



**Kadege v OCS Kilingili Police Station & 2 others (Constitutional
Petition 5 of 2022) [2024] KEHC 9176 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION 5 OF 2022**

JN KAMAU, J

JULY 30, 2024

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER
ARTICLE 22(1) AND ARTICLE 23 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS IN ARTICLES**

**2(1), 3(2), 19(1) AND (3), 20(1) AND 2, 21(1), 23(1) AND (2), 24(1), 25(A) AND
(C), 26(1), 27(1) AND (2), 28, 29(A), (C), (D), (F), 31, 35(2), 39(1), 47(1) AND (2),
49(1)(A)(F) AND 50 OF ARTICLES 244 OF THE CONSTITUTION OF KENYA**

**VIOLATIONS OF THE PROVISIONS OF SECTIONS 3(1), 33, 36, 37 AND
46 OF THE CRIMINAL PROCEDURE ACT, CAP 75 LAWS OF KENYA**

BETWEEN

EDGER BWAMU KADEGE PETITIONER

AND

THE OCS KILINGILI POLICE STATION 1ST RESPONDENT

**THE INSPECTOR GENERAL OF POLICE NATIONAL POLICE
SERVICE 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. In its Petition dated 30th November 2022 and filed on 5th December 2022, the Petitioner herein prayed for:-



- a. A declaration that the Respondents violated the Petitioner’s Constitutional rights under the bill of rights.
 - b. An order directing the defendants (sic) to pull down and delete the Petitioner’s photograph and the words thereunder “He Is Armed And Dangerous; Be On The Sharp Look, Profession: Shop Breaking And Stealing, Bar Breaking And Stealing.” From social media and all police and citizens what’s up (sic) groups.
 - c. An order directing the Respondents to tender an unconditional apology to the Petitioner
 - d. An order that the Respondents do pay such appropriate compensation to the Petitioner as the court deems appropriate
 - e. Costs of the Petition.
2. The Petitioner’s Written Submissions were dated 15th March 2024 and filed on 3rd April 2024 while those of the 1st, 2nd and 3rd Respondents’ were dated and filed on 11th December 2023. The Judgment herein was based on the said parties’ written submissions that they relied on in their entirety.

The Petitioner’s Case

3. On 30th November 2022, the Petitioner swore an Affidavit in support of the Petition herein. He also swore a Supplementary Affidavit on 11th October 2023. The same was filed on 12th October 2023.
4. He averred that he was a law-abiding citizen of the Republic of Kenya and had never been convicted of any criminal offence. He stated that on 14th September 2022, the 1st Respondent and officers under him arrested him on suspicion of the offence of bar-breaking and stealing. They took him to his house in Chavakali, where they conducted a search but they did not recover any stolen goods and/or arms. He was released with no charges having been preferred against him on 15th September 2022. He pointed out that the 1st Respondent released him after failing to get any evidence connecting him to the alleged offences. He asserted that while he was at the police station, he discovered that there was no complaint against him.
5. On 26th October 2022, he was arrested again and released without being charged. He was, however, directed to report to the Director of Criminal Investigations Offices at Mudete the following day. He stated that the 1st Respondent took Kshs 6000/= from him and his photograph despite his protests.
6. He contended that on 27th October 2022, he received a call from his wife, Phylis Mulesi and his friends, Jonathan Nyabera and Brian Mulila and other friends and relatives informing him that they had seen his photograph with the words, “He Is Armed And Dangerous, Be On The Sharp Look, Profession: Shop Breaking And Stealing, Bar Breaking And Stealing” being circulated in the social media and what’s up (sic) groups. He was categorical that the said photograph was taken without his consent.
7. He said that he decided to remain indoors and limited his movements as he feared for his life. He averred that he instructed his Advocate to write to the 1st and 2nd Respondents demanding an explanation and/or for them to pull down the photographs from social media. He pointed out that todate, the 1st Respondent had failed to give an explanation why he took his photograph and circulated the same on social media and/or what’s up (sic) groups without his knowledge, consent and due process.
8. It was his contention that the conduct of the 1st Respondent was in gross violation of his rights under *the Constitution* and the Criminal Procedure Act. He further stated that in posting his photograph on social media with the aforesaid words, the 1st Respondent portrayed him as a dangerous, armed criminal, bar and shop breaker, without due process and as a result violated his right to innocence till



proved guilty, right to privacy and reputation, right to human dignity and life, right against inhuman and degrading treatment, right to due process and right to be heard, right to fair trial, right to fair administrative action, right to equal protection of the law, curtailed his freedom of movement, right to be arraigned in a court of law within twenty four (24) hours after arrest and the right against physical and psychological torture.

9. It was his contention that the 1st Respondent violated his right to fair trial and instead turned himself into investigator, prosecutor and judge and condemned him unheard in contravention of the law and principles of natural justice. He asserted that by failing to arraign him before a competent court of law, the 1st Respondent violated his rights under Article 47 of *the Constitution*.
10. He pointed out that being a State Officer, the 1st Respondent was mandated to observe and protect *the Constitution* but he failed to do so. He was emphatic that there was no provision of law that required that a suspect's photograph be taken at the point of arrest and be circulated in the social media.
11. He blamed the 1st Respondent for having violated the provisions of Section 33 of the Criminal Procedure Act. He was categorical that as a result of the 1st Respondent's conduct, he was subjected to psychological torture, humiliation and embarrassment and he could not therefore move around freely to fend for himself and family and could not earn a living by engaging in meaningful and gainful trade and activity because of fear. He was emphatic that he had suffered loss and damage as a result of the 1st Respondent's actions. He pointed out that he lost his driver as a driver where he used to earn a salary of Kshs 30,000/= per month and also stayed in a rental house after the 1st Respondent directed him to demolish his house and to leave his jurisdiction.

The 1st, 2nd & 3rd Respondents' Case

12. On 26th April 2023, Samuel Marienga, OCS Kilingili Police Station swore a Replying Affidavit on his own behalf and on behalf of the 2nd and 3rd Respondents. The same was filed on even date.
13. The Respondents averred that in the months of September and October 2022, there were series of bar and shop breakings within Chavakali Township. The 1st Respondent received security intelligence reports alluding to the fact that the Petitioner herein was the mastermind of the rampant theft.
14. They said that on 14th September 2022, the Petitioner was arrested within Chavakali area and booked in OB No 19/14/09/2022 at 1408hrs. However, he was too drunk to comprehend or respond to the questions that were being put across to him. He was then placed in custody for him to sober up.
15. On 15th September 2022 at 0908hrs, he was released after interrogation as per OB No 09/15/09/2022 to enable the 1st Respondent carry out further investigations in the matter. They averred that after his release, they continued receiving adverse intelligence reports and information on his involvement in the commission of theft within Chavakali Township and its environs. This information led to his second arrest on 26th October 2022 vide OB No 11/26/10/2022 at 1428hrs. However, he was again released on the same day vide OB No 23/26/10/2022 at 1804hrs.
16. The Respondents were categorical that on being released, he was issued with an order of compliance of attendance which directed him to report to SCCIO Sabatia for further questioning over his involvement in criminal acts within Chavakali and its environs. However, he failed to adhere to the said order.
17. They explained that any accused person could be released on cash bail but had to be issued with a receipt for the same. They denied that the Petitioner was never released on a cash bail of Kshs 6,000/



= hence no such receipt was issued to him. They were emphatic that his allegations that he was asked to pay Kshs 6,000/= were false and untrue.

