



Njoki v Directorate of Criminal Investigations & 2 others (Miscellaneous Petition 05 of 2020) [2023] KEHC 17924 (KLR) (Constitutional and Human Rights) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
MISCELLANEOUS PETITION 05 OF 2020**

HI ONG'UDI, J

MAY 31, 2023

BETWEEN

IBRAHIM KINGORI NJOKI PETITIONER

AND

DIRECTORATE OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

NATIONAL TRANSPORT & SAFETY AUTHORITY 3RD RESPONDENT

The urgent need to enact legal provisions to address the lacuna in the law relating to expunging of criminal records

The matter revolved around the expungement of criminal records by the Directorate of Criminal Investigations. The court found that there was no legal provision or basis for expungement of criminal records in Kenya. The court further stated that there was a very urgent need for the Legislature to enact legal provisions to address the lacuna in the law relating to expungement of criminal records in the interest of justice. The court further stated that there should be a distinction between misdemeanors and felonies as related to the period the records should be kept.

Reported by Kakai Toili

Criminal Law - Directorate of Criminal Investigations (DCI) – powers of the Directorate of Criminal Investigations (DCI) to expunge criminal records - whether the Directorate of Criminal Investigations (DCI) had the discretion to expunge criminal records.

Jurisdiction – jurisdiction of courts – jurisdiction of courts when interpreting the law - what was the role of courts when interpreting the law to make the ends of justice.

Brief facts

The petitioner filed a petition and notice of motion before the court. The notice of motion sought among other orders; that the 1st respondent, the Directorate of Criminal Investigations furnish the petitioner with a clear interim police clearance certificate. The petitioner averred that he was in possession of two (2) police



clearance certificates dated March 19, 2019 and December 9, 2019 respectively. Both certificates referred to a previous conviction for the offence of creating disturbance. The petitioner questioned the repeated appearance of that conviction in his clearance certificates, twenty (20) years after the occurrence.

The petitioner deponed that his requests to the respondents to remove the previous conviction from his clearance certificate had fallen on deaf ears. The 2nd respondent stated that the police clearance certificates were issued as per the law, and the information could not be changed by the 1st respondent. The 2nd respondent further contended that the record could only be changed where by appeal or revision the conviction was quashed.

Issues

- i. Whether the Directorate of Criminal Investigations had the discretion to expunge criminal records.
- ii. What was the role of courts when interpreting the law to make the ends of justice?

Held

1. One must plead in a precise manner the constitutional provisions said to have been violated and the manner in which the same was violated. A perusal of the petition only showed a citation of articles 2(1), 3(1), 21(1), 22(1), 23(1), 41(1) and 51(1) but not how they applied to the petitioner's case. His supporting affidavit only set out what his complaint was but did not link the cited provisions of the of Kenya, 2010, to his complaint. The petition did not meet the threshold required as set out in the *Anarita Karimi Njeru* case.
2. From a perusal of the key criminal statutes in Kenya namely; the Cap 63, the , Cap 75 and the , No11A of 2011, there was no legal provision or basis for expunging criminal records in Kenya. It was therefore not clear under what provision of the law the 1st respondent exercised the discretion, in expunging a conviction from ones record. Did that discretion apply to both misdemeanors and felonies? Was it fair to maintain the alleged twenty (20) year period for a conviction whose maximum sentence was six (6) months as that of the petitioner? That created a *lacuna* in law in that there was no regulatory framework to guide and stipulate the conditions one should satisfy before their criminal record was expunged. Further the law would stipulate the scope of such a mandate to safeguard against its abuse and create certainty and uniformity in the manner the procedure was applied in such applications.
3. While interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as had been the case without a great amount of judicial law making in all fields, constitutional law, common law and statutory interpretation. However, to the extent that judges made laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. That included not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how the society worked so that they could gauge the effect of the various alternative legal solutions available in deciding a case.
4. There was an urgent need for the Legislature to enact legal provisions to address the *lacuna* in the law relating to expunging of criminal records in the interest of justice. There should be a distinction between misdemeanors and felonies as related to the period the records should be kept.
5. Though the petitioner may not be successful in getting the orders he sought he had brought up through the petition a very important issue for consideration by the Attorney General and the Cabinet Secretary for the Ministry of Interior and National Administration and Parliament. It was not a loss to him because it was now twenty (20) years since his conviction in the year 2003. He was at liberty to apply to the 1st respondent for the expungement of this conviction from the record, which should not be an issue.

Petition partially allowed.



