



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 121 OF 2018**

**STANLEY MAGARE.....PETITIONER**

**-VERSUS-**

**THE ANTI-COUNTERFEIT AGENCY.....1<sup>ST</sup> RESPONDENT**

**THE OFFICER COMMANDING STATION**

**CENTRAL POLICE STATION NAIROBI.....2<sup>ND</sup> RESPONDENT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Through his petition dated 3<sup>rd</sup> April, 2018 the Petitioner, Stanley Magare, alleges violation of his rights and fundamental freedom by the Anti-Counterfeit Agency (the 1<sup>st</sup> Respondent), Officer Commanding Station, Central Police Station Nairobi (the 2<sup>nd</sup> Respondent) and the Inspector General of Police (the 3<sup>rd</sup> Respondent).

2. The Petitioner's testimony is that he is a senior manager with Premier Motors Spares, a limited liability company incorporated in Kenya. The company is in the business of selling motor vehicle spares parts in two shops along Kirinyaga Road in Nairobi Central Business District. His averment is that on 20<sup>th</sup> December, 2017 at around 11.00 am, the respondents stormed their premises wanting to conduct an inspection. The 1<sup>st</sup> Respondent's officer informed him that an undisclosed complainant had informed them that a product by the name silicone sealant which they were selling in the shop was counterfeit. He was subsequently arrested and detained for over twenty four hours but later released without being charged.

3. The Petitioner's averment is that his unlawful arrest and detention was as a result of the respondents' misconstruing and abusing their powers under the Anti-Counterfeit Act as there were no reasonable grounds to warrant his arrest. His deposition is that his release after being held in custody for over twenty four hours without any charges being preferred against him is sufficient demonstration that his arrest and detention was unlawful, grounded on pure malice and tantamount to detention without trial.

4. It is the Petitioner's case that his arrest and detention without trial violated his right to freedom and security as protected under Article 29 of the Constitution. He avers that the respondents' actions also violated his right to expeditious, lawful, reasonable and procedurally fair administration action under Article 47 of the Constitution. Further, that he was not supplied with written reasons for his arrest as required by said Article.

5. The Petitioner also alleges violation of the right to a fair hearing under Article 50 of the constitution. He asserts that the respondents failed to afford him the right to a fair hearing. The Petitioner additionally contend that the respondents violated his various rights under Article 49 of the Constitution namely the rights to be informed of the reason of his arrest, to remain silent, to communicate with an advocate, to be taken to court not later twenty four hours after arrest, and to be released on bond.

6. The Petitioner deposes that at the time of his arrest and detention, the 1<sup>st</sup> Respondent's inspectors informed him that the Anti-Counterfeit Act allowed them to arrest and detain him and that the arrest by the police was regular. It is, however, his averment that the Anti-Counterfeit Act does not grant any powers to the respondents to detain any person arrested on account of the provisions of the Act unless an offence has been established. According to him, the only grounds upon which a person may be arrested under the Act is when the person declines to give the inspector his name and address or hinders the inspector. His view therefore is his arrest was *ultra vires* the law.

7. The Petitioner therefore prays for orders as follows:-

**“a) A declaration that the action by the Respondents to arrest and detain the Petitioner was in outright contravention of Articles 29, 47, 49 and 50 of the Constitution of Kenya.**

**b) General damages for breach of constitutional rights under Articles 29, 47, 49 and 50.**

**c) General damages for unlawful arrest and detention of the Petitioner.**

**d) Any other order this Court shall deem mete and just.**

**e) The costs of this petition be awarded to the Petitioner.”**

8. The 1<sup>st</sup> Respondent opposed the petition through a replying affidavit sworn on 18<sup>th</sup> October, 2018 by Chief Inspector Martin Luther. It his averment is that he was assigned the duty of investigating an alleged intellectual property infringement that was reported to the 1<sup>st</sup> Respondent on 21<sup>st</sup> November, 2017 by Iseme Kamau & Maema Advocates on behalf of Abro Industries Inc. He deposes that the complaint form was accompanied by proof that the complainant was eligible to lay a complaint under Section 33 of the Anti-Counterfeit Act. Submitted alongside the complaint form was a statutorily verified affidavit in support of the complaint, an indemnity form and payment of the statutory fees.

