



**Gikono & another & another v Attorney General & another (Constitutional Petition 1 of 2019) [2022] KEHC 13954 (KLR) (11 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 13954 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CONSTITUTIONAL PETITION 1 OF 2019  
LM NJUGUNA, J  
OCTOBER 11, 2022**

**BETWEEN**

**EUSTACE GICHOVI GIKONO & ANOTHER & ANOTHER ..... PETITIONER  
AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The petitioners herein filed a petition dated February 14, 2019 wherein they seek for the following orders;
  - i. Declaration that the respondents violated the petitioners' rights and freedoms which included right to liberty, right to be brought to court within twenty four hours, right to dignity and freedom from cruel and inhuman degrading treatment contrary to articles 28, 29 and 49 (1) (a) & (f) of the Constitution of Kenya.
  - ii. General damages as the court shall assess consequent to the declarations of violations of fundamental rights and freedoms in (a) above.
  - iii. An award of exemplary, aggravated and/or punitive damages for blatant, callous, oppressive and high handed violation of the petitioners' constitutional rights by officers of the government.
  - iv. Special damages of Kshs 200,000/= paid for the legal fees in the trial.
  - v. Costs of the petition. Kindly advise
2. The petition is premised on the grounds on its face and it's supported by the affidavit sworn by the 1<sup>st</sup> petitioner. The petitioners' case is that on the November 11, 2014, they were unlawfully arrested



without any justification and in gross violation of their rights to liberty on fabricated charges to wit: possession of 14 bags of coffee cherries without a licence contrary to section 19 (1) (b) of the Crops Act, 2013 and they were detained for three (3) days without being arraigned in court. It was their case that they were kept in the police custody for more than 24 hours without being arraigned in court, thereby resulting to gross violation of the provisions of article 49 (1)(f) of the Constitution.

3. The 1<sup>st</sup> respondent filed grounds of opposition dated May 15, 2019 and averred that the petition as drawn discloses no cause of action capable of being litigated as a constitutional petition against it; further that, the petition is incompetent, misconceived, misplaced and an abuse of court process and that the same is omnibus, imprecise and lacks sufficient details and that the same ought to be dismissed with costs. The 2<sup>nd</sup> respondent did not participate in the petition herein despite having been served.
4. Directions were taken that the petition be canvassed by way of written submissions and only the petitioners adhered to the directions.
5. The petitioners submitted that they have clearly set out with precision and have demonstrated that indeed there was violation of their rights contrary to *inter alia* articles 49(1) (f) and 28 of the Constitution. Reliance was placed on the cases of Anarita Karimi Njeru v Attorney General (1979) KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance and others [2013] eKLR. The petitioners further submitted that in terms of quantum of damages, an amount of Kshs 2,000,000/= for each petitioner suffices, in vindicating their violated rights and to act as a deterrent for any would be future infringements. Reliance was placed on the cases of Gitobu Imanyara & 2 others v Attorney General Civil Appeal No 98 of 2014 [2016] eKLR and Lucas Omoto Wamari v Attorney General & another [2017] eKLR. In the end, it was prayed that the petition be allowed with costs and interests.
6. I have considered the petition herein, the grounds of opposition and the written submissions made by the petitioners. The matter before the court is a constitutional petition and I will proceed to determine whether the same has merits in line with the existing legal provisions in dealing with petitions.
7. The practice and procedure in constitutional Petitions is provided for under “The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013” (hereinafter referred to as ‘the Mutunga Rules’).
8. From the face of the petition, the same has been brought *inter alia* under articles 49 (1)(f), 19, 20, 21, 22(1) and 23(1), of the constitution. A cursory look at the orders sought to be enforced, the same include the rights of an accused person as envisaged under article 49 of the Constitution.
9. I have perused the materials before me and all the annexures, and it is clear that the dispute herein relates to the alleged detention of the petitioners for more than the constitutionally allowed period of time in reference to article 49 (f) (i). The petitioner made reference to various articles of the Constitution which were allegedly violated.
10. In my endeavour to determine whether the petitioners’ rights were violated as alleged, of importance to note is that the burden of proof on a petitioner in a constitutional petition was addressed by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR as follows: -

Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision



in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

11. Article 49(1)(f) of the Constitution provides as follows:

“49. An arrested person has the rights-  
(1) (f) to be brought to court as soon as reasonably possible, but not later than-  
(i) twenty-four hours after being arrested; or  
(ii) if the twenty-four hours end outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.”

12. The import of this provision is to protect arrested persons against unnecessarily long detentions by the police. Arrested persons are thus required to be presented to court in strict adherence with article 49 (1) (f) of the Constitution. The importance of this provision was discussed by the court in *Betty Jemutai Kimeiywa v Republic* [2018] eKLR;

13. In *Salim Kofia Chivui v Resident Magistrate Butali Law Courts & another* [2012] eKLR, the court stated as follows:

“... I therefore find and hold that the petitioner’s right under article 49(1) (f) were breached when he was arrested on March 24, 2011, detained in police custody and arraigned before the court in Butali on March 29, 2011”... “The tenor and effect of these provisions is to protect any person in Kenya from unwarranted arrest and detention for any period over twenty-four hours or for the period necessary to secure his production in court of the next available date. In any other case and detention beyond 24 hours must be authorized by court as provided by article 49(1) (g). Once the person’s attendance has been secured within the 24 hours, the court may order the person released or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.”

