



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

PETITION NO. 4 OF 2014

(FORMELRY H.C. PETITION NO. 372 OF 2012 NAIROBI)

MICHAEL MBOGO KIBUTI..... PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL RESPONDENT

Mr. Gitobu Imanyara for the Petitioner

Ms Mumo for the Respondent

JUDGEMENT

1. The Petitioner Michael Mbogo Kibuti was employed as a private in the Kenya Defence Forces on 2nd September, 1977 and was discharged from the Kenya Air Force as a Senior Private on 8th February, 1984.
2. The Petitioner was arrested and charged with mutiny and arising out of the failed coup of 1982. He was tried by a Court Martial on 29th December, 1982, convicted and jailed for one year.
3. The Petitioner was released after six months following a review. The Petitioner has alleged that he is and was at all times entitled to the protection and enjoyment of fundamental rights and freedoms of the individual set out and enshrined in the Constitution of Kenya and in particular to Articles 22(1), 23(1), 25(a), 27(1), 29(c), d, 47(1), 49(1) (a) (i), (iii), (d) and 50 (1).
4. The Petitioner has particularized the manner in which his rights and freedoms were violated in paragraph 17 of the petition which *inter alia* states that;
 - a. The Petitioner's right to protection from torture and cruel, inhuman or degrading treatment or punishment under Article 25 (a) has been violated.

Particulars

After undergoing interrogation at Kamiti Maximum Prison he was transferred to Naivasha Maximum Prison where he was left submerged in water for seven days. A most harrowing, inhuman and degrading treatment to any human being.

- b. The Petitioner's right not to be treated in an inhuman and degrading manner under Article 29(c), (d) and (f) was infringed as he was treated like an animal.

Particulars

During his incarceration at Naivasha Maximum Prison he was denied contact with any other person and neither was food or water provided in a dark room where he knew not the time of day

nor whether it was day or night and he had no access to sanitation.

- c. The Petitioner's right to expeditious, efficient, lawful and procedurally fair hearing and determination of his trial under Article 47(1) of the Constitution was violated, in that the Petitioner was denied representation by an advocate.
- d. The Petitioner's right as an arrested person to be informed promptly in a language he understands of the reasons for his arrest, the right to remain silent and the consequences of not remaining silent as provided for under Article 49(1), (a), (i)-(iii), (c) to communicate with an advocate and others whose assistance is necessary. Furthermore by failing to inform the Petitioner the reason for his arrest the Petitioner's right guaranteed under Article 47 (1) of the Constitution was violated.
- e. The Petitioner's right not to be compelled to make any confession or admission that could be used in evidence against the person as provided under Article 49(1) (d) was violated.
- f. The Petitioner's right to have the offence investigated and resolved by application of law and decided in a fair hearing under Article 50 (1) was violated by the Respondent in that the court martial sitting at Langata Barracks on the 29th December, 1982 breached the above provisions of Article 50(1) of the Constitution by not according him a fair hearing in line with the Rules of natural justice as it should have heard the Petitioner's defence.
- g. The Petitioner avers that the Court Martial and investigating officers did not follow due process and had occasioned the Petitioner injustice that was unconstitutional.
- h. The Petitioner therefore prays for the reliefs set out under paragraph 19 (a) – (d) of the Petition. The petition is supported by an Affidavit of the Petitioner sworn on 26th August, 2012.

Response

7. The Respondent filed a Replying Affidavit on 11.12.2014 sworn by Lieutenant Colonel Joseph Kosen Karbauli on 8.12.2014 in which the Respondent denies that the Petitioner was wrongfully arrested and incarcerated as alleged or at all.
8. The Respondent fully denies that the Petitioner was confined in isolation or exposed to adverse artificial conditions and degrading treatment as alleged or at all.
9. All the particulars of alleged violation of fundamental rights and freedoms of the petitioner are denied. The Respondent states that the petitioner was lawfully arrested, detained and tried by a Court Martial for the role he played in the failed coup of 1st August, 1982.
10. In particular the Respondent deny that the rights and fundamental freedoms of the petition were violated under Article 22(1), 23(1), 25(e), 27(1), 29(c) and 47 (1), 49(1) (e) and (d) and 50 (1) of The Constitution of Kenya 2010.
11. The Respondent adds that the Petitioner had indeed participated in the failed coup of August, 1982 and upon arrest and trial was convicted and sentenced to one (1) year imprisonment and dismissed from service by Court Martial. He was charged with the offence of mutiny contrary to section 22(1) of the Armed Forces Act, cap 199 (now repealed). His sentence was later reviewed to 6 months imprisonment as per the extract produced and marked "PMK1".
12. That the Petitioner admits having armed himself with a G3 rifle and ammunition. That this happened in unlawful circumstances and he was expeditiously tried in a fair manner in accordance with the law. The Petitioner did not appeal the outcome of the Court Martial but only applied for review of sentence and the same was reviewed in his favour.
13. The Petitioner is not entitled to any terminal benefits under the Armed Forces (officer and service men's) Pension Regulations of 1980 having been found guilty and convicted of participating in a mutiny.
14. That the Constitution of Kenya 1969, was specific on how human rights and fundamental freedoms would apply to members of the Armed Forces by making an exception under section 86 (4) which provided that;

“in relation to a person who is a member of a disciplined force raised under any law in force in Kenya, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in Contravention of any of the provisions of this chapter other than Section 71,73 and 74”

15. The rights claimed by the petitioner were limited by the Constitution and their enjoyment is not absolute.
16. That the petition was filed after 32 years, an inordinately long period and the same amounts to abuse of the process of the Court.

