

A person shall not be remanded in custody for an offence if

the offence is punishable by a fine only or by imprisonment for not more than six months.

Apart from Article 49, the Petitioner has also relied on **Articles 29 and 31** of the **Constitution, 2010**. The former protects the freedoms and security of the person while the latter protects the rights to privacy and specifically **Article 31(b)** protects the right not to have “*their possessions seized*”.

12. From the evidence before me and in light of the above provisions read together, there is no indication whatsoever, and none has been pleaded, that the Petitioner was arrested on suspicion of having committed a capital crime and therefore he could lawfully be held in police custody for a period exceeding 24 hours. In fact, and although the complaint in the Petition is quite serious, the Respondents did not bother

to even attempt an explanation as to why the Petitioner was arrested in the first place.

13. Learned State Counsel in his Submissions referred me to three decisions of the High Court viz,;

- i) **Simba vs Wambari [1987] KLR 601(Mbaluto, J)**
- ii) **Fwamba vs AG, HCCC No.1036 of 2002 – unreported (Mwera, J)**
- iii) **Koech vs African Highlands & Produce Company Ltd [2006] EA 159 (Musinga, J)**

14. I have read all three of them and they relate to the issue of damages payable for alleged malicious prosecution and not violations under the Bill of Rights. In the instant case, there was in fact no prosecution at all and so the decisions are irrelevant to the issue at hand.

I am aware that the High Court has previously and specifically addressed its mind to violation of **Section 72(3)** of the **Repealed Constitution** and where violations were proved, damages were duly awarded – see Herman Marire Nderi vs Republic, Petition No.115 of 2011.

15. I am of the same mind in applying the above holding to this case, where a Respondent chooses neither to challenge facts as tendered by an applicant and then also sits away from an opportunity to cross-examine such an applicant, then in the absence of any other compelling reason, then applying the uncontested facts to the law, clear violation has been established – see Harun Wakaba Thungu vs Republic, Misc. Appl. No.114 of 2004.

16. The Respondents did raise the issue of time bar in arguing that the Petition before the Court was misguided. Reference was made to **Section 3** of **Chapter 39**. A clear reading of that Section would show that it relates to claims in tort brought against the Government under the Civil Law jurisdiction conferred on Courts. The present claim is not such a claim but a claim based on alleged breach of fundamental rights and so that Section is irrelevant.

17. In any event, it is trite that in matters where violations of fundamental rights are alleged, courts should be slow to invoke limitation of time as a bar to the enforcement of those rights. That was the position as stated in Harun Thungu Wakaba & Others vs Republic, Misc.Appl. No.1411/2004 per Okwengu J. and by this Court in Herman Marire Nderi vs Republic, Petition No.115 of 2011.

18. I wholly agree and would add that in this case, to lock out a deserving litigant from enjoying the rights freely given by the Constitution of Kenya would be an act of betrayal of the same Constitution.

19. The only other issue to address is whether the reliefs sought are properly due to the Petitioner. Having found as I have that there is sufficient evidence of violation of **Section 72** and **Articles 29 , 31 (b)** and **49** aforesaid, it also follows that the declarations sought must be granted.

20. As to damages for the alleged violations, it is my finding that the law is now settled that damages are payable in circumstances where proof is given that the State has violated the rights of an individual and as to quantum, it is in the discretion of the Court I have perused the authorities submitted by counsel for the Petitioner viz;

- i) **Harun Thungu Wakaba vs AG, [2010] eKLR**
- ii) **Wachira Waihere vs AG, H.C. Misc.No.1184 of 2003**
- iii) **Stanley Waweru Kariuki vs AG, [2013] eKLR and**
- iv) **Moses Tenga Omwoyo vs AG, J.R Application No.265 of 2001**

All the above cases, so far as I can see, related to unlawful detention which was also accompanied by

torture and acts amounting to degrading and inhuman treatment which were found to be in complete violation of the Constitution.

21. I have considered the matter before me and like all awards in damages, the circumstances of each case, comparable past decisions and the test of reasonability must be invoked by the Court in determining the most appropriate award.

In instant case I have decided that a global sum of Kshs.500,000/- is sufficient compensation to the Petitioner.

Conclusion

22. In Dominic Omolo vs A.G., H.C Misc. Appl. No.494/2003 (supra), the Court decried the laxity exhibited by the office of the Attorney General in matters of this kind. The same laxity is apparent in this case and the message is that the said office should not expect any special treatment by the Courts for whatever reason. I digressed.

The final orders in this matter are that;

- a) *It is hereby declared that the arrest and subsequent incarceration of the Petitioner for a period of 7 days amounted to deprivation of his freedom arbitrarily and without just cause contrary to **Article 29(a)** and **(b)** as read with **Article 49** of the **Constitution**.*
- b) *It is hereby declared that the seizure of the Petitioner's property, namely, three mobile phones without lawful cause was a violation of **Article 31(b)** of the **Constitution, 2010**.*
- c) *The Respondents shall, jointly and severally, pay to the Petitioner the sum of Kshs.350,000/- all inclusive, for all violations above.*
- d) *The Petitioner shall have the costs of his Petition.*

23. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF JUNE, 2013

ISAAC LENAOLA
JUDGE

In the presence of:

Florence – court clerk

Mr. Wamosta for Respondent

No appearance for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA
JUDGE