Orders

- i. *Counsel for the respondent to bring to the attention of the Attorney General, Cabinet Secretary for the Ministry of Interior and National Administration and Parliament the contents of the judgment;*
- ii. *No order as to costs.*

Citations

Cases

1. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1979] KLR 154 — Explained
2. *Imanyara, Mugambi & another v Attorney General & 5 others* Constitutional Petition 399 of 2016; [2017] KEHC 7955 (KLR) — Explained
3. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) — Explained
4. *Omondi, Bernard Ouma & another v Attorney General & Inspector General of Police* Petition 345 of 2016; [2021] KEHC 2513 (KLR) — Explained

Statutes

1. Constitution of Kenya article 2(1); 3(1); 21(1); 22(1); 23(1); 41(1); 51(1) — Interpreted
2. Criminal Procedure Code (cap 75) In general — Cited
3. Data Protection Act, 2019 (cap 411C) sections 25, 31, 32, 35, 39, 40, 42, 44, 45, 47 — Interpreted
4. National Police Service Act, 2011 (cap 84) — section 55 — Interpreted
5. Penal Code (cap 63) section 95(1) — Interpreted
6. Criminal Procedure Act (cap 75) sections 271A, 271B, 271C, 271D, 271DA, 271E — Interpreted

Advocates

None mentioned

JUDGMENT

1. The petitioner filed a petition and notice of motion both dated February 20, 2020. The petition is filed under articles 2(1), 3(1), 21(1), 22(1), 23(1), 41(1) & 51(1) of the [Constitution](#). It does not state what rights have been violated, and what prayers he seeks.
2. In the notice of motion he seeks the following prayers:
 - a. The honourable court be pleased to order the 1st respondent DCI to furnish the petitioner with a clear interim police clearance certificate. That will enable the process of NTSA, PSV barge to take place.
 - b. That the honourable court be pleased to order the NTSA. to let the petitioner pay for the PSV/ Institution barge pending the hearing and determination of this petition.
 - c. That the honourable court be pleased to order the traffic headquarter not to make any arrest to the petitioner herein pertaining to lack of PSV / institution barge until this Petition is heard and determined.
 - d. That costs of this petition be provided for.

The Petitioner's Case

3. The petition and application are supported by the verifying and supporting affidavits both dated February 20, 2020. The petitioner has averred that he is in possession of two (2) police clearance



certificates dated March 19, 2019 and December 9, 2019 respectively. Both certificates refer to a previous conviction for the offence of creating disturbance. He questions the repeated appearance of this conviction in his clearance certificates, twenty (20) years after the occurrence. He depones that his requests to the respondents to remove the previous conviction from his clearance certificate has fallen on deaf ears.

The Respondents' Case

4. The 2nd respondent filed grounds of opposition dated December 3, 2021. A summary of the grounds is that the petitioner is seeking for final orders in the application; he wants the 1st respondent compelled to omit factual information; the information in the police clearance certificate has been issued in violation of the petitioner's rights; Allowing the petition will interfere with the statutory and constitutional obligations of the respondents; both petition and application are defective in form and substance.
5. In the replying affidavit sworn by No 23xxx – I.P Samson K. Ireri the deponent reiterates the grounds of opposition. He deponed that the police clearance certificates were issued as per the law, and the information cannot be changed by the 1st respondent.
6. Further that under section 55 of the *National Police Service Act*, the 1st respondent remains the custodian of fingerprints as well as proof of conviction. The record can only be changed where by appeal or revision the conviction is quashed.
7. He has averred that the 1st respondent cannot omit information from the clearance certificate as the same would be a misrepresentation of facts, and breach of constitutional duty. Secondly issuance of a police clearance certificate is the mandate of the 1st respondent meaning this court has no legal basis to direct the 1st respondent to omit information. That would be an illegality if allowed by this court.

Parties Submissions

The petitioner's submissions

8. The petitioner appeared in person. In his submissions dated August 13, 2021 the petitioner argued that it is only fair that the respondents be ordered to give him a clear clearance certificate without referring to his past conduct, since its long gone and he is a new person. That the continued acts by the respondents are violating his rights to dignity and social justice.
9. In his further submissions dated March 6, 2023 he contends that through the offices of Data Commissioner, Officer of Data Controller and Office of Data processor his fingerprints can be removed from the record. That by refusing to clear him the said offices have violated sections 25, 31, 32, 35, 39, 40, 42, 44, 45 & 47 of the *Data Protection Act*. It's his submission that the responses and submissions by the 1st and 2nd respondents do not provide any meritorious materials and should be dismissed by this court.

The 1st & 2nd Respondents' submissions

10. These submissions are dated January 3, 2023 and were filed by counsel M/s J Kiramana. She has given a brief background of this matter arising from the petitioners Police clearance certificate which contains a record of his previous conviction. Counsel raised two issues. On whether the petition meets the threshold for a constitutional petition, she submitted that the petitioner who is claiming that his rights have been violated moved the court by way of an application instead of a Petition. That the said application lacks sufficient specificity.



