



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 294 OF 2012

BETWEEN

LUCAS OMOTO WAMARI PETITIONER

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner's case is that his fundamental rights and freedoms were violated when he was unlawfully arrested and detained. He alleges that unreasonable force was used against him when

he was shot by a police officer and that he was maliciously prosecuted.

2. In his amended petition dated 12th July 2012, the petitioner alleges that his rights as guaranteed under the former Constitution were violated and as a result he seeks the following reliefs:-
 - a. *A declaration that the shooting, wounding and maiming of the petitioner on his right arm by the police officer was in the circumstances a violation of the petitioner's fundamental right of the security of the person and freedom from being subjected to any form of violence including freedom from torture, cruel, inhuman and or degrading treatment contrary to sections 70(a), 71(1) and 74(1) of the former Constitution.*
 - b. *A declaration that the arrest and detention of the petitioner in police custody between 14th April 2010 and 26th April 2010 on a non-capital offence before being arraigned in court of law was a violation of the petitioner's fundamental right to personal freedom, liberty and rights of an arrested person contrary to sections 70(a) and 72(3) of the former Constitution.*
 - c. *A declaration that the detention of the petitioner in police custody between 14th April 2010 and 26th April 2010 incommunicado without access to any persons from the outside world and without the police providing him with access to any medical treatment whilst visibly injured and in excruciating pain was a violation of the petitioners fundamental rights to human dignity and to the right to have the dignity protected, the security of the person and the protection of law, fundamental freedom from cruel, inhuman and degrading treatment and fundamental right to health care services and emergency treatment contrary to sections 70(a) and 74(1) of the former Constitution.*
 - d. *A declaration that the prosecution of the petitioner on pretended, fabricated and unfounded criminal charges particularly the capital charges of robbery with violence in Makadara Chief Magistrate's Court Criminal Case No. 1657 of 2010 that rendered the petitioner ineligible for bail for eight (8) months was a violation of the fundamental right of the petitioner to equal protection and equal benefit of the law and amounts to subjecting the petitioner to cruel, inhuman and degrading treatment contrary to sections 70(a), 74(1) and 77 of the former Constitution and was in the whole circumstances an abuse of the criminal law, the process of court and a malicious prosecution.*
 - e. *Special damages – Kshs.303,106/=*
 - f. *General damages as the court shall assess consequent to the declarations of violations of fundamental rights and freedoms in (i) to (iv) above.*
 - g. *An award of exemplary, aggravated and or punitive damages for blatant, callous, oppressive and highhanded violation of constitutional rights by offices of the Government.*
 - h. *Costs of the petition.*
 - i. *Interest on prayers (v) to (viii) above.*

The Petitioner's Case

3. The petitioner's case is set out in the amended petition and the petitioner's supporting affidavit sworn on 12th July 2012. The petitioner testified and his counsel, Mr Mureithi, made oral submissions.
4. The petitioner testified that on 4th April 2010, at about 6 pm he was at the Kwa Reuben School, within the Mukuru Slums, where he had gone to test drive a motor cycle he wanted to purchase after borrowing some money from a local micro-finance institution. While he was in the school compound with three of his friends, two police officers came and accused them of being robbers. The petitioner's friends left and PC Osman grabbed him and took the money from his pocket. The petitioner testified that he tried to get his money back and passers-by joined in loud protest

causing PC Osman to release the money. When the petitioner was walking away, PC Osman shot him on the right arm and warned him not to report the incident to the police.

