



**Ombija v Officer Commanding Hardy Police Station & 4 others (Constitutional
Petition E179 of 2021) [2024] KEHC 7744 (KLR) (Civ) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CONSTITUTIONAL PETITION E179 OF 2021**

EC MWITA, J

JUNE 28, 2024

BETWEEN

ISAIAH OMOLO OMBIJA PETITIONER

AND

OFFICER COMMANDING HARDY POLICE STATION 1ST RESPONDENT

CPL JOHN OBUL 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. The petitioner filed this petition against the respondents for the violation of his rights and fundamental freedoms. The petition is supported by an affidavit and written submissions.
2. The petitioner stated that his employer, Shilida Academy, filed a report at Hardy Police Station that he had vandalized and stolen motor vehicle parts. Police officers from Hardy Police Station, including the 2nd respondent, arrested him on 20th December 2020 at about 11 am and detained him the station.
3. The petitioner asserted that he was moved to various places, including Rubis Petrol Station along Langata Road in the guise of investigation and was later detained at the station, where he was tortured.
4. On 22nd December 2020, he was moved a round in the boot of a police vehicle and later taken back to the station. On 24th December he was frog marched to an isolated room within the station and assaulted with kicks and blows in the presence of employees of Shilida Academy. He was stripped naked violently beaten with a metallic rod and his private parts squeezed.



5. The petitioner stated that he was tortured held at the station until 31st December 2020 when he was arraigned at Kibera Law Courts in Criminal Case No. E1534 of 2021 on charges of stealing motor vehicle parts contrary to section 279(c) of the Penal Code. The petitioner states that his detention from 20th December 2020 to 31st December 2020 violated his rights and fundamental freedoms for which he seeks redress.
6. The petitioner thus sought a declaration that the respondents jointly and severally breached, infringed and or violated his rights and fundamental freedoms including breach of article 10(2)(d); 27(1); 29; 31(1) 47(1); 49(1); and 50(1); damages and compensation for detention for 11 days; violation of the right to privacy.
7. The petitioner relied on decision in John Siwa Nyanjwaya & Maurice Ochieng Onyango v Director of Criminal investigations [2020] eKLR, that accessing the petitioner's mobile data/ communication was a violation of the right to privacy contrary to Article 31(1) of the Constitution.
8. Regarding detention for 11 days, the petitioner cited the decision in Michael Rotich v Republic [2016] eKLR, that it is unlawful for the police to seek to have a person who has been arrested to remain in custody without a formal charge and being produced before court.
9. The petitioner again cited the decision in Akusala A Bonface v OCS Langata Police Station & 4 others [2018] eKLR, that he Had suffered both mental and physical torture while in police custody for which he deserved compensation. He urged the court to award Kshs. 1,000,000 for detention.
10. On torture, inhuman and degrading treatment, the petitioner relied on the decisions in Charles Mwenda v Inspector General of Police, National Police Service & 2 others; Law Society of Kenya, Interested Party & 3 others (Interested Party) [2021] eKLR (para 66, 67, 77 and 78); Michael Maina Kimami & another v Attorney General [2019] eKLR, citing the decision of the European Commission on Human Rights in the Greek case 1969 Y.B. Eur. Conv on H.R. 186 that "the notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical which in the particular situation is unjustifiable..."
11. The petitioner also relied on the decision in Kenneth Stanley Njindo Matiba v Attorney General [2017] eKLR (para 99) where the court awarded Kshs. 15,000,000 for torture, degrading and inhuman treatment.

Response

12. The respondents filed a joint grounds of opposition, a replying affidavit sworn by CPL John Obul, the 2nd respondent, and written submissions, in response to the petition.
13. The respondents denied the petitioner's allegations and asserted that the petitioner had not demonstrated that his constitutional rights had been violated; how their conduct constituted a violation of the rights and freedoms in terms of the principle in Anarita Karimi Njeru v Republic [1979] eKLR and that the police were discharging their statutory mandate.
14. In the replying affidavit, Cpl. John Obul, the investigating officer in that case, deposed that a report of theft off motor vehicle parts was made at the station on 15th December 2020 and that the petitioner was arrested on 23rd December 2020 at 8 o'clock by CPL Mutinda and Evalyn Lung'ahi, an employee of the complainant. The petitioner was informed of his rights under article 49(1) of the Constitution and was allowed to contact his relatives.
15. CPL Obul denied that the petitioner was placed in a car boot or tortured. According to CPL Obul, he took the petitioner to court on 24th December 2024 (Republic v Isaiah Ombija Omolo & another -Misc.



