



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MAKHANDIA & MOHAMMED, J.J.A)

CIVIL APPEAL NO 132 OF 2015

BETWEEN

STEPHEN OUMA AMBOGO.....APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS....RESPONDENT

(An appeal from the judgment of the High Court of Kenya *at Nairobi (Lenaola, J.) dated 21st March 2014 in Petition No 281 of 2008*)

JUDGMENT OF THE COURT

Background

1. On 2nd July, 2007, **Stephen Ouma Ambogo** (the appellant), was arrested by officials of the now defunct **Kenya Anti-Corruption Commission** (the Commission) and charged before the Magistrate's Anti-Corruption Court for the offence of soliciting for a benefit contrary to Section 39(3)(a) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003 in ***Republic v Stephen Ouma Ambogo (Nairobi Anti-Corruption Court Case No 32 of 2007)***.

2. It was the appellant's claim that the arrest was stage managed by the Commission, and was calculated to humiliate him as he was roughed up during the arrest, insulted and, at the behest of the arresting officers, the entire incident was filmed by the media and broadcasted on television. The appellant further claimed that following the arrest, his constitutional rights were violated as he was taken to the police station against his free will, detained for a prolonged period of time and denied the services of a lawyer despite his repeated demands that he be availed one.

3. Aggrieved by his arrest and arraignment, the appellant filed a petition before the High Court at Nairobi, seeking various declarations, *inter alia* that: his arrest and detention were unlawful and in breach of **Sections 70, 72 and 76** of the now repealed Constitution of Kenya; the filming and subsequent televising of his arrest before he was arraigned in court was a breach of **Section 77** of the repealed Constitution; and that the charges that he faced, considering the manner in which the evidence against him was procured, were highly prejudicial to a fair trial and that the prosecution against him should therefore not proceed.

4. **The Director of Public Prosecutions** (the respondent) opposed the petition through a replying affidavit sworn by **Robert Karani (Karani)**, was at the time a police officer and an investigator seconded to the Commission, and was the investigating officer in the case against the appellant. **Karani's** account of events was that on 2nd July 2007, he, on behalf of the Commission, received a complaint that a police officer attached to the Banking Fraud Investigations Unit had detained two people who had committed an offence and was demanding a bribe for their release; and that he was instructed to investigate the complaint on behalf of the Commission; that he met the two complainants, **Jackson Gichuhi** and **Charles Ngure Wanjiku**, fitted one of them with an audio recording device and instructed them to return to the appellant with the intention of recording any further communications.

5. It was **Karani's** further testimony that the complainants returned to the Commission later that afternoon; that when he reviewed the recording, he heard the appellant demanding a bribe of Kshs 60,000.00 to facilitate the release of two people who were in custody; that once he established that the complaint was authentic, **Karani** facilitated an operation where the complainants were given money

amounting to Kshs 40,000.00 which they were to hand over to the appellant; that the complainants proceeded to Home Park Restaurant along Harambee Avenue to meet the appellant; that he (**Karani**) saw the complainants having tea with the appellant; that at some point, the appellant and the complainants walked into a toilet at the restaurant, and he and his investigators followed; that they found the appellant receiving the money from the complainants; that at this point, the appellant attempted to leave but he was arrested and taken to **Kileleshwa Police Station** that evening at about 8:30pm.

6. **Karani** conceded that the appellant was arraigned in court on 4th July, 2007 which was thirty-six hours after he was initially arrested. To explain this delay, **Karani** stated that this was the earliest opportunity that the appellant could have been arraigned in court bearing in mind the complex nature of standard police procedure in collecting evidence. **Karani** further stated that at all times, the appellant was allowed to engage the services of an advocate and that he did in fact contact one **Mr. Biyot**, Advocate, immediately after his arrest; that the said advocate was present when **Karani** and the other investigators compared the money recovered from the scene with photocopies that had been taken of the money previously; that in addition, before the appellant was locked up at the police station he was asked to deposit a police bond of Kshs 30,000.00 before his release but he was unable to do so.

7. **Karani** denied that the Commission was responsible for the televising of the appellant's arrest, stating that the Commission had no control over any media that may have been at the scene of the arrest. **Karani** further stated that none of the investigators shouted at the appellant, and neither did they ridicule him or ambush him, or breach any of his constitutional rights. **Karani** contended that the appellant had no constitutional claim against the respondent, and urged the court to dismiss the petition and allow the criminal case against the appellant to proceed to its logical conclusion.