5. The petitioner testified that as he feared for his life he did not go to hospital or report the matter to the police. After a few days he proceeded to his rural home in Yala. He went to his Chief and explained his circumstances. He also reported to Yala Police Station. On 14th April, 2010, he was arrested by the OCS Yala Police Station at Sagam Community Hospital where he had gone for treatment. He then was taken to Yala Police Station where he was detained for two hours then transferred to Siaya Police Station on the same day. At Siaya Police Station he was detained from 14th April 2010 to 18th April, 2010 then transferred to Kilimani Police Station, Nairobi where he was detained from 18th April 2010 to 20th April 2010. He was finally transferred to Industrial Area Police Station where he was detained from 20th April 2010 until 26th April 2010. He was arraigned in court to plead to charges of “*escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code*” in ***Makadara Criminal Case No 1657 of 2010***.
6. The petitioner did not plead to the charge and was remanded at Industrial Area Police Station until 28th April 2010 when he was required to plead to additional charges of robbery with violence and preparation to commit a felony contrary to **sections 296(2) and 301(1)(b) of the Penal Code** respectively. He pleaded not guilty. The petitioner avers he was not taken for treatment to Mbagathi Hospital despite a court order. He was only taken to hospital after 21st July 2010 when his advocate applied to the court for him to be treated.
7. The petitioner’s trial commenced on 28th July 2010 when the prosecutor informed the court that the statement from complainant had not been recorded. It was only on 7th December 2010 that after calling three witnesses that the prosecutor applied to withdraw the capital robbery charge under **section 87(a) of Criminal Procedure Code** (“the **CPC**”) on the grounds that the witnesses were not able to identify the accused person. The petitioner was consequently released on a cash bail of Kshs 20,000.00. On 18th March 2011, the petitioner was acquitted on the remaining counts under **section 210** of the **CPC** for want of a case to answer.
8. Mr Mureithi submitted on behalf of the petitioner that the use of the firearm by the officer was unreasonable since the petitioner was unarmed. He also argued that the petitioner ought to have been brought to court within 24 hours of his arrest considering that the offence for which he was first charged was bailable. He contended that no reasons were given to the petitioner for the period he was in custody and he was held *incommunicado*. He was also not taken for treatment of the injury he sustained as a result of the gunshot.
9. To support this argument counsel relied on the decision of ***Raditshego Godfrey Mashilo and Minister of Police v Jacobus Michael Prinsloo (2012) ZACSA 146*** where the Supreme Court of Appeal in South Africa held that where the law prescribed the outer limit for detention, the duty was on the police to bring him to court as soon as possible without waiting for the time to lapse. Counsel urged that on the available evidence there was no reason to hold the petitioner even though the law provided the outer limit for detention. The petitioner also complains that when he was first arraigned in court he was charged with a non-capital offence of escape from lawful custody. It was only later that the prosecution applied for time to amend the charge sheet to include a capital robbery charge after purporting to carry out an identification parade on 27th April 2010.
10. Mr Mureithi submitted that the facts of the case disclosed that the petitioner was a victim of an abuse of the process and he ought to be compensated for the injury, loss and damage he

sustained as a result of the violation of his rights and fundamental freedoms. Counsel cited ***George Joshua Okungu and Another v Chief Magistrate's Court Anti-Corruption Court at Nairobi and Another Nairobi Petitions Nos 227 & 230 of 2009***[2014] eKLR.

The Respondents' case

11. The respondents oppose the petition and have filed a replying affidavit sworn by PC Osman Mohammed on 24th January, 2013 and Grounds of Opposition dated 17th April 2013. The respondent did not call PC Osman to testify on behalf of the respondents. Mr Njogu, counsel for the respondents, did not cross-examine the petitioner but elected to make oral submissions.
12. Mr Njogu submitted that this petition was filed under the provisions of **section 72(3)** of the former Constitution which permitted arrest of the petitioner and that at time material to this case under **section 123** of **CPC** the offence of robbery with violence was not bailable at the time. Counsel further argued that in fact the petitioner was held for a period less than 14 days. Counsel submitted that even when the initial charge was for a bailable offence, the prosecution was at liberty to amend the charge to robbery before close of its case.
13. Counsel relied on **section 28** of the ***Police Act (Repealed)*** to defend the PC Osman's use of the firearm on the petitioner. He urged the court to take cognisance of evidence which made it clear that the petitioner was escaping from lawful custody.
14. He finally submitted that the Attorney General had powers to undertake proceedings under **section 26** of the former Constitution regardless of whether they led to an acquittal or conviction and urged that the petition be dismissed.

Determination

15. The petitioner testified and when given an opportunity to cross-examine him, counsel for did not do so. I also note that PC Osman, the officer implicated in the shooting did not testify nor was any other witness called to enlighten the court on the circumstances of the shooting.
16. Three issues fall for consideration;
 - a. Whether the shooting of the petitioner was unlawful in the circumstances.
 - b. Whether the detention of the petitioner was a violation of his fundamental rights and freedoms.
 - c. Whether the prosecution of the petitioner was an abuse of the process.