Submissions

17. The Respondent prays that the petition be dismissed with costs.
18. The Petitioner filed written submissions on 17th February, 2015 and served the Respondent but the Respondent did not file any written submissions in spite of being given opportunity to do so on 28th January, 2015 and 25th February, 2015.

Issues for determination

- a. Did the Respondent violate the human rights and fundamental freedoms set out in the petition dated 26th August, 2012 and filed on 27th August, 2012?
- b. If the answer to (a) above is in the affirmative, what remedies if any are available to the Petitioner?

Determination

19. The Petitioner relies extensively on the provisions of The Constitution of Kenya 2010 to allege violation of his human rights and fundamental freedoms by the Respondent.
20. The Constitutional provisions alleged by the Petitioner to have been violated include Article 22(1), 23(1), 25(a), 27(1), 29(c) and (d), 17(1), 49 (1) (a) (i) – (iii), (d) and 50 (1) of The Constitution of Kenya 2010.
21. The Petitioner does not make reference to the Constitution of Kenya of 1969 (now repealed) or to any of its provisions in the entire petition. No such reference is made in the Supporting Affidavit of Michael Mbogo Kibuti sworn on 26th August 2012.
22. The Advocates for the Petitioner Gitobu Imanyara & Co Advocates from the authorities presented to this court and in particular, The Court of Appeal at Nairobi Civil Appeal No. 79 of 2012 Peter M. Kariuki Vs Attorney General, have had conduct of suits emanating from the aftermath of the Attempted Coup d’etat on 1st August, 1982.
23. This Appeal arose from the judgement of Musinga J in HCCC No. 403 of 2006.
24. From the judgement of the Court of Appeal delivered on 21st March, 2014, it is clear that, the suit was founded on the provisions of the erstwhile Constitution of Kenya, 1969 in particular, section 84(1) of the former Constitution.
25. The Petitioner in that suit sought a declaration that his human rights and fundamental freedoms guaranteed under sections 72(5), 74(1), 77(1) (c) and (d); 77(a) and 82(2) of the former Constitution were violated and therefore was entitled to damages as redress in respect of each of his rights and freedoms that were breached. It cannot therefore be said that the Advocates for the petitioner were unaware that the cause of action in this matter arose long before the promulgation of The Constitution of Kenya 2010.
26. The question that the court must answer, given the pleadings by the petitioner is whether the petition having been entirely pleaded based on the provisions of The Constitution of Kenya 2010 that did not exist when the cause of action arose stand to be dismissed for that reason alone.
27. In the Court of Appeal at Nairobi Civil Appeal No 219 of 2013 Independent Electoral and Boundaries Commission and 2 Others Versus Stephen Mutinda Mule and 3 Others, the learned Judges of Appeal, relying on a decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd Vs Nyasulu (1998) MWSC3 and a decision of Uganda Court of Appeal in Libya Arab Uganda Bank for Foreign Trade and Development and Another Vs Adan Vessiliadis (1980) UG/CA/6, where Odoki J. A, cited with approval the dictum of Lord Denning in Jones Vs National Coal Board (1953) 2 QB 55, held;

“ As the authorities do accord with our own way of thinking, we hold them to be representative of

the proper legal position that parties are bound by their pleading which in turn limits the issues upon which a trial court may pronounce. The Learned Judge, no matter how well intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent she committed a reversible error and the appeal succeeds on that score”

28. Nigeria Supreme Court in Adetoun Oladeji (Nig) Ltd Vs Nigerial Breweries Plc and S. C 91/2002, per Judge Pius Aderemi JSC stated on the point;

“ it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with averments of the pleadings goes to no issue and must be disregarded”

29. This court is bound by the foregoing pronouncement of the law. Therefore, to the extent the petitioner only relied in the petition on provisions of the law that were non-existent at the time the cause of action arose, the Court’s hands are tied and cannot substitute this invalid cause of action with another based on the Constitution of Kenya, 1969(repealed) which the petitioner ought to have relied upon. To do so would be to ambush the Respondent who has had no opportunity to meet a case based on the provisions of Constitution of Kenya 1969 (repealed).

30. To this extent the suit by the Petitioner is incompetent and discloses no cause of action to the extent that all the alleged violations relate to provisions of the Constitution of Kenya 2010 which provisions were non-existent at the time the cause of action arose.

31. The petition is dismissed with costs.

Dated and Delivered at Nairobi this 10th day of June 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE