



**Nalika v Nzoia Water Services Co & 4 others (Constitutional Petition E007 of 2022) [2023] KEHC 406 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 406 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CONSTITUTIONAL PETITION E007 OF 2022**

**DK KEMEL, J**

**JANUARY 26, 2023**

**IN THE MATTER OF THE CONSTITUTION OF KENYA.  
AND IN THE MATTER OF ARTICLES 1,  
2,3,10,19,20,21,22,23,24,28,29,36,39,40,43,47,49,50,75,  
157,165(3)(B), 232,244 & 245 OF THE  
CONSTITUTION OF KENYA. AND  
IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS IN THE BILL OF RIGHTS**

**BETWEEN**

**KENNEDY KITUI NALIKA ..... PETITIONER**

**AND**

**NZOIA WATER SERVICES CO ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**EMONGOR IMASAI ..... 4<sup>TH</sup> RESPONDENT**

**INSPECTOR KANDA ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner describes himself as a Kenyan citizen who has been subjected to unlawful arrest, detention and harassment and his family subjected to poor sanitation. He brings this action against the 1<sup>st</sup> respondent, a limited liability company tasked with managing water and sanitation services within Bungoma and Trans Nzoia Counties, the 2<sup>nd</sup> respondent being in command of the national police



service, the 3<sup>rd</sup> respondent in his capacity as the legal advisor to the government under Article 156 of the Constitution and the 4<sup>th</sup> and 5<sup>th</sup> respondents being in their capacity as police officers stationed at Webuye Police Station.

2. It is the petitioner's gravamen that on March 1, 2022 while at home, a group of people identifying themselves with the 1<sup>st</sup> respondent approached him with the intention of disconnecting his sewerage line due to a debt of Kshs 40,000/-. An argument ensued following his rejection of the request by the group that they use his house to disconnect the line from his house manhole.
3. In the course of the argument and realizing that probably he was not going to win the argument, he rushed to Webuye Police Station to seek assistance. To his surprise, he was arrested on allegations of threatening the 1<sup>st</sup> respondent's officials with a panga. He was thrown into the cells and charged in court.
4. His complaint is on the conduct of the 1<sup>st</sup> respondent, the 4<sup>th</sup> and 5<sup>th</sup> respondent who being police officers violated his constitutional rights during the arrest. In the circumstances, his petition seeks the following reliefs;
  - a. A declaration be and is hereby issued that the respondents, contravened Articles 40, 43 (1)(b), 49 and 50 of the Constitution of Kenya 2010 in exercise of its purported mandate.
  - b. An order be and is hereby issued that the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents violated the petitioner's rights by assaulting him, maliciously damaging his property and subjecting him to inhumane treatment of unlawfully confining him in police cells without having him officially booked in the occurrence book many hours before he was officially booked as an accused person.
  - c. The honourable court does issue orders of stay of Webuye Criminal Case No MCCR E082 of 2022 until this petition is heard and determined.
  - d. The honourable court do issue a declaration be and is hereby issued that the prosecution of Kennedy Kitui Nalika in Webuye Criminal Case No MCCR E082 of 2022 is unconstitutional, unlawful, irregular and unfair.
  - e. The honourable court do issue an order calling, removing, delivering up to this honourable court and quashing or revoking the decision to charge and prosecute Kennedy Kitui Nalika in Webuye SRM's Criminal Case Number E082 of 2022.
  - f. The 1<sup>st</sup> respondent be restrained from continued harassing, causing arbitral arrests and blocking of the household sewages of the national estate residents.
  - g. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents should pay for personal damages amounting to Kshs 1,000,000/= costs of the petitioner's spectacles, torn shirt, embarrassment and unlawful confinement.
  - h. The court does determine the level of general damages resulting from the constitutional violations.
  - i. Costs of the petition be provided for.
  - j. Any further reliefs that the honourable court deems fit to grant.
5. The petition is opposed by the 1<sup>st</sup> respondent through a replying affidavit of Isaac Simiyu who deponed inter alia; that the petition ought to be addressed by the Water Tribunal under the Water Act, 2016; that the first respondent being a limited liability company is charged with the task of providing clean and safe water and sanitation services as well as to levy and collect service charges to its customers to the



- residents of Bungoma and Trans Nzoia Counties; that in order to realize arrears from its customers, the 1<sup>st</sup> respondent conducted public sensitization in the estate where the petitioner resided which meeting the petitioner attended and thereafter, the 1<sup>st</sup> respondent distributed demand notices to the residents including the petitioner who owed arrears in excess of Kshs 40,000/= which amount the petitioner did not dispute; that on the day of the incident, the company dispatched employees to disconnect and block the sewage systems of defaulting customers including the petitioner who became hostile, violent and threatened to kill the employees with a panga leading the employees to retreat and reported the incident at the police station; that he does not know what happened at the police station after lodging their complaint with the police; that it is his disposition that the 1<sup>st</sup> respondent has not breached any constitutional provision.
6. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents similarly filed a replying affidavit through Samuel Kanyuga Kimani, the OCS Webuye Police Station who deponed inter alia; that the petitioner was charged with the offence of threatening an officer carrying out his lawful duties and that the instant petition is calculated to shield him from prosecution for the offence; that the petition is premised on rights which are not absolute and should be considered against other people's rights; that the petitioner was properly booked into the cells and promptly produced before court which was reasonable in the circumstances; that upon a report being made to them, they visited the scene for investigation purposes and upon being satisfied that a crime had been committed, arrested the petitioner and that nine witnesses recorded their statements and are ready to testify in court.
  7. The petition was heard by way of written submissions. It is only the petitioner and the 1<sup>st</sup> respondents who filed and exchanged submissions.
  8. The petitioner identified the following issues;
    - a. Whether the petitioner's rights were violated.
    - b. Whether criminal case No MCCRE082 of 2022 brought against the petition should be dismissed.
    - c. Whether the petitioner is entitled to the reliefs sought.
  9. On the first issue, it is argued that the 1<sup>st</sup> respondent has failed to provide clean water to the petitioner as mandated by Article 43 of the Constitution and section 63 of the Water Act, 2006. That it is clear that the water bill was accumulated by an earlier tenant Peter Maloba and it was therefore unfair to require the petitioner to settle the bill and negates several articles of the Constitution.
  10. On the second issue, he contends that this court ought to order the dismissal of the criminal case in Webuye as it was fabricated against him by the respondents.
  11. Lastly on the third issue, he submits that the petitioner is entitled to the orders sought as his rights were violated.
  12. On the first respondent's part, it is submitted that the petitioner has not established that his rights were violated. That such violation must be specifically be pleaded and proved. Reliance is placed on Anarita Karimi Njeru v Republic (1976-1980) KLR 1272 and Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 others (2013) eKLR and Joel Amdany & 90 others v Baringo County Government & 3 others (2021) eKLR
  13. On whether the criminal proceedings should be sustained, the 1<sup>st</sup> respondent argues that the mere fact that the petitioner has been charged before a court of law doesn't amount to violation of rights and



that the legality or otherwise of the charges is a matter to be determined by the trial court. Reliance has been placed on

*Hon James Ondicho Gesami v the Attorney General & others Petition 376 of 2011* and *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji (2014) eKLR*.

14. On whether the petitioner is entitled to the orders sought, it is submitted based on the authority in *Kiambu County Tenants Welfare Association v Attorney General & another (2017) eKLR* and the provisions of section 107 (1) of the *Evidence Act* that the 1<sup>st</sup> respondent did not violate the petitioner's rights.

### Analysis

15. Given the facts of the matter outlined in the preceding paragraphs, the court is of the view that the following issues commend themselves for determination;

- a. Whether the respondents violated the petitioner's rights.
- b. If the above is in the affirmative, what remedies ought to be granted.

16. Given the history of the matter given in the preceding paragraphs, it is a cardinal principle of constitutional litigation that a party ought to plead violation of constitutional rights with as much precision as possible. This is the rule running through several authorities within our jurisdiction.

17. The principle of precision was first stated in *Anarita Karimi Njeru (supra)* where it was held;

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

18. The principle was reiterated by Mativo J in *Leonard Otieno v Airtel Kenya Limited (2018)* where the learned judge held thus:-

It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.

19. The petitioner's complaint is based on his arrest and subsequent arraignment before the subordinate court to answer to charges of threatening to kill contrary to section 223 of the *Penal Code*. From the pleadings, the parties have elaborated the circumstances leading to his arrest. The petitioner deems the respondent's conduct to be malicious and has led to violation of his constitutional rights. The specific articles complained to have been violated are given in the heading to this petition.

20. It is also a principle of law as stated by section 107(1) of the *Evidence Act* that the burden of proof lies on the petitioner to adduce sufficient evidence to support his case.



21. The petitioner prays that as a result of such violation, this court ought to order stay of such proceedings. Whether this prayer is plausible or not, I will look up various authorities guiding the grant of such orders as enunciated by case law.

