



**Mwani v Attorney General & another (Constitutional Petition
E014 of 2022) [2024] KEHC 10660 (KLR) (16 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CONSTITUTIONAL PETITION E014 OF 2022**

DO CHEPKWONY, J

AUGUST 16, 2024

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 28, 29,
31, 47, 49, 51, 156, 245, 258 AND 259 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF VIOLATION OF HUMAN RIGHTS AND UNLAWFUL DETENTION

BETWEEN

ELIUD WANYOIKE MWANGI PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

JUDGMENT

1. For determination before this court is the Petition dated 21st May, 2021 which seeks the following orders:
 - a. That a Declaration be issued that the arrest of the Petitioner and the subsequent detention without being presented in court for more than 24 hours is a violation of the rights and fundamental freedom as envisaged in Articles 19, 25 And 49 of Constitution.
 - b. That a Declaration be issued that the torture of the Petitioner's wife and son contrary to Article 25 as well as the seizure of his properties and search of his home contrary to Article 31 was not in accordance with *the Constitution* and amounted to the violation of the right to non-limitation of fundamental rights and freedoms as well as right to privacy.
 - c. General damages.
 - d. That the costs for this Petition be payable to the Petitioner by the Respondents.



2. The facts of the Petition were that on 26th November, 2014, the Petitioner was attending a burial of a late friend in Kagira and thereafter he went to his farm after receiving a call from a client that the vegetables he had sold her were missing. While at the farm, the Petitioner heard some screams from a nearby bush and going there, he found it was an elderly woman who was screaming that she had found a thief and there was a crowd ready to lynch the thief. That he, (the Petitioner) pleaded with the crowd to spare the life of the thief and urged that he be handed over to the police. And together with the crowd, they left for the police station as he called the Assistant Chief of Nyathuna Sub-location to inform him of what had transpired and requested for police help. That when they got to the police station, they booked a complaint and the matter was taken up by Corporal Irungu, who also recorded a statement from the alleged thief before he could be taken to hospital. The Petitioner went on to state that on 27th November, 2014, he inquired from the said Corporal about the alleged thief and informed that the thief had been released on condition that he leaves his phone behind at the police station and reports back on 28th November, 2014.
3. The Petitioner goes on to state that on 28th November, 2014, he was approached by some six (6) men while at his shop and they accused him of beating up their relative, (the alleged thief). Since the Petitioner had a delivery to make, he told them to come on another date but was later informed by a friend that the six men had sworn to teach him a lesson and relocate their relative, the “alleged thief” to Kitui. The Petitioner then called Corporal Irungu to inquire about the status of their investigations and was informed that the said thief had never returned to the station, he had not been re-arrested.
4. According to the Petitioner, he was at his farm on 2nd December, 2014, when he was called by his wife and she informed him that the police had raided their house and wanted to arrest the Petitioner for killing the alleged thief. That his wife had then directed the officers to find him at their farm and on the same day he was arrested alongside his wife and son by the officer in charge of Kikuyu police station who was acting under the direction of the Respondents and escorted to Kikuyu Police Station where they spent the night.
5. According to the Petitioner, his wife and son were beaten and sustained serious injuries when his wife told the police that she knew nothing about his phone. He also said that his property, including his motor vehicle were destroyed by the police who also stole some items in the process of looking for his mobile phone. He further stated that his house and young children were left unattended to as the police could not allow his wife to lock their house.
6. It is the Petitioner's case that on 3rd December, 2014, his wife and son were released without being charged while he was arraigned before Kikuyu Law Courts on 4th December, 2014 vide Miscellaneous Criminal Case No. 136 of 2014 with no charges preferred against him but instead the prosecution sought that he be detained for a further five (5) days as the police continued with their investigations. He was then arraigned in court on 8th December, 2014 where the court was informed by the Prosecution that they had not heard from the Investigating Officer and this led to the court dismissing the case against the Petitioner on the ground that the five (5) days the police had been granted for investigations had lapsed.
7. The Petitioner argues that the actions of the Respondents infringed on his constitutional rights in contravention to Articles 1, 10, 19 (1), 20 (1), 21 (1), 22(1), 23 (1), 24, 28,29,31,49, 51 (1), 156, 245, 258 (1), 259 (1) of *the Constitution*. Also, the Petitioner argues that the arrest of his wife and son was conducted in a manner that violated their rights and freedoms since the reason for their arrest and the brutal torture was not disclosed and therefore this was against their fundamental human rights.