9. Chief Inspector Luther avers that on 20<sup>th</sup> December, 2017 after satisfying himself that all the statutory requirements had been met, he proceeded to the premises of Premier Motors Ltd situated along Kirinyaga Road in Nairobi in the company of three administration police officers to conduct investigations and seizures based on the complaint laid with regard to suspected counterfeit Abro Grey 999 gasket markers duly registered under the Trade Marks Act.

10. According to Chief Inspector Luther, when they arrived at the premises he introduced himself and his team and the purpose of their visit to the Petitioner herein who was the store manager. His averment is that the Petitioner responded aggressively in an attempt to obstruct the inspection. The Petitioner tried to lock them inside the premises and tore up the police identification card of one of the officers. This, he deposes, resulted in a physical altercation necessitating the police officers to contain the Petitioner by placing him under arrest. The Petitioner was subsequently escorted to and booked at Central Police Station at 1.50 pm under OB 47/20/12/2017. He avers that the Petitioner was released the next day, 21<sup>st</sup> December, 2017, at 10.20 am under OB 29/20/12/2017 and was therefore in police custody for less than twenty four hours.

11. It is Chief Inspector Luther's testimony that the introduction he made to the Petitioner not only satisfied the standard procedure for civilian law enforcement officers but also Article 49 of the Constitution. His averment is that the arrest of the Petitioner was done in line with Section 23(3) of the Anti-Counterfeit Act as suspected counterfeit goods had been seized. His case therefore is that the Petitioner's arrest was lawful as the same was done pursuant to a suspicion based on reasonable grounds. Chief Inspector Luther therefore denies violation of constitutional rights as alleged by the Petitioner.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents oppose the petition through grounds of opposition dated 6<sup>th</sup> December, 2018 as follows:-

**“a) That the Petitioner has not demonstrated before the Honourable Court how the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have violated his Constitutional Rights.**

**b) That the 1<sup>st</sup> Respondent is mandated to combat counterfeiting trade and other dealings in counterfeit goods and in the process they are mandated to inspect premises and ask for assistance from the police in terms of detaining a suspect.**

**c) That the Petitioner has failed to produce records/a report obtained from the Central Police Station to the effect that the Petitioner was confined in the aforementioned police station and/or confined for more than 24 hours.**

**d) That the police are professional in undertaking their statutory mandate under the National Police Service Act and do not condone false imprisonment.**

**e) That the Respondents have therefore acted in accordance with the power conferred upon them by law and in line with public interest.**

**f) That the petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.”**

13. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents also filed a replying affidavit sworn on 14<sup>th</sup> June, 2019 by Inspector Jane Kabuchwa. She avers that the Petitioner was among those arrested in an operation against counterfeit products conducted in Nairobi on 20<sup>th</sup> December, 2017. Her deposition is that the Petitioner was locked up at Central Police Station on 20<sup>th</sup> December, 2017 at 13.50 hours as per the OB extract 47/20/12/2017 and released on 21<sup>st</sup> December, 2017 at 10.20 hours. Upon release, the Petitioner was required to appear before the 1<sup>st</sup> Respondent for further action as provided under Section 52 of the National Police Service Act.

14. The Petitioner filed a supplementary affidavit sworn on 12<sup>th</sup> November, 2018. He denies the averment by Chief Inspector Luther that he became aggressive and states that if that was indeed true he ought to have been charged under Section 24 of the Anti-counterfeit Act which creates the offence of obstruction. Further, that the allegation that he attempted to lock the officers in the premises is not true. He points out that the identification card he allegedly tore has not been exhibited. His averment is that the extract of the occurrence book exhibited in Court is doctored as he was released late into the day on 21<sup>st</sup> December, 2017 and not at 10.20 hours as averred by Chief Inspector Luther.