22. In *Eunice Kbalwali Miima v Director Public of Prosecutions & 2 others (2017) eKLR* where the Court stated:

The circumstances under which the Court will grant stay of a criminal process in these kinds of proceedings is now well settled. The Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for halting those proceedings..... That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

23. Similarly, in *Republic v Commissioner of Police and Another ex parte Michael Monari & Another (2012) eKLR*, it was held:

The police have a duty to investigate on any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

24. Lastly, Nyakundi J in *Ezekiel A Omollo v Director of Public Prosecutions & 2 others*-Petition No E002 of 2020- Malindi held;-

In light of the preceding authorities to which I am fully aligned with, it was incumbent upon the petitioner to demonstrate to the satisfaction of the court that the respondents had somehow abused, overstepped or exercised their mandate unlawfully in carrying out the said investigations and prosecuting the petitioner in order for the reliefs sought to avail to him. It is not enough to simply state that the decision by the respondents to undertake an investigation and mounting criminal charges against the petitioner constituted an abuse of court process. The petitioner did not demonstrate any unlawful actions, excess or want of authority, evidence of malice, evidence of intimidation or even of manipulation of court process so as to seriously impede the likelihood of him getting a fair trial as provided for under Article 50 of the *Constitution*. In the absence of such proof, this court is unable to bring the intended criminal proceedings against the Petitioner to a halt.

25. From the above authorities, it is clear that to succeed in such claim, one has to satisfy the conditions established by the cases being that the mandate bestowed upon the respondent was exercised unlawfully.

26. It is not enough for the petitioner to allege that his rights have been violated without more. He should show that by the exercise of the powers conferred on the respondent by the statute, the respondent



went and or acted beyond the powers. Under article 157(11) of the Constitution, the Director of Public Prosecution is required to have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process. With such safeguards, the courts ought not to usurp the constitutional mandate of the DCI to investigate crimes and for the DPP to initiate criminal proceedings respectively provided that the same is done in a justifiable manner. The courts only intervene where there is contravention of the Constitution. In the case of Paul Nganga Nyaga v Attorney General & 3 Others [2013] eKLR it was held;

“...this court can only interfere with and interrogate the acts of other constitutional bodies if there is sufficient evidence that they have acted in contravention of the constitution.”

Again, in the case of Hon James Ondicho Gesami v Attorney General & Others Petition No 376 of 2011 it was held:

“...The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges....In my view, requiring that the petitioner subjects himself to the normal prosecution process mandated by the law where he has all the safeguards guaranteed by the Constitution does not in any way amount to an attack on his human dignity in violation of his constitutional rights.” Looking at the claims by the petitioner, I am not persuaded that he has presented cogent evidence that his arraignment in the lower court has violated his rights under the Constitution since he will be accorded a fair trial before the lower court which is a competent one in all respects and that he will be given an opportunity to challenge the charges as laid and that the trial court will ensure that a fair trial is conducted in the matter. It seems to me that the petitioner has mounted this petition in a bid to checkmate the respondents and ultimately scuttle the trial in the lower court. Even though the petitioner claims that the charges levelled against him are actuated by ulterior motive, he has not placed sufficient evidence in that regard. If the charges levelled against him are shaky in nature, the trial court will pronounce itself over the same and thus it is not good practice for a party to rush to the High Court with a view to seeking to discontinue lower court proceedings on the ground that they are baseless and likely to crumble in the end. The party must participate in those proceedings and allow the trial court to resolve them in accordance with the law.

27. I am satisfied that our country has robust measures for the protection of persons on trial. Article 50 of the Constitution provides enough safeguards for the upholding of the petitioner’s rights while undergoing trial in that court. In any event, not enough material has been placed before me to warrant the order of stay of proceedings in that court. I am certain the court is guided by the Constitution and the various legislative provisions governing conduct of proceedings. Indeed, the mere fact that a person has been charged in court does not in itself amount to a violation of constitutional rights since the legality of the said charges or their success thereof is a matter that can only be determined by the trial court. The petitioner has not presented evidence that he will not be accorded a fair trial in line with the dictates of Article 50 of the Constitution. No prejudice will be suffered by the petitioner if the lower court case is allowed to proceed. In any case, the petitioner has already been supplied with copies of the charges and witness statements as well as other exhibits by the prosecution and is thus well placed to tackle the said charges in the lower court. If the respondents do not prove their case, the petitioner will ultimately be acquitted and he will be at liberty to lodge claims for malicious prosecution in the civil courts. In the circumstances, I find that the petitioner’s rights have not been violated by the respondents as alleged.
27. As regards the second issue and in view of the foregoing observations, it is my finding that no remedies are available to the petitioner as the first issue has been answered in the negative.
28. In the result, it is my finding that the petitioner’s petition dated August 8, 2022 lacks merit. The same is dismissed. Each party shall bear their own costs.



**DATED AND DELIVERED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

**D KEMEI**

**JUDGE**

In the presence of :

No Appearance for Gatimbu for Petitioner

Wekesa for Oundo for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents

Kizito Court Assistant