8. The Petitioner also holds that his wife and son were detained without any charges being preferred against them and they were never arraigned in court on 3rd December, 2014, yet it was a working day. It is the Petitioner's contention that the police arrested him and his family without conducting their investigations which action has injured his reputation. He also contends that the torture of his wife and son was inhuman treatment with them being frogmarched to the police Land Rover which was in contravention to Article 25 of *the Constitution*. The Petitioner has therefore urged the court to grant the orders sought in the Petition as prayed.

The Response

9. In response, the Respondents filed Grounds of Opposition dated 13th February, 2023 and a replying affidavit sworn by Peter Ogolla Ochieng, the SCCIO, Kikuyu on 5th May, 2023. According to the Respondents, the Petitioner has not demonstrated how the Respondents violated their Constitutional rights as was established under the case of Anarita Karimi Njeri v R (1976- 1980) KLR 1272.
10. They stated that under the Police Service Act, the police have a mandate which includes but not limited to provide assistance to public when in need to maintain law and order to preserve peace, to protect, to investigate crimes, to collect criminal intelligence, to prevent and to detect crime, to apprehend offenders and enforce all laws and regulations which it is charged with and perform any other duties that may be prescribed by the Inspector General under this Act or any other written law from time to time. To do this, they follow the procedure laid down under the Criminal Procedure Code and which they did in arresting the Petitioner, his wife and son and upheld their rights under Article 49 of *the Constitution*.
11. The Respondents also hold that the police acted in accordance with the power conferred upon them by the law and in line with the power to prosecute vested upon the office of Director of Public Prosecution under Article 157 of *the Constitution* of Kenya, which office is an independent Constitutional Office, only subject to the control of the court but based on the Principles of illegality, irrationality and procedural impropriety.
12. The Respondents further hold that the Petition offends the provisions of Sections 106 and 107 both of the *Evidence Act*, on the burden of proof as mere generalised assertions have been made without any supporting evidence. According to the Respondents, a claim of infringement of fundamental rights and freedom as enshrined in *the Constitution* can only be denied by the persons who claim such violation and no other person claiming to be doing it on their behalf, without authority. The Respondents have urged the court to find the Petition as frivolous, incompetent and an abuse of the court process.
13. In their replying affidavit, the Respondents have averred that as stated by the Petition, the same is time barred and that the claim of unlawful detention offends the express provisions of the law under Section 3 of the *Public Authorities Limitation Act*, and hence it is an abuse of the court process. They also state that it is difficult to obtain the public record after a period of nine (9) years since the records by public entities such as the Respondents cannot be held indefinitely and were probably disposed of after some time as guided by the applicable Acts of Parliament and Regulations.
14. According to the Respondents, the Petitioner has not disclosed why he took so long to bring the petition to court and is therefore guilty of laches and the same is an afterthought. The Respondents have also argued that the Petitioner has not identified the perpetrators or given their names or the exact time the acts complained of occurred and therefore it is difficult to ascertain whether the Petitioner, his wife and son were held for more than 24 hours. The Respondents further argue that the Petition



offends the provisions of Sections 106 and 107 both of Evidence Act in that the Petitioner's Petition is generalized and without any supporting evidence to discharge the burden of proof he is charged with.

15. The Respondents contend that the Petitioner has not demonstrated to this court how the Respondents violated his Constitutional rights and those of his wife and son, hence the Petition lacks merit and is a non-starter for want of full disclosures. By the Petitioner failing to disclose any justifiable cause to warrant the intervention of the court, and the Respondents have urged the court to dismiss the Petition with costs.
16. The court directed that the Petition to be canvassed by way of written submissions which the Petitioner filed on 22nd June, 2023, and that the contents thereof have duly been noted by the court.

Determination

17. Having carefully read through the Petition alongside the response by the Respondents, I have considered the arguments in the submissions filed by the Applicant dated 22nd June, 2023 in support of the Petition and find that the main issues for determination by this court are:
 - a. Whether the Petition has merit to warrant the orders sought.
 - b. Whether the Respondent acted beyond the powers accorded to it by the Constitution and Statute.
18. To begin with, the court will restate the law that has been relied on by the Petitioner and Respondents in support of their respective arguments for and against the prayers sought. Article 19 of the Constitution provide that

“The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies. (2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

- (3) The rights and fundamental freedoms in the Bill of Rights
 - a. belong to each individual and are not granted by the State;
 - b. do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
 - c. are subject only to the limitations contemplated in this Constitution.

Article 25 provides that:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited--

- a. freedom from torture and cruel, inhuman or degrading treatment or punishment;
- b. freedom from slavery or servitude;
- c. the right to a fair trial; and



d. the right to an order of habeas corpus.

“Article 49(1)(h) of *the Constitution* of Kenya gives an arrested person the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

Article 31 then provide that:

“Every person has the right to privacy, which includes the right not to have--

(a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed”.