- Criminal Application No. 211 of 2020), and applied for more time to hold the petition for purposes of investigations. The court granted permission to hold the petitioner for 7 days more days.
16. The petitioner was later charged in court on 31st December 2020 with theft of motor vehicle parts contrary to section 279(c) of the Penal Code and was remanded. CPL Obul maintained that he acted within the law while discharging his mandate respecting the petitioner.
 17. The respondents relied on several decisions, arguing that the petitioner had not proved violation of fundamental rights and freedoms. These included; Anarita Karimi Njeru v Republic [1979] KLR; Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR; Abuya Abuya v Independent Electoral and Boundaries Commission & another [2014] eKLR.
 18. The respondents contended that the petitioner did not discharge the burden of proof and relied on sections 107 and 109 of the Evidence Act and the decision in LT. Col. Peter Ngari Kigume & others v Attorney General (petition no. 128 of 2006), [2009] eKLR.
 19. The respondents again cited the decision in Eric Kibiwott Tarus & others v DPP & 7 others [2014] eKLR (para 90) and urged that the petition be dismissed.

Determination

20. I have considered the pleadings, the response, submissions and the decisions relied on. The petitioner's case is that although he was arrested on 20th December 2020, he was detained at the police station and only charged in court on 31st December 2022 after being held for 11 days in violation of his fundamental rights and freedoms. The petitioner also stated that he was tortured in the course of being held at the police station.
21. The respondents argued that a report was filed against the petitioner for theft of motor vehicle parts. The petitioner was arrested on 23rd December 2022 and booked in OB 23/12/2020 and was informed of his constitutional rights and allowed to contact his relatives, including his wife, brother and uncle. The respondents denied violating the petitioner's fundamental rights and freedoms. The question that arises for determination is whether the petitioner's fundamental rights were violated.
22. The petition was disposed of through affidavits and written submissions with oral highlights. During highlighting of submissions, both counsel reiterated what was in their pleading and affidavits. They also adopted their written submissions.
23. I have read through the petition and supporting affidavit. The petitioner asserted that he was arrested and kept in the police station from 20th December 2020 until 31st December 2020 when he was produced in court. This the petitioner maintains was a violation of his fundamental rights and freedoms guaranteed under the Constitution.
24. Article 49(1) of the Constitution provides that an arrested person has the right—(a) to be informed promptly, in a language that the person understands,(i) the reason for the arrest;(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.
25. The petitioner argues that he was kept at the police station for 11 days and was only produced in court on 31st December 2020, a violation of the Constitution. The respondents contended that the petitioner was produced in court on 24th December and the court allowed further detention of the petitioner.



26. The replying affidavit of CPL Obuol attached documents including an application filed at the Chief Magistrates court at Kibera, Misc. Application No. E211 of 2020 for custodial orders, where the petitioner and another person James Aduda were the respondents. The court issued an order on the same day, 24th December 2020 authorising the OCS, Hardy Police Station to remand the two at the Station for 7 days and set the matter for mention on 31st December 2020.
27. The respondents also attached a copy of the charge sheet registered in the court on 30th December 2020 and shows that the petitioner was charged on 31st December 2020 with the offence of theft of motor vehicle parts contrary to section 279(c) of the Penal Code. According to the charge sheet, the date of apprehension to court was indicated as 31st December 2020, the same date the petitioner stated that he was produced in court.
28. The petitioner did not controvert the fact that he was arrested on 23rd December 2020 and produced in court on 24th December 2020 and the court allowed that he be remanded at the police Hardy Police station for 7 more days and be produced in court on 31st December 2020. The petitioner did not, therefore, show that he had been detained at the police station for more than 24 hours allowed by the Constitution.
29. The petitioner again pleaded averred and submitted that he was tortured in the hands of the police. The petitioner relies on some documents to show that he was tortured.
30. I have also gone through the documents on record but could not trace evidence to show that the petitioner was tortured. There is a medical document in the respondents' replying affidavit, from Sinai Hospital dated 25th December 2020 referenced "KUB SCAN REPORT" on the petitioner. The document shows that all vital organs were normal.
31. It is strite law, that a petitioner bears the burden of proof. A claim for violation of fundamental rights and freedoms, must just like any other claim, be proved to the required standard; that of balance of probabilities.
32. Sections 107(1) of the Evidence Act states that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. That is, the burden of proof lies on he who asserts the existence of a fact.
33. Section 108 further states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. while section 109 is to the effect that the burden of proof as to any particular fact lies on the person who wishesthe court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Conclusion

34. In the circumstances of this case, the petitioner fell short of proving first, that he was detained at the police station beyond the 24 hours allowed by the Constitution. Second, there was no evidence that the petitioner was tortured or treated in a manner that was violative of his constitutional rights. It is one thing to plead that rights were violated and it is another to prove to the satisfaction of the court that indeed there were violations.
35. Consequently, the conclusion I come to is that the petitioner has not proved his case to the required standard. For that reason, the petition is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2024

E C MWITA



JUDGE