11. Counsel cited the case of *Benard Ouma Omondi & another v Attorney General & another* 2021 eKLR in support of her argument. In the said case the court held:
 - “ 21. It is now settled law that for constitutional petition to be successful it must raise with reasonable precision the constitutional provisions which have been infringed or threatened to be infringed or violated, and the manner in which those provisions were infringed by the respondents. I find that this is not only necessary for the court to be able to ascertain whether there was a violation of a constitutional right but it is also important for enabling the respondents to respond to the case and every allegation, putting forwarding a concise case on their defence.”
12. On whether the petitioner’s rights have been violated counsel submitted that the two police clearance certificates were issued in accordance with the provisions of the *Constitution* under article 35 granting the right of access to information. Further that the certificates are a true reflection of the information maintained by the 1st respondent in relation to the petitioner’s past criminal record. Moreover she argues that the 1st respondent operates within the provisions of section 55 of the *National Police Service Act* which allows him to be the custodian of fingerprints as well as proof of conviction.
13. She finally argues that the twenty year rule is discretionary and was not applicable to the petitioner at the time of filing the petition. What he is asking for is preferential treatment from the 1st respondent which is improper and unconstitutional.

Analysis and Determination

14. Upon considering the pleadings, affidavits, grounds of opposition, parties submissions plus the law I find three issues falling for determination. These are:
 - i. Whether the petition has met the threshold for drafting constitutional petitions.
 - ii. Whether the petitioners constitutional rights have been violated.
 - iii. Whether the petitioner should be issued with the reliefs sought.

Issue No (i) Whether the petition has met the threshold for drafting constitutional petitions

15. The respondents raised this issue in their submissions. Counsel submitted that the petitioner had not stated with sufficient precision, how the respondents had violated his rights. This was not responded to by the petitioner.
16. The threshold stated in the case of *Anarita Karimi Njeru v Republic* (1979) KLR 154 and re-affirmed in the case of *Mumo Matemu v Trusted Society of Human Rights & 5 others* [2013] eKLR among others is that, one must plead in a precise manner the constitutional provisions said to have been violated and the manner in which the same was violated. Also see *Bernard Ouma Omondi & another* (*supra*).
17. A perusal of the petition only shows a citation of articles 2(1), 3(1), 21(1), 22(1), 23(1), 41(1) & 51(1) but not how they apply to his case. His supporting affidavit only sets out what his complaint is but does not link the cited provisions of the *Constitution* to his complaint. I therefore find that the petition herein does not meet the threshold required as set out in the *Anarita Karimi Njeru* case.



Issue No (ii) Whether the petitioner’s constitutional rights have been violated.

18. From the material before this court it is a fact that the petitioner was convicted of the offence of creating disturbance C/S 95 (1) of the Penal Code and sentenced to six (6) months imprisonment in the year 2003. In his search for a job he has been required to have a police clearance certificate. He thus applied for the same on March 19, 2019 and another one on December 9, 2019.
19. The police accordingly acted and issued him with the said certificates as per the request. In the certificates has been indicated that he was convicted of the offence of creating disturbance. It’s this indication that is the basis of this petition. The petitioner claims that the said indication of the conviction has made it difficult for him to get a job for purposes of catering for his family.
20. The question begging an answer is disclosure of any wrong that the 1st respondent committed by releasing the required information. The said information is under the custody of the 1st respondent by virtue of section 55 of the National Police Service Act. The Petitioner has not demonstrated how the respondents have violated the provisions of the Constitution and the many provisions of the Data Protection Act cited, by him.
21. By virtue of this petition the petitioner wants this court to order for his record of conviction to be expunged so that he can have a clear clearance certificate. He claims that his attempts to have this done by the 1st respondent has fallen on deaf ears as the 1st respondent claims that he has to wait for 20 years.
22. The Attorney General at paragraph 23 of the respondents submissions states:

“Despite there being no legal framework for expunging a conviction from a person’s record, the twenty-year rule referred to in the petitioner’s pleadings, is exercised in a discretionary manner. In any event, even if the 1st respondent wanted to apply the rule to the petitioner herein, the twenty-year period had not yet lapsed at the time of filing this petition.”
23. Infact it’s this submission by the Attorney General that will assist Kenyans. I have perused the key criminal statues in Kenya namely; The Penal Code cap 63, the Criminal Procedure Code cap 75 and the National Police Service Act No11A of 2011 and note that there is no legal provision or basis for expungement of criminal records in Kenya.
24. It is therefore not clear under what provision of the law the 1st respondent exercises the discretion, in expunging a conviction from ones record. Does this discretion apply to both misdemeanors and felonies? Is it fair to maintain the alleged twenty (20) year period for a conviction whose maximum sentence is six (6) months as that of the petitioner?
25. The above unquestionably creates a lacuna in law in that there is no regulatory framework to guide and stipulate the conditions one should satisfy before their criminal record is expunged. Further the law would stipulate the scope of such a mandate to safeguard against its abuse and create certainty and uniformity in the manner the procedure is applied in such applications.
26. Undoubtedly the instant dispute is one where courts are called upon to address the gap in law by creating jurisprudence in a bid to deliver justice. I find guidance in the case of Mugambi Imanyara & another v Attorney General & 5 others [2017] eKLR where it was held that:

“Finally while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make



laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.”