18. They further pointed out that the National Police Service (NPS) only shared information about suspected criminals and the offences they were alleged to have committed through the Kenya Police gazette and in-house WhatsApp Group but not in private WhatsApp Groups. They asserted that intelligence information and information from informants was confidential and as such it could not be shared with private persons because doing so was unethical.
19. They were emphatic that the 1st Respondent did not share any WhatsApp Group with Jotham Nyabera, Brian Mula nor Phyllis Malesi whom the Petitioner alleged to have seen the photograph and informed him of the same. They added that the Petitioner had not disclosed the said WhatsApp group or the cell phone numbers that were allegedly used in circulating his photograph.
20. They asserted that the Petition herein was not an honest quest for justice but a means for the Petitioner to prevent and scare them from continuing investigations of the numerous complaints that had been made against him. They termed the Petition herein as unfounded and rogue and urged this court to dismiss the same.

Legal Analysis

21. Having considered the Petition, the affidavit evidence and the Petitioner's and 1st, 2nd and 3rd Respondents' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-
 - a. Whether or not the Petitioner's constitutional rights had been infringed upon and if so, what reliefs was he entitled to; and
 - b. Who was to bear the costs of this Petition
22. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

I. Constitutional Rights & Fundamental Freedoms

23. The Petitioner reproduced his averments in his affidavit evidence and submitted that the Respondents subjected him to inhuman and degrading treatment and torture which violated his rights. He reiterated that their actions subjected him to embarrassment and reputation. He urged the court to find that his Petition was merited and that the Respondents had failed to rebut his claim.
24. On their part, the Respondents submitted that the Petitioner had not demonstrated how his rights had been violated and the extent to which his rights had been violated. They pointed out that he had not adduced any evidence in his pleadings to show that indeed his allegations were true.
25. It was their contention that merely stating that one's rights were infringed upon was not enough in a constitutional petition but that the petitioner was obligated to prove his allegations with a reasonable degree of precision. In this regard, they relied on the case of *Thorp vs Holdsworth* (1876) 3 Ch.D. 637 where it was held that the whole object of pleadings was to bring the parties to an issue.
26. They further placed reliance on the cases of *Anarita Karimi Njeru vs Republic* [1979]eKLR, *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others* [2013]eKLR and *David Gathu Thuo vs Attorney General & Another* [2021]eKLR where the common thread was that if a person was seeking redress from the High Court on a matter which involved a reference to *the Constitution*, it was



- important that he or she set out with a reasonable degree of precision that which he or she complained of, the provisions said to be infringed, and the manner in which they are alleged to be infringed.
27. They pointed out that the Petition herein had not met the threshold of drafting a Petition, he had not particularised how his rights were infringed in a precise manner, his pleadings did not show the manner in which his rights were infringed, if he was arrested or paraded outside Kilingili police station or his photograph was taken and that the said photograph was distributed in WhatsApp Groups by the Respondents stating that he was armed and dangerous.
 28. They invoked Section 107 and 109 of the *Evidence Act* and submitted that it was trite law that he who alleged had to prove as was held in the case of David Gathu Thuo vs Attorney General & Another (Supra). They further contended that it was public knowledge that police officers were mandated to maintain law and order, therefore, if anything was reported, it was their responsibility to carry out investigations and charge accused persons after they found evidence compelling them to do so. They were emphatic that arresting the Petitioner herein was purely in their mandate. They asserted that he failed to prove his allegations against them.
 29. They further placed reliance on the case of Peter Mauki Kaijenja & 9 Others vs Chief of the Defence Forces & Another [2019] eKLR where it was held that award of damages entailed exercise of judicial discretion, which had to be exercised judicially. They also cited the cases of Calvin Ouma Magare & 18 Others vs Director of Public Prosecution & 4 Others [2022] eKLR and David Gathu Thuo vs Attorney General & Another (Supra) where the courts therein did not award damages where the petitioners had not met the threshold of a constitutional petition. They urged the court not to grant any order on compensation.
 30. The Petitioner was categorical that the 1st Respondent's conduct grossly violated his rights under *the Constitution* of Kenya, 2010 and the Criminal Procedure Act Cap 75 (Laws of Kenya). He further stated that by posting his photograph on social media with the aforesaid words, the 1st Respondent portrayed him as a dangerous, armed criminal, bar and shop breaker, without due process.
 31. Although he cited several rights as having been infringed, he did not set out with precision the actual Articles that he claimed had been infringed save for Article 3 and Article 49(1)(f) of *the Constitution* of Kenya. Even so, he did not expound the alleged infringement under the said Articles. He ought to have set out with a reasonable degree of precision what he complained of, the provisions said to be infringed and the manner in which they were alleged to be infringed as held in the celebrated case of Anarita Karimi Njeru vs Republic (Supra).
 32. Going further, his evidence did not show that he was arrested, paraded outside Kilingili police station and his photograph taken. There was also no evidence to prove that the 1st Respondent circulated the said photograph with a caption that the Petitioner was armed and dangerous on social media and WhatsApp groups as he did not provide details of the mobile phone numbers he used to circulate the same or the numbers that were used in circulating the same. He did not also adduce evidence to show that the 1st Respondent shared WhatsApp groups with the people he said informed him that his photograph was being circulated in WhatsApp groups.
 33. An annexure showing his photograph with the impugned words alone was not enough as it could not tell which registered phone number forwarded the same and/or prove who exactly captioned the photograph or who took the photograph at the Police Station.
 34. Undoubtedly, the National Police Service (NPS) was charged with the duty of carrying out investigations into suspected criminal activities and to apprehend those culpable. However, in carrying out their respective mandates, they were subject to both *the Constitution* of Kenya, 2010 and the law.