Whether shooting of petitioner was unlawful

17. The respondents admit that the petitioner was shot by PC Osman but justify the action of PC Osman on the basis of the law. Under **section 71(1)** of the former Constitution, "*No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.*" **Section 71(2)** of the former Constitution also gives five specific instances where a person may lawfully be deprived of his life, that is, in defence of person or property, in effecting a lawful arrest, or prevention of escape from lawful custody, in suppressing a riot, insurrection or mutiny, prevention of commission of a crime and death as a result of an act of war. The respondents consequently submit that PC Osman's acts fell within constitutionally accepted exception to the right to life.

18. The provisions of **section 71(2)** are given effect by **section 28** of the **Police Act (Repealed)** which provides that:

28. *A police officer may use arms against-*

- a. *any person in lawful custody and charged with or convicted of a felony, when such person is escaping or attempting to escape;*
- b.
- c. *any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person;*

Provided that arms shall not be used-

- i. *As authorized in paragraph (a), unless the officer has reasonable ground to believe that he cannot otherwise prevent the escape, and unless he gives warning to such person that he is about to use arms against him and the warning is unheeded;*
- ii. *As authorized in paragraph (b) or paragraph (c), unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm or that he cannot otherwise prevent the rescue or, as the case may be, effect the arrest.*

19. **Section 21** of the **CPC** also allows the police or a private person who endeavours to arrest a person suspected of having committed an offence to use all means necessary to effect arrest where arrest is forcibly resisted. **Section 21 (3)** forbids the use of unreasonable force in effecting arrest in the following terms, *“Nothing in this section shall justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.”*

20. The use of force is permitted by the law to effect a lawful arrest or prevent escape from lawful custody but that the force must be reasonable in the circumstances. The general approach of the courts in assessing the reasonableness or otherwise in the use of a firearm in effecting arrest is illustrated by the case of ***M’lbui v Dyer (1967) E.A. 315*** where the court held that the defendant was negligent in firing the third shot in the direction of the plaintiff as the amount of force used in the circumstances was neither reasonable nor necessary. This was so because at the time of firing the third shot, the plaintiff was unarmed. In ***Charles Munyeki Kimiti v Cpl Joel Mwenda and Others Nyeri CA Civil Appeal No. 129 of 2004 [2010]eKLR***, the Court of Appeal stated, *“Whether or not police have used excessive force in effecting arrest is a matter of degree dependent on the peculiar circumstances of each case. In deciding whether liability should attach for alleged careless or negligent use of firearm by police in effecting arrest, the court should take into account, among other things, that the pursuit and arrest of dangerous and armed criminals is a hazardous operation and that it is in the public interest that the police operations are not unreasonably impeded by the decisions of the courts.”*

21. The petitioner testified that on the material day he was shot on the right arm while in an altercation with PC Osman who had threatened him and taken his money. He denied that he had been arrested or was in police custody when he was shot or that he attempting to escape. The evidence of PC Osman is to be found in his replying affidavit and his testimony in the criminal proceedings. In the replying affidavit PC Osman depones that the petitioner had been arrested and while in the course of being admitted into the cells, he jumped over the counter and ran away. PC Osman gave chase while ordering him to stop but he defied the order hence he fired one round of ammunition from his Ceska pistol in the air to scare him but he vanished in the

slums. He states that he entered the incident in the Occurrence Book.