27. A comparative analysis of other jurisdictions laws on the topic divulges a clear procedure which is lacking in our jurisdiction. I would like to specifically highlight the procedure set out in the South African criminal law in this examination.
28. Sections 271A - E of the [Criminal Procedure Act 51 of 1977](#) exclusively provide for the expungement of criminal records in South Africa as follows:
 - i. Section 271A - Certain convictions fall away as previous convictions after expiration of 10 years.
 - ii. Section 271B - Expungement of certain criminal records.
 - iii. Section 271C - Expungement of certain criminal records under legislation enacted before the [Constitution](#) of the Republic of South Africa, 1993, took effect.
 - iv. Section 271D - Expungement of certain criminal records by Criminal Record Centre.
 - v. Section 271DA Revoking of certificate of expungement erroneously issued.
 - vi. Section 271 E Regulations.
29. In a nutshell expungement of a criminal record in the South African Law is a process by which a criminal record of a convicted offender is removed from the criminal record database of the Criminal Record Centre of the South African Police Service. For one to be eligible they must satisfy the following criteria:
 - i. A period of 10 years has passed after the date of the conviction for the offence.
 - ii. One has not been convicted and sentenced to a period of imprisonment without the option of a fine during those 10 years.
 - iii. The sentence was corporal punishment.
 - iv. The sentence was postponed or one was discharged.
 - v. The sentence was a fine not exceeding R20 000.
 - vi. The sentence was imprisonment with the option to pay a fine (not more than R20 000) instead of serving the period of imprisonment.
 - vii. The sentence of imprisonment was suspended wholly.
 - viii. The sentence was correctional supervision in terms of section 276(1)(h) of the [Act](#).
 - ix. The sentence was imprisonment in terms of section 276(1)(i) of the [Act](#).
 - x. The sentence was periodical imprisonment in terms of Section 276(1)(c) of the [Act](#).
 - xi. That there is proof one’s name has been removed from the National Register of Sex Offenders or the National Child Protection Register, if relevant.



30. The Act in the same manner also provides for the classes of persons whose criminal records cannot be expunged. This grounds are that: a period of 10 years has not lapsed after the date of the conviction; the person was sentenced to direct imprisonment; where the fine imposed was more than R20 000 where the imprisonment was not suspended and there was no option of a fine during the 10 year period; his or her name is still included in the National Register for Sex Offenders or the National Child Protection Register.
31. In view of the provisions for expungement of criminal records, Section 271E of the said Act provides as follows:
- The Minister
- (a) must make regulations regarding-
- (i) the form on which a person's written application for the expungement of his or her criminal record must be made, as provided for in section 271B(1)(a) and section 271C(2)(a) and (b);
 - (ii) the certificate of expungement to be issued by the Director-General: Justice and Constitutional Development or the Minister, as provided for in section 271B(2) and section 271C(3) and (5)(b); and
 - (iii) the manner in which the Director-General must submit certificates of expungement that have been issued, to the head of the Criminal Record Centre of the South African Police Service, as provided for in section 271B(3) and section 271C(4); and
- (b) may make regulations regarding any other matter which is necessary or expedient in order to achieve the objects of sections 271B, 271C and 271D.
32. I have set out the South African procedure for expungement of criminal records to demonstrate the glaring gaps in our law with reference to this subject. There is therefore a very urgent need for the Legislature to enact legal provisions to address this lacuna in the law relating to expungement of criminal records in the interest of justice. Let there be a distinction between misdemeanors and felonies as related to the period the records should be kept.
33. From the evidence on record and above findings it is clear that though the petitioner may not be successful in getting the orders he sought he has brought up through this petition a very important issue for consideration by the Hon Attorney General and the Cabinet Secretary for the Ministry of Interior and National Administration and Parliament. It is not a loss to him because it is now twenty (20) years since his conviction in the year 2003. He is at liberty to apply to the 1st respondent for the expungement of this conviction from the record, which should not be an issue.
34. The upshot is that the petition partially succeeds in view of the above orders. Counsel for the respondent should bring to the attention of the Attorney General, Cabinet Secretary for the Ministry of Interior & National Administration and Parliament the contents of this Judgment. There shall be no order as to costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 31ST DAY OF MAY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