8. After hearing submissions from the parties, the High Court (**Lenaola, J.** as he then was) rendered a judgment in which it declined to terminate the appellant's prosecution. However, the court found that there had been no reasonable explanation as to why the appellant was not arraigned in court within the 24hour period stipulated by the Constitution and therefore found that there had been a violation of **Section 77(3)** of the repealed Constitution.

9. On the question of whether there was a violation in the manner in which the respondent obtained the evidence against the appellant, the learned Judge held that this argument was premised on **Article 50(4)** of the current Constitution. Further, that under the repealed Constitution, this right was limited in the event that there was reasonable suspicion that an offence had been committed or in the interests of public safety or public order. The court noted that while **Article 50** was heavily relied on by the appellant, there was no evidence that the appellant had been granted leave to amend his petition to bring it under the purview of the current Constitution, and that being the case, the provisions of the current Constitution could not be applied retrospectively in the appellant's case.

10. The court also found that there was no evidence that the appellant had been denied the opportunity to contact or retain a lawyer, and neither was there evidence that the broadcast of the appellant's arrest on television was at the behest of the respondent. The appellant was only partially successful in the petition and he was awarded Kshs 50,000.00 for the violation of his right to be brought to court within 24 hours of his arrest, but all his other prayers were dismissed. The appellant was also granted $\frac{1}{4}$ of the costs of the petition.

11. Aggrieved with the entire judgment of the High Court, the appellant filed the instant appeal in which he raises fifteen grounds of appeal upon which he takes issue with the judgment of the trial court and which can be summarized as that the learned Judge erred: in holding that there was no leave sought and granted to the amended petition; in failing to consider submissions addressed by the parties with respect to **Article 50(4)** of the **Constitution of Kenya, 2010**; and in failing to consider that the appellant's rights to access an advocate were violated and eventually reaching a decision that occasioned a miscarriage of justice.

Submissions

12. The appellant argued his appeal in person. The appellant submitted that the trial court erred in refusing to consider the amended petition for the sole reason that there was no leave to amend the petition; and that the amended petition was properly supported by his submissions, which were also not considered, and this eventually led to the learned Judge not determining the petition according to the weight of the evidence.

13. The appellant also urged us to hold that the provisions of the current Constitution were applicable to his case as the rights and freedoms contained in the retired Constitution were not fundamentally different from the rights contained in the Bill of Rights in the current Constitution.

14. In his final submission the appellant urged us to enhance the award of damages granted by the High Court, to the sum of Ksh 2,000,000.00 in line with recent jurisprudence for the infringement of his fundamental rights and freedoms.

15. Despite being served with notice of hearing of the appeal, the respondent did not attend the hearing of the appeal. We have nonetheless considered the appellant's submissions and the entire evidence on record. We have done so in a bid fulfil our duty of rehearing the petition and making our own independent conclusions and giving our own reasons as set out in ***James Kanyiita Nderitu v Attorney General & another [2019] eKLR (Civil Appeal No. 96 Of 2013)***.

16. This is a first appeal. In *Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2 EA 212* this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

17. The first issue that arises for our determination is whether the trial court erred in failing to consider the appellant’s amended and re-amended petition, opting to instead rely on the original petition that was filed on 15th May, 2008 and which raised issues under the repealed Constitution. Our consideration of the record shows that the appellant’s re-amended petition did, as the trial court noted, import provisions of the current Constitution of Kenya. It specifically relied on **Article 50(4)** of the Constitution which provides that:

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

18. We have gone through the record filed by the appellant. Despite the fact that both the amended and re-amended petitions are on record, there is no indication that the appellant was ever granted leave to amend his petition. In the circumstances, we are unable to find fault with the trial court’s statement that:

“6. I Note that an Amended Petition dated 16th June 2011 is referred to by the Petitioner in his lawyer's Submissions but do not see it on the reconstructed record. I also see that a Notice to Re-Amend the Amended Petition was filed on 17/4/2013 but I see no record that leave to Re-Amend the Petition was ever given. The Re-Amended Petition is undated but makes fundamental changes to the Petition because it deletes any reference to Sections 70, 72, 73, 74, 76 and 81 of the Repealed Constitution and instead introduces references to Articles 23, 25, 27, 28, 47 and 50 of the Constitution, 2010 and adds one more prayer; that “a declaration that the Petitioner’s continued prosecution by the Police at the instance of KACC without a written consent and permission from the Respondent herein is illegal and therefore null and void.