22. In the criminal proceedings, PC Osman testified that, *“We managed to arrest the accused. We recovered nothing. We ordered him to remove his shoes but he started running away. I fired two rounds of ammunition. He disappeared into the nearby slum. I later booked the incident”*
23. The other witness who testified in the criminal proceedings, PW2, was the security watchman who reported to the police at Reuben Centre that he had seen three people with a motor cycle with registration plates. Although he testified to the alleged escape, he did not mention any shooting in his evidence although he testified that the one of the three people was arrested and managed to escape. He stated the person was chased and disappeared into the slums.
24. As I stated, the court was denied the opportunity to test the evidence of PC Osman by cross-examination. However, taking the petitioner’s uncontested evidence and the evidence on record, I find the evidence in the affidavit and the evidence in the trial contradictory. In his affidavit PC Osman states that he shot once in the air. This position is supported by the investigation diary. In the criminal proceedings he testified that he fired two rounds of ammunition. I am inclined to believe the petitioner’s version of events and I find that PC Osman shot the petitioner once and that shot was aimed at the left hand shoulder of the petitioner causing him injury.
25. In the criminal case, the learned magistrate in his ruling held that the petitioner was not in lawful custody as he had not been booked into the Police Station. The evidence by the petitioner was not contested and I am inclined to believe that he was shot by PC Osman in an altercation. The evidence of PW2, who is an independent witness, in the criminal proceedings is surprising as it is unlikely that an incident of shooting would have gone unnoticed by the night guard who allegedly saw the petitioner escape from arrest and being chased. Nowhere in his evidence does PW2 allude to a shooting. The petitioner version of events is more plausible as it is consistent with one shot being aimed at him rather than two shots being fired in the air. The respondents have not shown that the officer could not otherwise prevent the escape, or that he gave any warning that he was about to use the firearm against the petitioner in the circumstances. It is also clear the petitioner was unarmed. In my view the officer had no apprehension of danger to himself and the shooting was unreasonable and the use of force unnecessary and unlawful.

Whether Detention violated petitioner’s rights

26. **Section 72(3)** of the former Constitution implies that the 24 hours, applicable to arrest upon suspicion of having committed an offence not punishable by death, is not absolute. The State may, in an appropriate case, offer an explanation which may absolve it from blame for the detention and delay in charging a person. The wording of that section is material and is as follows;

72(3). A person who is arrested or detained

(a) ...

(b) ...

and who is not released, shall be brought before a court as soon as is reasonably practicable 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. [Emphasis mine]

27. In **Julius Kamau Mbugua v Republic Nairobi Criminal Appeal No. 50 of 2008 [2010]eKLR** the Court, in relation to the construction of **section 72(3)**, stated that, '*By section 72(3)(b) a suspect so arrested or detained and who is not thereafter released had to be taken to court as soon as reasonably practicable and if he is not taken within 24 hours, if arrested or detained for non-capital offence or within 14 days, if he is arrested for capital offence, then the section cast a burden on a person who alleges that any detention beyond the specified period is still constitutional, of proving that the suspect was still brought before the court as soon as is reasonably practicable.*'
28. The fact that the petitioner was in police custody from 14th April to 26th April 2010, a period of 13 days is not contested. When he was charged he was charged with the offence of escaping from lawful custody which is a non-capital offence. In the circumstances, there was a violation of the petitioner's right to liberty when he was not brought to court within 24 hours.
29. The respondent's case is that the petitioner was charged with the offence of robbery with violence which is a non-bailable offence when the charges against him were amended on 28th April 2010. In the circumstances, the Mr Njogu submits that there was no violation of **section 72** of the former Constitution. With regard to detention I am in agreement with the **Mashilo Case** (supra) that 14 days provides the outer limit for such detention. The South Africa Supreme Court of Appeal held that, "*...The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier...Expedition relative to circumstances is what is dictated by the subsection and the Constitution...All that need be said is that Mashilo (and probably many other police officers at the police force) clearly misunderstands the provision of s. 50. His response to Kruger that 'he was entitled to detain the applicant for 48 hours before he had to be brought to court for the first time', was well ill-conceived.*" The duty imposed on the State was to bring to court as soon as is reasonably practicable and not necessarily on the 14th day merely because the time limit is stated in the Constitution. Even if I exclude the time taken for bringing the petitioner from Siaya to Nairobi, that is 14th to 18th April, the time from 18th April to 26th April 2010 is unexplained by the respondents.
30. What I infer from the circumstances of the case is that there was no basis to hold the petitioner and in order to justify his detention on the robbery with violence charge which I believe was added to the charges to validate the detention period. My inference is supported by the fact that the identification parade, which presumably was to support the robbery with violence charge, was conducted on 27th April 2010 which is a day before he pleaded to the capital charge. Why the identification parade could not be carried out between 18th and 26th April 2010 is unexplained. Furthermore none of the witnesses, who testified in the criminal case, gave any evidence to support the charge of robbery with violence.
31. In the circumstances, I find and hold that the petitioner right to liberty was violated when he was arrested and detained for a period of 9 days.