15. Through his submissions dated 12<sup>th</sup> November, 2018 the Petitioner submits that his arrest and detention was without reason hence a violation of Article 29 of the Constitution which forbids deprivation of freedom arbitrarily without just cause and detention without trial. The decision in **Michael Rotich v Republic [2016] eKLR** is cited for the holding that the police should only arrest a person when they have *prima facie* evidence that an offence has been disclosed which can result in the person being charged.

16. The Petitioner urges this Court to find that he was unlawfully arrested and detained. In reaching this conclusion, the Court is asked to rely on the decision in **Daniel Njuguna Muchiri v Barclays Bank of Kenya Ltd & another [2016] eKLR** where it was held that the ingredients of the test of false imprisonment are unlawful restraint of another against their will and without legal justification. Reliance is also placed on the decision in the case of **Daniel Waweru Njoroge & 17 others v Attorney General [2015] eKLR** as to what constitutes false arrest and false imprisonment.

17. It is also the Petitioner’s case that his right to privacy under Article 31 of the Constitution which includes the right not to have his person, home or property searched and his possession seized was violated by the respondents. He relies on the decision in **Samura Engineering Limited & others v Kenya Revenue Authority, Petition No. 54 of 2011** in support of this argument.

18. The Petitioner’s case is that his goods were seized on 20<sup>th</sup> December, 2017 and the same had not been released to him by the time he filed the instant petition on 4<sup>th</sup> April, 2018. According to the Petitioner, the failure to return the seized goods to him is sufficient evidence that the respondents’ actions were actuated by malice and the seizure was never intended to test whether the goods were counterfeit. Further, that the respondents’ actions had caused a serious disruption of the Petitioner’s business occasioning him heavy losses.

19. On the alleged breach of the right to fair administrative action as protected by Article 47 of the Constitution, the Petitioner

contends that he was not accorded an opportunity to be heard before his goods were seized. He asserts that the failure to hear him resulted in an unreasonable and irrational decision by the respondents. The decisions in **Dry Associates Limited v Capital Markets Authority & another Petition No. 328 of 2011**; **Onyango Oloo v Attorney General [1986-1989] EA 456**; and **Standard Resource Group Ltd v Attorney General & 2 others [2016] eKLR** are cited as holding that natural justice should be complied with in an administrative process.

20. The Petitioner further contends that the respondents violated Article 50 of the Constitution. His case is that the respondents ought to have afforded him an opportunity to be heard in regard to their decision to detain him. He submits that the respondents had in the process also violated the rights he was entitled to as an arrested person under Article 49 of the Constitution. He stresses that he was not informed of the reasons for his arrest and neither was he accorded an opportunity to contact a lawyer or his employer. Further, that he was not released on bond even though there were no compelling reasons for his continued detention.

21. As for the remedies to be awarded to him, the Petitioner refers to Section 16(2)(a) and (b) of the Anti-Counterfeit Act as providing for compensation to an aggrieved party by way of damages. His case is that the respondents acted with gross negligence and in bad faith. The Petitioner places reliance on the decisions in **Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort Limited t/a Paradise Beach Resort & another (2012) eKLR**; and **Standard Newspapers Limited and another v Attorney General & 4 others [2013] eKLR** and prays for Kshs. 5 million as compensation.

22. Through submissions dated 12<sup>th</sup> November, 2018, the 1<sup>st</sup> Respondent places reliance on the extract of the occurrence book and submits that it is police officers from the National Police Service who arrested the Petitioner. Further, that Section 22 of the Anti-Counterfeit Act provides for appointment of police officers as inspectors. Section 23(3) of the same Act is identified as authorizing an inspector to arrest any person suspected of having committed an offence under the Act. It is the 1<sup>st</sup> Respondent's case that the Petitioner was informed of the purpose of the visit to his premises and was arrested with the intention of charging him under Section 33(1)(a) of the Act. It is therefore the 1<sup>st</sup> Respondent's case that Articles 29, 47(1) and 50 of the Constitution were not violated as alleged by the Petitioner.