7. Sadly, without leave to Re-Amend the Petition being granted, I will only determine the Petition dated 15/5/2008 and will construe the submissions on record in that context.”

19. We observe that at the trial court, the appellant contended that the evidence against him, having been obtained through entrapment, was illegal and secured through the violation of his rights. In his submissions before us, the appellant argued that the trial court ought to have considered the applicability of **Article 50(4)** due to the fact that there was similar provision for the right against illegally procured evidence under **Sections 72 and 76** of the repealed Constitution. This is not the case. **Section 72** of the repealed Constitution provided for the limitation of the right not to be deprived of personal liberty where, among other reasons, there was reasonable suspicion of having committed an offence under the law. On the other hand, **Section 76** of the repealed Constitution provided for protection against arbitrary search of one’s person except in the instance of reasonable requirement in the interests of among others, public safety, public order or public morality or other reasonable justifications in a democratic society.

20. Should **Article 50(4)** of the Constitution of Kenya 2010 apply retrospectively to the aid of the appellant? In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR (Application 2 of 2011)*, the Supreme Court of Kenya stated on retroactivity of the Constitution that:

“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with *retrospective ingredients*. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.” [Emphasis supplied]

21. The Supreme Court subsequently reiterated the above position in *Karen Njeri Kandie v Alassane Ba & another [2017] eKLR (Petition 2 of 2015)* as follows:

1. We, further, ... restate our position in Samuel Kamau Macharia, that the Constitution cannot be subjected to the principles of statutory interpretation that prohibit retrospective application of laws generally; and where need be, only the language of the Constitution should be a guide

as to whether a provision applies retrospectively or not.” [Emphasis supplied]

22. Applying our minds to the binding case law of the Supreme Court as well as the wording of **Article 50** of the Constitution, we find that **Article 50(4)** would not aid the appellant for the following reasons. First, the language contained in that article does not provide for a situation that would allow its retroactive effect. Secondly **Article 50 (4)** provides for a situation where evidence that is obtained in violation of fundamental human rights and freedoms may be excluded, if that evidence would render the entire trial unfair. In the instant case, there was no evidence to show that the procuring of evidence by the State against the appellant was in violation of his rights. The appellant further alleged that he was not allowed to contact a lawyer, and the respondent denied this assertion, stating that the appellant was in fact allowed to contact one **Mr. Biyot**. The appellant did not controvert this evidence, and the respondent’s assertion remained unchallenged. In addition, the appellant claimed that the respondent engineered an arrest and prosecution with the sole aim of embarrassing him, but as noted by both the respondent and the trial Judge, the respondent could not have had control over what the media would do. There was no evidence in support of the appellant’s assertions, and they thus remained unproven. The best forum where these allegations can be fully canvassed will be before the trial court.

23. We now turn to the final ground of appeal which is the appellant’s prayer that the damages awarded to him be enhanced. We agree with the finding of the High Court that the appellant’s rights were infringed upon when he was detained for a period beyond twenty-four hours before he was arraigned in court. This was a violation of his rights under **Section 77(3)** of the repealed Constitution which entitled him to a remedy in terms of monetary compensation. However, the award of damages for violation of a constitutional protection are, in the words of this Court in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR (Civil Appeal 98 of 2014)** that:

“it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court’s discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration.”

24. The law on circumstances under which an appellate court would interfere with an award of damages has been reiterated by this Court in numerous decisions. In **Kemfro Africa Limited t/a Meru Express Services & Another v A.M. Lubia and Another v A.M. Lubia and Another (No.2) (1982-88) L KAR 727** it was stated that:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant factor) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an erroneous estimate.” See: **Mbogo v Shah [1968] EA 93**.

25. In the instant appeal, before we can interfere with the discretion of the trial court in the awarded damages of Kshs 50,000.00, we must consider if in the circumstances of this case, the award granted was rational or reasonable. Having paid due regard to the circumstances of the appeal before us, where the appellant was detained for a period of about 36 hours before he was arraigned in court, we find that the trial court properly exercised its discretion and find no basis upon which we can interfere with the damages awarded. We therefore decline to interfere and reject this ground of appeal as well.

26. In the result, this appeal is bereft of merit and must therefore fail, and we hereby order it dismissed with no order as to costs.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true *copy of the original*.

Signed

DEPUTY REGISTRAR