



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E363 OF 2020

-BETWEEN-

JONAH ORAO ANGUKA.....PETITIONER

-VERSUS-

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. DIRECTOR OF CRIMINAL INVESTIGATIONS.....RESPONDENTS

JUDGMENT

1. Following the murder of *Hon. Robert John Ouko* in the night of 12th and 13th February, 1990, at Got Alila in the then Kisumu District, *Jonah Orao Anguka*, the Petitioner herein, was subsequently charged with the murder thereof in Nairobi High Court Criminal Case No. 51 of 1993 (hereinafter referred to as '*the Criminal Case*').

2. The Criminal Case was fully heard and on 29th July, 1994, the High Court delivered judgment where the Petitioner was found not guilty of the murder charge and he was acquitted. He then left the country for the United States of America as a political asylee and acquired the citizenship of America. By dint of the then Constitution, the Petitioner lost his Kenyan citizenship.

3. By the passage of the 2010 Constitution, the Petitioner was desirous of regaining his Kenyan citizenship. Towards that end, he began the application process as required in law. One of the requirements in the application was a Police Clearance Certificate (hereinafter referred to as '*the Certificate*').

4. The Petitioner severally applied for the Certificate. He obtained two Certificates, but both indicated that the Criminal Case was still pending. He annexed the copies thereof in confirmation.

5. The Petitioner contended that he severally attempted to have the Certificate rectified given that he was acquitted of the said murder charge, but in vain. At one point in time the Petitioner sought the certification of the proceedings and the judgment in the Criminal Case by the High Court, but he was not successful as the Court file could not be found due to passage of time. The High Court, however, confirmed *vide* a letter dated 10th February, 2020 that the Criminal Case was concluded and the Petitioner acquitted of the murder charge.

6. The Petitioner contended that despite all such evidence the Respondents remained adamant and refused to rectify their records and to issue him with a Certificate confirming the correct position on the Criminal Case, hence this Petition.

7. The Petitioner further contended that he is elderly and is required to travel to the United States of America for his annual medical check-up, but he cannot do so since he cannot obtain an electronic passport given the state of the Certificate.

8. It is, hence, contended that the Petitioner's rights and fundamental freedoms under Articles 14(5), 27, 29, 30, 31, 32, 33, 34, 35, 36 and 48 of the Constitution are variously infringed.

9. In the main, the Amended Petition dated 16th November, 2020 prayed for the following orders: -

1. That this petition be certified urgent and be heard ex- parte in the first instance.
 2. That pending the inter parte hearing and determination of the Petition herein the Honourable Court be pleased to issue interim orders directing the 1st and 2nd respondents to clear the applicant of the charges on criminal case no. 51 of 1993.
 3. A Declaration that the pending murder charges in CRIMINAL CASE NO: 51 OF 1998 within the police records is unconstitutional and is in breach of the petitioner's bill of rights as envisaged in the Supreme Constitution 2010.
 4. A Declaration that the manner in which the Directorate of Criminal investigations handled the petitioner's case by not having him cleared of the case in their records even after his (petitioner's) acquittal of the charges was unfair, in bad taste and not in furtherance of the course of justice and was a breach of the Petitioner's right to freedom.
 5. An order for the 1st and 2nd respondents, to have the (petitioner's) names cleared of the murder charges as acquitted in Criminal Case No. 51 of 1998.
 6. General damages for the violation of the petitioner's constitutional rights as explained hereinabove.
 7. Any such orders as the court deem fit and expedient to grant for the ends of justice to be met.
10. The Petitioner filed written submissions and a List of Authorities in support of the Amended Petition.
11. The 1st Respondent entered appearance and filed Grounds of Opposition dated 23rd June, 2021. One of the grounds therein was that the 2nd Respondent had since rectified their records and cleared the Petitioner of the said criminal charges and issued him with a correct Certificate confirming that the Criminal Case was not pending.
12. While relying on the Grounds of opposition, the 1st Respondent prayed that the Petition be dismissed.
13. The Petition was heard by way of reliance on the pleadings, affidavit evidence and written submissions.
14. The Petitioner did not file any further pleading disputing the fact that the 2nd Respondent had since rectified their records and issued him with a correct Certificate. However, under Section 24 of the Evidence Act, Cap. 80 of the Laws of Kenya such cannot constitute conclusive proof of such fact.
15. There is no doubt that the Petitioner was acquitted of the murder charge in the criminal case. That fact is proved. It, however, seems that the 2nd Respondent did not update its records accordingly so as to reflect that the Criminal Case was concluded and the Petitioner acquitted of the murder charge. I say so since the Certificates dated 26th September, 2016 and 7th July, 2020 respectively indicated that the Criminal Case was still outstanding.
16. The 2nd Respondent has not fronted any other reason for not clearing the Petitioner save for the Criminal Case. Given the prevailing correct position, the 2nd Respondent should accordingly rectify its records and issue the Petitioner with another Certificate.
17. On whether the Respondents infringed the Petitioner's rights, I will reiterate the manner in which Constitutional Petitions ought to be presented.
18. The practice and procedure in constitutional Petitions is provided for under *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '**the Mutunga Rules**'). Rule 10 thereof is on the form of Petitions. Sub-rule 2 provides as follows: -

The Petition shall disclose the following: -

- (a) the petitioner's name and address;
- (b) the facts relied upon;
- (c) the constitutional provision violated;
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.

19. Speaking of the manner in which constitutional Petitions ought to be presented and proved, the Supreme Court in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR** stated as follows: -

Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

20. In this case, the Petitioner pleaded the Articles of the Constitution alleged to have been infringed in an ‘omnibus manner’. It was pleaded that the Petitioner’s rights and fundamental freedoms under Articles 14(5), 27, 29, 30, 31, 32, 33, 34, 35, 36 and 48 of the Constitution are variously infringed. The Petitioner did not state the nature of injuries, if any, and the manner in which he suffered on the basis of the alleged Articles of the Constitution.

21. A Petition presented in such a manner does not meet the threshold under the Mutunga Rules and as established in **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others** case (supra).

22. I would have disallowed the Petition as a non-starter were it not for the fact that the issue herein is fairly straight-forward and more or less settled.

23. Having said so, the Amended Petition is hereby determined as follows: -

(a) The Director of Criminal Investigations shall rectify its records to indicate that Nairobi High Court Criminal Case No. 51 of 1993 Republic vs. Jonah Orao Anguka was determined and the Petitioner acquitted of the murder charge.

(b) Subject to any other lawful impediment, the Director of Criminal Investigations shall issue the Petitioner herein with a Police Clearance Certificate.

(c) There shall be no orders as to costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 27th day of January, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss. Mathairo, Learned Counsel for the Petitioner.

Miss. Kabila, Learned Counsel for the 1st Respondent.

Elizabeth Wanjohi – Court Assistant.