23. Another line of argument taken by the 1<sup>st</sup> Respondent is that the Petitioner was never held for over twenty four hours as alleged and Article 49(1)(f)(i) of the Constitution was therefore not violated. It is submitted that the evidence placed before the Court shows that the Petitioner was arrested on 20<sup>th</sup> December, 2017 and booked into Central Police Station at 2.30pm and released on 21<sup>st</sup> December, 2017 at 10.20am. It is the Respondent's case therefore that the Petitioner was only in police custody for 20 hours and 30 minutes hence there was no violation of the constitutional requirement that an arrested person be taken to court not later than twenty four hours from the time of his arrest. The Court is therefore urged to dismiss the petition with costs to the 1<sup>st</sup> Respondent.

24. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents' submissions dated 12<sup>th</sup> June, 2019 are similar to that of the 1<sup>st</sup> Respondent. It is additionally the case of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the Petitioner has not discharged the burden of prove as required by sections 107 and 108 of the Evidence Act. Reliance is placed on the decision of **Susan Mumbi v Kefala Grebedhin, Nairobi HCCC NO.332 of 1993**, as cited in **Kipkebe Limited v Peterson Ondieki Tai [2016] eKLR**, for the holding that the question of the court presuming adverse evidence does not arise in civil cases since whoever alleges has to prove.

25. The question raised in this case is whether the arrest and detention of the Petitioner violated his constitutional rights. This can only be determined based on the evidence placed before the Court by the parties. The Petitioner's case is that his arrest was without reason. On the other hand the respondents claim that the Petitioner's arrest was justified.

26. The Petitioner is indeed correct that an arrest under the Anti-Counterfeit Act is not open-ended. Section 23(3) of the Anti-Counterfeit Act, 2008 provides that:-

**“An inspector may arrest, without a warrant, any person whom he suspects upon reasonable grounds of having committed any offence under this Act and may search and detain such a person:**

**Provided that no person shall be arrested under this section unless he obstructs or hinders the inspector or refuses to give his name and address to the inspector or to produce to him satisfactory evidence of his identity, or gives a name and address which the inspector has reason to believe to be false or it appears to the inspector that such a person may not be found or made answerable to justice without unreasonable delay, trouble or expense.”**

[Emphasis supplied]

27. It is the Petitioner's case that he never obstructed or hindered the inspector nor did he refuse to give his name and address in order to justify his arrest. His case is that had he done so he would have been charged under Section 24 of the Act. The said Section does indeed create several offences as follows:-

**“24. (1) A person who-**

**(a) willfully obstructs an inspector in the discharge of his duties;**

**(b) willfully fails to comply with any requirement properly made to him by an inspector;**

**(c) without reasonable cause, fails to give to an inspector any assistance or information which the inspector may reasonably require of that person for the purpose of the performance of his duties under this Act; or**

**(d) in giving any such information as is mentioned in paragraph (c), makes any statement which he knows to be false or does not believe to be true, commits an offence.**

**(2) A person who, without authority –**

**(a) breaks, damages or tampers with a seal applied by an inspector under this Act; or**

**(b) removes any goods, documents, articles, items, objects or things sealed or sealed-off by an inspector or detained or stored at a counterfeit goods depot under this Act, commits an offence.”**

28. The respondents' case is that the Petitioner resisted arrest, attempted to lock the inspector and his team in the premises and even tore an identification document belonging to a police officer. The Petitioner's case is that all the allegations were an afterthought. Who then should the court believe" Documents never lie. The truth should be obtained from the entries in the Occurrence Book at Central Police Station. The Occurrence Book extract attached to the replying affidavit sworn on 14<sup>th</sup> June, 2019 by Inspector Jane Kabuchwa clearly shows that the Petitioner was placed in the cells on 20<sup>th</sup> December, 2017 at 13.50 hours for the offence of having in possession in the course of trade counterfeit goods contrary to Section 32(c) as read with Section 33(1)(a) of the Anti-Counterfeit Act. The remark made when the Petitioner was released on 21<sup>st</sup> December, 2017 at 10.30 hours is that:-