35. The Petitioner challenged the manner in which the police discharged their duties in relation to security intelligence information they had received and consequent criminal investigation.
36. This court had due regard to the case of Commissioner of Police & Another vs Kenya Commercial Bank Ltd & 4 others [2013] eKLR where it was held that whereas there could be no doubt that the field of investigation of criminal offences was exclusively within the domain of the police, it was well settled that the aforesaid powers were designed to achieve a solitary public purpose, of inquiring into alleged crimes and, where necessary, calling upon the suspects to account before the law.
37. Courts therefore had to wait for investigations to be completed and the suspect charged by the Director of Public Prosecutions (DPP). The Respondents were under a duty to ensure that proper interrogations and investigations were done and those culpable were apprehended as the law required. That was the balance created by the law and the essence of the rule of law.
38. The court had power to oversee that the DPP and the Inspector General undertook these functions in accordance and compliance with the law so as to prevent and avoid abuse of the legal process. If it was demonstrated that there had been a serious abuse of power, then the court could intervene in order to secure the ends of justice and restrain abuse of power that could lead to harassment or persecution.
39. The burden of proof rested with a petitioner alleging unconstitutional exercise of such power. If sufficient evidence was adduced to establish a breach, the evidential burden shifted to the respondent to justify the decision.
40. Based on the above analysis, the Petitioner herein was required to show the rights that he alleged had been infringed, as well as the basis of each of his grievances. Sections 107(1), (2) and 109 of the Evidence Act, Cap 80 (Laws of Kenya) required whoever desired any court to give judgment as to any legal right or liability and depended on the existence of facts, he or she had to prove that those facts existed.
41. The Respondents clearly explained that it was within their mandate to receive security intelligence information and act upon the same and that in doing so they were not allowed to share such information. It was upon the Petitioner to demonstrate how the law was unequally applied to him or how he was discriminated against, which he failed to do. He therefore did not demonstrate with precision the manner in which his right to equal protection of the law was so allegedly infringed. Hence, that claim could not succeed.
42. In the circumstances foregoing, this court found that the Petitioner had failed to prove how the 1st Respondent and/or Respondents infringed his rights under the Constitution of Kenya.

II. Costs

43. Bearing in mind that the Respondents herein were government entities, this court departed from the general rule that costs follow events as it would be unconscionable to order a citizen to pay costs to its government.

Disposition

44. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition dated 30th November 2022 and filed on 5th December 2022 was not merited and the same be and is hereby dismissed. There will be no orders as to costs.
45. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF JULY 2024



J. KAMAU
JUDGE