14. As earlier stated, the 2<sup>nd</sup> respondent despite having been served with the petition, chose not to participate, and therefore, denied this court an opportunity to hear their side of the case but nonetheless, this court is possessed of the requisite jurisdiction to determine the issue raised by the petitioners. Further, this court is clothed with jurisdiction under article 165(3) (b) and (d) (ii) of the Constitution to determine whether rights or fundamental freedom in the bill of rights have been denied, violated, or infringed. And as the court observed in *Miguna Miguna v Dr Fredrick Okengo Matiang’i, Cabinet Secretary for Ministry of Interior and Coordination of National Government & 7 others* [2018] eKLR, it must be everyone’s obligation to uphold the Constitution, respect, enhance and protect human rights and fundamental freedoms because they are the foundation of the rule of law and good governance.

15. It is trite that he who alleges must prove and therefore, the burden remains with the petitioners to prove their case. [see section 109 of the Evidence Act]. Further, In *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, the Supreme Court stated on the evidential burden of proof:



(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

16. From the record, I note that the petitioners were arrested on November 11, 2014 and were presented before court on November 14, 2014 to take plea and from my arithmetic, the same was in excess of one day contrary to provisions of article 49(1) (f) of the Constitution.

17. Article 49(1)(f) of the Constitution provides that an arrested person has the right to be brought before a court as soon as reasonably possible but not later than twenty-four hours after being arrested.

18. Detention pending a formal charge must be based on an individualized determination that, it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime, none of which have been advanced in this case given that the 2<sup>nd</sup> respondent did not participate. Apart from the suspicion that the petitioners had committed the offences preferred against them, no explanation was advanced as to why they were held in detention for a period of three days before they were arraigned in court.

19. The need for a court to decide each case on the basis of its own peculiar facts and circumstances was perhaps best demonstrated in Gerald Macharia Githuku v Republic, Criminal Appeal No 119 of 2004. In that appeal, the accused person had been taken to court 17 days after his arrest. The Court of Appeal said;

"We have come to the conclusion, after a careful weighing of these two considerations, in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court 17 days after his arrest, instead of within 14 days, in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant, and although on the evidence we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72 (3) of the Constitution should be disregarded."

20. The petitioners have moved this court and have averred that their constitutional rights were infringed upon by the respondent's failure to arraign them before the court within the prescribed timelines as per the provisions of the constitution and as such, have sought for orders *inter alia* that; they be compensated an amount of Kshs 2,000,000/= and they cited the case of Gitobu Imanyara & 2 others v Attorney General Civil Appeal No 98 of 2014 [2016] eKLR and Lucas Omoto Wamari v Attorney General & another [2017] eKLR and costs and interests.

21. The Court of Appeal in Gitobu Imanyara & 2 others v Attorney General Civil Appeal No 98 of 2014 [2016] eKLR had this to say in regard to damages:

" ...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..."

22. The case before me being a constitutional petition, I turn for guidance to the principles set out in *Gitobu Imanyara & 2 others v Attorney General* (supra); the petitioners herein were arrested on the November 11, 2014 and detained for three days before they were arraigned in court which is clearly contrary to article 49(1)(f) of the *Constitution* of Kenya 2010. The fact has not been denied by the respondents. No reasons have been given to the court why they were not presented before court within 24 hours as provided for in the *constitution*. I find that their constitutional rights were violated and they are thus entitled to damages for the said violation.
23. The petitioners have suggested Kshs 2,000,000/= for each petitioner and have relied on the case of *Lucas Omoto Wamari v Attorney General & another* [2017] eKLR where a similar amount was awarded.
24. As already noted, the 1<sup>st</sup> respondent did not file submissions to the petition though he filed grounds of opposition. The 2<sup>nd</sup> respondent did not participate at all.
25. The court has perused the case of *Lucas Omoto Wamari (supra)*. The appellant in that case was shot and injured by a police officer without any reasonable cause and sustained injuries on his right arm. The incident occurred on the April 4, 2010 and subsequently; the appellant was arrested on the April 14, 2010 when he was arraigned at Makadara Magistrate's Court where he was charged with the offence of escape from lawful custody contrary to section 36 of the *Penal Code*.
26. On the April 28, 2010, the prosecution charged the appellant with two more offences that is; robbery with violence contrary to section 296(2) of the *Penal Code* and preparation to commit a felony contrary to section 308(1)(b) of the *Penal Code*. On December 7, 2010, the offence of robbery with violence was withdrawn and the trial proceeded with regard to the non-capital offence and ended in the appellant being acquitted under section 210 of the *Criminal Procedure Code*.
27. The appellant filed a petition maintaining that his fundamental rights and freedoms were violated as he was unlawfully shot and wounded, unlawfully arrested and detained. He also contended that he was maliciously prosecuted and that he suffered general and special damages.
28. From the facts of that case, it is clear that the same is very different from the case herein; the petitioners' case being that they were detained for a period of three (3) days before they were arraigned in court.
29. Guided by the cases of *Daniel Waweru Njoroge & 17 others v Attorney General* (Civil Appeal No 89 of 2010) [2015] eKLR and that of *Erastus Maina Karanja v The Machakos County Government*, I am of the considered view that Kshs 150,000/= is reasonable compensation and the same is hereby awarded to each petitioner.
30. As for the claimed special damages in the sum of Kshs 200,000/= paid as legal fees in the trial, it is trite that special damages have to be specifically pleaded and strictly proven. No evidence was tabled before the court to prove that the said amount was paid. I decline to award it.
31. The petitioners are also awarded the costs of the petition.
32. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2022.**

**L. NJUGUNA**



**JUDGE**

.....for the Petitioners  
.....for the Respondents



<https://new.kenyalaw.org/akn/ke/judgment/kehc/2022/13954/eng@2022-10-11>