Malicious Prosecution

32. The petitioner has charged that his prosecution in **Criminal Case No. 1657 of 2010** which ended in an acquittal was malicious and an abuse of the court process. Malicious prosecution is a well-

known cause of action founded on the abuse of legal process. In ***Murunga v Attorney General (1979) KLR 138*** the court stated that in order to prove malicious prosecution the following ingredients must be established:

- a. The plaintiff must show that prosecution was instituted by defendant, or by someone for whose acts he is responsible;
 - b. That the prosecution terminated in the plaintiff's favour
 - c. That the prosecution was instituted without reasonable and probable cause and
 - d. That the prosecution was actuated by malice.
33. I am prepared to hold that the ingredients (a), (b) and (c) above required to establish a claim for malicious prosecution have been proved by the petitioner. The ruling by the learned magistrate that led to the petitioner's acquittal under **section 210** of the **CPC** shows that there was no basis for the prosecution in the first place. What I fail to detect in this matter is *animus malus*, that is, actual malice. I therefore dismiss this claim.

Reliefs

34. I have found that the petitioner's rights were violated as follows;
- a. The petitioner was unlawfully shot and injured and therefore his rights under **section 71** of the former Constitution violated.
 - b. The petitioner's rights under **section 72** of the former Constitution were violated when he was detained for more than 24 hours without being brought to court as soon as reasonable practicable.
35. The injuries sustained by the petitioner are a direct result of the unlawful act hence the petitioner is entitled to special and general damages against the respondents. It is trite law that special damages must be pleaded with particularity and proved. The petitioner claims Kshs 53,106.00 as medical expenses incurred as a result of the gunshot injury. He has provided receipts for treatment and I have no doubt that he was treated for the injuries sustained.
36. As regards the sum of Kshs 250,000 claimed as legal fees for the defence of ***Makadara Criminal Case No. 1657 of 2010***, I decline to award the same in light of my findings in regard to the claim for malicious prosecution. I therefore award the petitioner Kshs 53,106.00 for medical expenses incurred.
37. The nature and extent of the petitioner's injuries as a result of the gunshot to his right arm were not disputed. According to the medical report of Dr Ndung'u, who examined the petitioner on 21st July 2010 while he was still in custody, observed the following, "*There is an entry gunshot wound on the medial upper right arm about 20 cm from the right shoulder joint. There is an exit wound at the same level laterally. Both the entry and the exit wound are healed. There is a mid-third comminuted fracture of the right humerus. There is non-union of the fracture with formation of a false joint.*" The doctor concluded that although such a fracture would normally heal, in the petitioner's case this was unlikely due to poor management of the initial injuries hence surgery would be required in the future. The same prognosis is confirmed by Dr Theophilus Wangata who examined the petitioner on 1st March 2012. He notes that future corrective surgery is required to remove the surgical medical plate which will cost about Kshs 120,000.00. The petitioner testified that he is still undergoing treatment at the Kikuyu PCEA Hospital. He also stated that he is unable to do the previous work of a tent maker he was able to do.

38. Although the petitioner did not refer the court to any decided cases where damages for similar injuries were awarded, I think a sum award of Kshs 500,000.00 as general damages and Kshs. 120,000.00 for future medical expenses would adequately compensate the petitioner.
39. I decline to award exemplary damages as such a case has not been made out. I do not detect any high handed conduct or brazen and deliberate violation of the petitioner's right other than the violations I have found outlined in the judgment.

Disposition

40. In view of the conclusions I have reached in the matter, I enter judgment for the petitioners against the respondents as follows;
- a. **I hereby declare that the fundamental rights and freedoms of the petitioner guaranteed under sections 71 and 72 of the former Constitution violated by the respondents.**
 - b. **The petitioner is awarded the following sums;**
 - i. **General damages - Kshs. 500,000.00**
 - ii. **Future medical expenses – Kshs. 120,000.00**
 - c. **Kshs. 53,106.00 as special damages.**
 - d. **Interest on (b) above shall accrue at court rates from the date of this judgment and on (c) from the date of filing the petition.**
 - e. **The respondents shall bear the costs of the suit.**

DATED and DELIVERED at NAIROBI this 31st March 2014.

D.S. MAJANJA

JUDGE

Mr Mureithi instructed by Mbugua Mureithi and Company Advocates for the petitioner.

Mr Mohamed, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr Njogu, Prosecution Counsel, instructed by the Directorate of Public Prosecutions for the 2nd respondent.



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