19. It is trite law that Constitutional violations should be pleaded with a reasonable degree of precision. This was stated in the case of *Anarita Karimi Njeru v The Republic* [1976-1980] KLR 1272 . Also, in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the Court of Appeal set out the standard of proof required in Constitutional Petitions. The Court of Appeal judges in this case stated that

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.

20. In this case having carefully gone through the respective pleadings by the parties and in reliance on the cited case Law, the court finds that the Petitioner has not fulfilled this doctrine on specificity as he has not demonstrated how his rights and freedom and those of his wife and son were violated. He has also not demonstrated how himself, his wife and son were subjected to psychological torture. The Petitioner has not even shown how their freedom of movement and liberty was restricted as he has not provided any evidence or given any information on whether or not they were detained or arrested, and for how long, if at all.

21. Section 106 of the Criminal Procedure Code provides that:

Execution of warrant directed to a police officer

“A warrant directed to a police officer may also be executed by another police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed”.

Section 107 of the Criminal Procedure Code thereof provides that:

“The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant”.

22. Having read through the pleadings filed by the Petitioner, this court has noted that while the Petitioner, in his Petition and submissions has referred to a Miscellaneous Criminal Application *No. 136 of 2014* to prove his arrest and that of his wife and son, medical reports from Kinoo Medical Clinic dated 20th June, 2015, 10th June, 2015 and a receipt to the effect dated 30th June, 2023 to confirm that his wife and son were beaten by police, as a result of which they suffered injuries and receipt dated 15th December, 2014 and 4th June, 2015 from Mulakh Motors Auto Garage and Mwananchi Hardware and Tools to confirm costs he incurred in repairing his Motor Vehicle, these evidence was neither presented nor attached for the courts perusal so as to authenticate the claims. The court finds that there is need to have interrogated the dates when the incident that allegedly led to the arrest, infringement, violation



of rights and psychological torture of the Petitioner's wife and son with the dates of seeking medical treatment and repair of motor vehicle as indicated on the documents.

23. It is also trite law that courts ought not interfere with the duties of the Respondents as they are all independent offices established under *the Constitution* unless it can be shown the same was done illegally, unlawfully and against public interest.
24. The 2nd Respondent is established under Article 245 (1) of *the Constitution* and its powers to investigate crimes in provided for under Article 245 (4) of the Constitution which states that:
4. The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to
 - a. The investigation of any particular offence or offences;
 - b. The enforcement of the law against any particular person or persons; or
 - c. The employment, assignment, promotion, suspension, or dismissal of any member of the National Police Service.”
25. On this, the court is persuaded by the High Court in Judicial Review Application *8 of 2017* Republic v Director of Public Prosecutions & 2 others ex parte Edwin Harold Dayan Dande & 3 Others, where it held as follows:
- “It is also important to mention that article 245(4)(a) of *the Constitution* provides that: 'no person may give a direction to the Inspector General with respect to the investigation of any offence or offences.' Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.”
26. It therefore follows that the court can only interfere with duties of the 2nd Respondent as provided for under Articles 244 and 245, both of the Constitution and under the provisions of the *National Police Service Act*, only if the constitutional and statutory provisions are not adhered to or if the actions are illegal and unlawful.
27. From the evidence availed in the application, it has not been demonstrated that the actions by the Respondents were contrary to the constitutional or statutory provisions. Therefore, this only means or leads to the conclusion that the 2nd Respondent was acting within its mandate to investigate the matter so as to establish whether there was need to arrest the Applicant. Indeed, it has been shown that upon conclusion of the investigations, the 2nd Respondent released the Petitioner without preferring any charges and therefore its actions were within their legally provided for mandate under the Police Service Act and Constitution.
28. It is further worth noting as raised by the Respondents that the alleged incident from which the Petition arises, took place in the year 2014, but the Petition was filed in the year 2022, which is a period of about nine years. According to the Respondent, it is difficult to obtain and or retrieve the documents relating to the said incident. The Petitioner has not adduced any evidence to rebut or substantiate the claim by the Respondent in this regard.
29. In the upshot and for the reasons disclosed in determining this petition, this court finds that the Petition dated 21st May, 2024 lacks merit and proceeds to dismiss the same with costs to the Respondent.

It is so ordered.



JUDGMENT DELIVERED DATED AND SIGNED AT KIAMBU

THIS 16TH DAY OF AUGUST, 2024

D.O CHEPKWONY

JUDGE

In the Presence of

Martin – Court Assistant

Ms. Kariuki holding brief for Mr. Achach for Petitioner

No appearance by Respondent

