



JOB OGUMA OLIMBA PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

Introduction

1. The petitioner is the defendant in *Nairobi Children's Case No. 792 of 2009* where he was committed to civil jail for 30 days for failure to pay maintenance for his children. The order for committal was made on 15th July 2011 and at the time of filing this petition he was in custody at the Industrial Area GK Prison. On 5th August 2012, Hon. Justice Musinga after hearing the petitioner's counsel, made an order directing the release of the petitioner from prison custody forthwith.

2. The petitioner avers that his imprisonment was a violation of his fundamental rights and freedoms and he now seeks the following reliefs;

(a) A declaration that section 40 of the Civil Procedure Act, 2010 is unconstitutional.

(b) A declaration that the petitioner's imprisonment by Hon. C. W. Ocharo, SRM on 15th July 2011 in Nairobi Children's Case No. 792 of 2009 is violation of his constitutional rights and freedoms and is therefore unconstitutional.

(c) An order that the Government through the respondent do pay the Applicant general damages to be quantified by the Court for unlawful and illegal imprisonment.

(d) Costs of this petition be borne by Respondent.

The hearing and submissions

3. When the matter came up for hearing today, neither the respondent nor interested party nor their advocates attended court although the hearing date was taken by consent. Counsel for the petitioner, Mr Ogutu abandoned prayer (a) of the petition in view of my decision in the case of *Beatrice Wanjiku & Another v Attorney General & Another Nairobi Petition No. 190 of 2011 (Unreported)* where I found that **section 40** of the *Civil Procedure Act* dealing with committal to civil jail for non payment of debts under the Act was not unconstitutional. The respondent had filed written submissions but these were focused on prayer (a) of the petition.

4. Counsel therefore directed his submissions to prayer (b), (c) and (d) of the petition. Mr Ogutu submitted that the proceedings of the subordinate court are clear that the Notice to Show Cause was served on the petitioner and his case was heard. After hearing the matter, the Court found that the petitioner had not shown cause. Counsel attacked the decision on the ground that there was no evidence that the petitioner had deliberately refused to pay maintenance rather the evidence showed that he could not pay as he had lost his employment. Counsel also pointed to the fact that since the debtor was in court, an order for his immediate arrest and committal was made and consequently the petitioner served 21 days

before Hon. Justice Musinga ordered his release.

5. Mr Ogotu submitted that the petitioner is entitled to damages as a remedy for violation of his rights. Counsel contended that in so far as the court disregarded the principles that govern the issuing of an order of arrest and committal, the court should award damages. The order, counsel asserted, was not made in good faith and the state should therefore compensate the petitioner for arbitrary actions. A sum of Kshs.5,000,000/= as general damages was proposed in the circumstances.

Determination and disposition

6. I have considered the petition in light of the proceedings in the subordinate court. I think it would be important to set out the contents of the learned magistrate's ruling delivered on 15th July 2011 where she states as follows;

RULING

The applicant herein is the mother to the children DO, SO and EO while the respondent is their father.

The applicant seeks order for the arrest and committal to civil jail of the respondent who has failed to provide maintenance for his children as ordered by the court. The order was inter alia the defendant to pay school fees for the children and provide a monthly maintenance of Kshs.7,000/=

The respondent filed a replying affidavit stating that he had not refused to cater for his children's needs but is out of employment. Further that the defendant had to move out of the matrimonial home following an order of the court hence his expenditure has increased.

According to the respondent, the applicant is able to cater for the children's upkeep until he secures alternative employment He argued further that committal to civil jail for a civil debt is no longer a mode of execution in law. Counsel wondered why the applicant would waste money by paying for subsistence allowance instead of providing for the children.

From the submissions of both counsels for the parties, it is undisputed that the defendant has not been providing maintenance as ordered. Should this be an excuse that one has lost his job? I think not. The applicant from the record has been in court since January 2011 seeking execution.

Since then the matter has been adjourned on the defendant's instance. To inform the court that he cannot comply because he has lost his job is not a sufficient ground.

Further submission that committal to civil jail is unconstitutional cannot stand as Hon Njagi held that as long as there are two conflicting laws which are in force, they are both applicable. Section 40 of the Civil Procedure Act has not been repealed and it therefore open to a party to exercise this option. Further the sums prayed for in the degree does not arise from a civil debt parse and is therefore distinguishable from the authority cited.

I find merit in the application and order that the defendant be arrested and committed to civil jail for a period of 30 days unless he so soon as comes up with a sum of Kshs.100,000/= or a sum agreeable to the applicant.

The applicant to pay the subsistence allowance.

SENIOR RESIDENT MAGISTRATE

7. It is clear from the decision that the learned magistrate did not examine or deal with whether the petitioner was deliberately refused to pay maintenance. In ***Beatrice Wanjiku Case (Supra)***, I made it very clear that for committal to civil jail to pass constitutional muster, the judgment-creditor must prove and that the court must find that judgment-debtor's failure to pay the debt is deliberate. This position was

emphasised by Justice Kariuki in ***R.P.M and P.K.M Nairobi Divorce Cause No. 154 of 2008 (Unreported)***. In this case the learned magistrate merely found that failure to make payment for want of a job was not sufficient ground. This in effect cast the burden of proof upon the petitioner to establish why he should not be committed rather than the petitioner showing that the debtor is being recalcitrant. In fact from the ruling it is difficult to know what further facts were required to be proved by the petitioner to escape jail. The arrest and committal was therefore an infringement of the petitioner's freedom.

8. Counsel also complains that the petitioner was immediately arrested after the judgment and whisked to jail. I think the proper procedure to be adopted where a committal order is made, is that the judgment-debtor ought to be given an opportunity to settle the debt. In the circumstances of this case, the violation itself was aggravated by the imprisonment immediately after the decision. I however do not think, as submitted by the counsel, that the right to pursue further relief was taken away as the petitioner was fully represented.

9. As regards the prayer for damages, I am not inclined to award damages as the violation occurred in the course of proceedings and the magistrate dealt with the matter in the ordinary course of business. There is no evidence of bad faith or malice and the fact that the court merely misdirected itself is not a basis to award damages against the state.

10. I allow the petition to the extent that I grant the following relief;

(a) The order of arrest and committal made on 15th July 2011 in Nairobi Children's Case No. 792 of 2009 be and is hereby set aside.

(b)The respondent shall bear the costs of this application.

DATED and DELIVERED at **NAIROBI** this 4th day of October 2012.

D.S. MAJANJA
JUDGE

Mr O. Ogutu instructed by Ochieng' Ogutu and Company Advocates for the petitioner.