**“Now CPL Charles Lepuchirit - released one prisoner namely STANLEY MAGARE who was held for the offence of being in possession of counterfeit goods”.**

29. The respondents own exhibit clearly shows that the Petitioner was arrested for being in possession of counterfeit goods. As correctly submitted by the Petitioner, had he resisted arrest and turned violent as alleged by the respondents he ought to have been charged with the offences created by Section 24 of the Anti-Counterfeit Act. The respondents have not pointed out any provision of the law that authorized them to arrest and detain the Petitioner since Section 23 of the Anti-Counterfeit Act is clear that an arrest is subject to the conditions in the proviso. Being found with counterfeit goods is not a sufficient ground for being arrested and locked up. The conditions in the proviso to Section 23 should be met.

30. The evidence adduced by the respondents supports the Petitioner's averment in his further affidavit of 12<sup>th</sup> November, 2018 that the allegation that he attempted to lock the inspectors in the premises was untrue and an afterthought. The Petitioner's case is plausible considering the failure to exhibit the police identification document allegedly torn by the Petitioner.

31. The respondents had the onus of establishing that the proviso to Section 23(3) of the Anti-Counterfeit Act had been met to warrant the arrest and detention of the Petitioner. They have failed to do so. The Petitioner's lamentation that his arrest and detention was without reason is therefore justified.

32. The Petitioner has, however, failed to establish that Article 49(1)(f)(i) of the Constitution which required that he be presented to Court not later than twenty four hours after his arrest was violated. The documentary evidence placed before the Court shows that he was arrested on 20<sup>th</sup> December, 2017 at 13.50 hours and released on 21<sup>st</sup> December, 2017 at 10.30 hours. Twenty-four hours had therefore not lapsed by the time of his release. His claim that the evidence of the respondents is doctored is not supported by any evidence. I will therefore rely on the evidence adduced by the respondents in reaching the conclusion that the Petitioner was held in custody for less than twenty two hours.

33. There was also an attempt by the Petitioner to question the seizure of the product that was alleged to be counterfeit. It is noted that this Court found in **Premier Motors Limited v The Anti-Counterfeit Agency, Nairobi High Court Petition No. 122 of 2018; [2019] eKLR** that the respondents did not violate any law in the seizure of the Petitioner's goods. It is therefore clear that particular issue is no longer open for litigation before this Court.

34. Which rights of the Petitioner were infringed by respondents" The evidence shows that Article 29 of the Constitution was indeed violated. The Petitioner has, however, not demonstrated that his person was searched. He has therefore not established violation of Article 31 of the Constitution. Article 50 of the Constitution provides for the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body. None of the respondents is a court or tribunal and the Petitioner has not shown how that right was violated. The Petitioner has also not demonstrated how Article 47 of the Constitution was violated by the respondents.

35. The Petitioner has established that he was unlawfully arrested and detained by the respondents' agents. He was held in custody for about twenty two hours. His arrest violated his rights as protected by Article 29(a) of the Constitution. He is therefore entitled to relief. He has asked for Kshs.5 million as compensation. It is, however, my view that the decisions he has cited are not a good measure of the damages he should be awarded. The facts of the two cases were totally different from the facts of this case. It is noted that the Petitioner was held for less than a day. In my view, an award of Kshs.100,000/- should be adequate compensation. That is the amount I award him as general damages for the unlawful loss of liberty. He is also entitled to costs against the respondents.

36. In summary, judgment is entered in favour of the Petitioner and against the respondents as follows:-

- a.) A declaration is hereby issued that the arrest and detention of the Petitioner by the respondents violated Article 29(a) of the Constitution;
- b.) The Petitioner is awarded Kshs.100,000/- as general damages for violation of his constitutional rights; and
- c.) The Petitioner is awarded costs of the proceedings against the respondents.

**Dated, signed and delivered through video conferencing/email at Nairobi this 4<sup>th</sup> day of June, 2020.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**



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